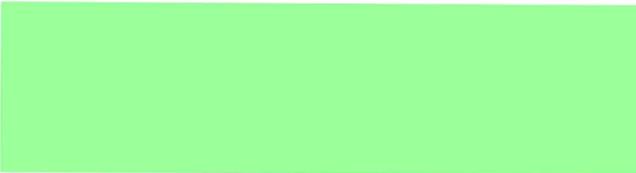




U.S. Citizenship
and Immigration
Services

(b)(6)

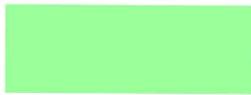


DATE:

JAN 29 2013

OFFICE: NEBRASKA SERVICE CENTER

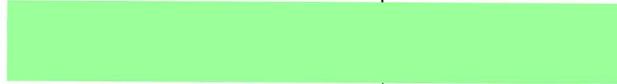
FILE:



IN RE:

Petitioner:

Beneficiary:



PETITION:

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

ON BEHALF OF PETITIONER:

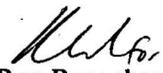


INSTRUCTIONS:

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 Director, Nebraska Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a blood bank. It seeks to employ the beneficiary permanently in the United States as a medical technologist. 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 job offer portion of the labor certification does not demonstrate that the job requires a minimum of a baccalaureate degree, specifically that the allowance of a three-year foreign degree disqualifies the position from the requested EB2 visa classification. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. 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.

As set forth in the director's August 12, 2011 denial, the issue in this case is whether or not the petitioner has established that the labor certification requires a minimum of a baccalaureate degree such that the beneficiary may be found qualified for classification as a professional.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (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. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), provides that "the term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The above regulation uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

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.¹ On appeal, the petitioner submits a letter, a copy of general qualifications for licensure of technologists in Florida, a copy of the decision *Matter of Panganiban*, 13 I&N Dec. 581 (DCA 1970), and a copy of Appendix A to the Preamble of the Department of Labor PERM regulations.

Here, the Form I-140 was filed on August 20, 2010. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional (at a minimum, possessing a bachelor's degree or foreign degree equivalent to a U.S. bachelor's degree). However, in the labor certification, Section H, item 4, the petitioner indicated that the minimum level of education required is an "Associate's" degree. The director determined that the job offer portion of the labor certification did not demonstrate that the job requires the minimum of a baccalaureate degree.

On appeal, the petitioner submits a letter signed by [REDACTED] President & CEO of the petitioner, stating that the current industry standard for medical technologists requires a bachelor's degree for the occupation; however, the State of Florida licenses medical technologists that do not have a bachelor's degree due to prior state licensure requirements. The petitioner states that it will consider those applicants as qualified professionals to be employed as medical technologists.

On appeal, counsel asserts that the "occupation of Medical Technologist has long been recognized as a profession requiring national and international certification." Counsel cites to Appendix A to the Preamble of the Department of Labor PERM regulations, which lists Medical and Clinical Laboratory Technologists as a position requiring professional recruitment. Counsel confuses the DOL regulation with Section 203(b)(3)(A)(ii) of the Act.

The proffered position's requirements are found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. The instructions for the ETA Form 9089, Part H, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties: Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On the ETA Form 9089, the "job offer" position description for a medical technologist provides:

Process donor or patient specimens for lab analysis. Perform and interpret tests, report results.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the labor certification reflects the following requirements:

H.4. Education: Minimum level required: Associate's degree.

H.4-B. Major Field Study: Medical Technology.

7. Is there an alternate field of study that is acceptable?

The petitioner checked "yes" to this question.

7-A. If Yes, specify the major field of study:

Molecular biology, chemistry, or related field.

8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked "no" to this question.

9. Is a foreign educational equivalent acceptable?

The petitioner listed "yes" that a foreign educational equivalent would be accepted.

6. Experience: None in the position offered,

10. or none in a related occupation.

14. Specific skills or other requirements: FL Clinical Laboratory Medical Technologist License in Blood Banking, or Immunohematology, Serology, & Chemistry.

The occupational classification of the offered position is not one of the occupations statutorily defined as a profession at section 101(a)(32) of the Act, which states: "The term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

Part H of the ETA Form 9089 indicates that the petitioner requires an Associate's degree for the proffered position. The fact that the DOL considered the position to be a professional position that required additional recruitment steps for the labor certification process pursuant to 20 C.F.R. § 656.17(e)(1)(ii) is irrelevant. Because the petitioner's requirements for the proffered position are less than a baccalaureate degree, the proffered position may not be classified as a professional.

Counsel also cites to the decision *Matter of Panganiban*, 13 I&N Dec. 581 (DCA 1970). We note that based on the time period for the case cited that the preference categories and immigration framework was different. Prior to the Immigration Act of 1990 (IMMACT 90), only two preference categories existed for individuals seeking to immigrate on a job-related basis: the third and sixth preferences under 8 U.S.C.A. § 1153(a) and (6). To qualify for third preference, the beneficiary had to be a member of the professions, or a person of exceptional ability in the arts and sciences. IMMACT 90 created five categories under the amended under 8 U.S.C.A. § 1153(b), four of which were employment based, and the fifth related to investment or employment creation. The prior third preference became second preference, and the former sixth preference became third, including skilled and unskilled. The regulation now clearly states at 8 C.F.R. § 204.5(1)(3)(ii)(C) that if the

petition is for a professional, the evidence must show that the beneficiary has a baccalaureate or foreign equivalent degree.

Further, prior to IMMACT 90, there was no definition of the term "professional." Now, however, professional is defined at INA § 101(a)(32) and 8 C.F.R. § 204.5(1)(3)(ii)(C) which explicitly requires a bachelor's degree. Therefore, the cases cited, which were all decided prior to IMMACT 90, are irrelevant.

While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Pursuant to the regulation at 8 C.F.R. § 204.5(1)(3)(ii)(C), the proffered position must require a Bachelor's degree, which is the minimum required by the regulatory guidance for professional positions. The plain meaning of the regulatory language concerning the professional classification sets forth the requirement that the proffered position must require a minimum of a bachelor's degree in order to be qualified as a professional for third preference visa category purposes. In the instant case, while the evidence submitted does establish that the beneficiary has a qualifying degree, the labor certification does not demonstrate that the job requires the minimum of a bachelor's degree. Accordingly, the petition cannot be approved.

Beyond the decision of the director,² the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.³ If the petitioner's net income or net current assets is

² An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

³ See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the instant case, the record contains a copy of the petitioner's 2009 annual report, a copy of the beneficiary's 2009 Form W-2 issued by the petitioner, and copies of the beneficiary's paystubs issued by the petitioner from July 16, 2010 through August 13, 2010. This evidence fails to establish the petitioner's ability to pay the beneficiary the proffered wage for the year of the priority date (2010) onwards. This must be addressed with any further filings.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.