



U.S. Citizenship
and Immigration
Services

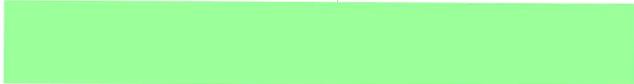
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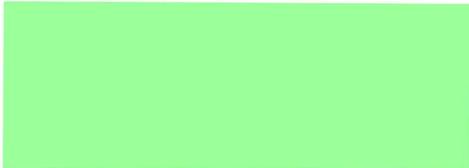
JAN 24 2013

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and consulting business. It seeks to employ the beneficiary permanently in the United States as a database administrator pursuant to section 203(b)(3)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(ii). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification approved by the United States Department of Labor (DOL).

The director determined that the ETA Form 9089 failed to demonstrate that the job requires a professional possessing a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree; and therefore, the beneficiary cannot be found qualified for classification as a member of the professions holding a bachelor's degree or equivalent. 8 C.F.R. § 204.5(l)(3). Specifically, the director stated that the petitioner indicated on the ETA Form 9089 at Part H.8 A through C that it required at a minimum, an associate's degree with six years of experience. The director determined that the terms of the ETA Form 9089 did not require, at minimum, a bachelor's degree. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec.158 (Acting Reg'l Comm'r 1977). The priority date of the petition is September 3, 2002, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).¹

¹ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

Here, the Form I-140 was filed on May 13, 2010. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional (at minimum, possessing a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree).

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

On appeal, counsel asserts that the alternate combination of education and experience are specified in the advertisements; that the ETA Form 9089 accepted an alternate combination of education and experience; and that the bachelor's degree in computer science or related fields with three years of experience has an alternate combination of education and experience that is acceptable, to wit an associate's degree with six years of progressive experience. Counsel further asserts that as per the DOL, both the bachelor's degree and the specific associate's degree requirements are considered as "Specific Vocational Preparation (SVP) 2;" and therefore, a specific associate's degree with six years of progressive experience could be considered, as is the bachelor's degree with three years of experience, under section 203(b)(3)(A)(i) or (ii) of the Act, as a skilled worker or professional.

The regulation at 8 C.F.R. § 204.5(l)(3)(i) states in pertinent part that "[t]he job offer portion of an individual labor certification, Schedule A application, or Pilot Program application for a professional must demonstrate that the job requires the minimum of a baccalaureate degree."

In this case, the job offer portion of the ETA Form 9089 indicates that the minimum level of education required for the position is an associate's degree or equivalent and six years of experience. Accordingly, the job offer portion of the ETA Form 9089 does not require a bachelor's degree. However, the petitioner requested on the Form I-140 classification as a professional, a qualified immigrant who holds at least a baccalaureate degree. Accordingly, the petition must be denied and the appeal dismissed.

The evidence submitted does not establish that the ETA Form 9089 requires a baccalaureate degree or the equivalent.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.