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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE:

APR 14 2015

OFFICE: NEBRASKA SERVICE CENTER

FILE:

IN RE:

Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner describes itself as a software developer and computer consulting firm. It seeks to permanently employ the beneficiary in the United States as a programmer analyst. On the Form I-140, Immigrant Petition for Alien Worker, the petitioner marked box "e" at Part 2, indicating that it seeks to classify the beneficiary as a professional pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii).¹ As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is January 17, 2014, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

The director's December 19, 2014 denial found that the job offer portion of the labor certification is not consistent with the minimum requirements for classification as a professional. Specifically, the proffered position's minimum education and experience requirements did not meet the standard for classification as a professional because section H.14 of the labor certification indicated that the petitioner "will accept three (3) years relevant college education combined with three (3) years work experience in the job opening or related occupation in lieu of degree requirement."

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.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in part:

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.

¹ Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. *See also* 8 C.F.R. § 204.5(l)(2).

² 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, 766 (BIA 1988).

Section 101(a)(32) of the Act defines the term "profession" to include, but is not limited to, "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." If the offered position is not statutorily defined as a profession, "the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation." 8 C.F.R. § 204.5(l)(3)(ii)(C). In addition, the job offer portion of the labor certification underlying a petition for a professional "must demonstrate that the job requires the minimum of a baccalaureate degree." 8 C.F.R. § 204.5(l)(3)(i)

In *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the court held that, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, U.S. Citizenship and Immigration Services (USCIS) properly concluded that a single foreign degree or its equivalent is required. *See also Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008) (for professional classification, USCIS regulations require the beneficiary to possess a single four-year U.S. bachelor's degree or foreign equivalent degree).

Thus, the plain meaning of the Act and the regulations is that the beneficiary of a petition for a professional must possess a degree from a college or university that is at least a U.S. baccalaureate degree or a foreign equivalent degree.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Bachelor's degree in computer science.
- H.5. Training: None required.
- H.6. Experience in the job offered: 12 months of experience.
- H.7. Alternate field of study: CIS, MIS, Electronics, Math, Any Engg, Bus. Admin.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: 12 months as a technical lead or systems analyst.
- H.14. Specific skills or other requirements: Reqs. Bachelors in Comp. Sci., or CIS or MIS or Electronics or Math or any Engineering or Business Administration. Will accept three (3) years relevant college education combined with three (3) years work experience in the job opening or related occupation in lieu of degree requirement. Any suitable combination of training, education or experience will be considered. Employer is a software development and computer consulting firm. Travel & Relocation to various client sites throughout the U.S. for periods of 6 mos to 2 yrs required.

The petitioner contends that the language used in section H.14 is the alternative requirement for the position and, because the beneficiary has the U.S. equivalent of a master's degree, the director's finding that the position did not qualify as a professional is unreasonable. However, whether the instant beneficiary holds education credentials which meet or exceed the minimum requirements for a professional is not in question in this case. Rather, the issue is that the proffered position's minimum requirements, as stated on the labor certification, do not meet the minimum qualifications

required for classification as a professional—specifically, a U.S. baccalaureate or foreign equivalent degree.

We must look to the job offer portion of the labor certification to determine the required qualifications for the position and cannot ignore a term of the labor certification or impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). We interpret the meaning of terms used to describe the requirements of a job in a labor certification by “examin[ing] the certified job offer *exactly* as it is completed by the prospective employer” and our interpretation of the job’s requirements must involve “reading and applying *the plain language* of the [labor certification]” even if the employer may have intended different requirements than those stated on the form. *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added).

In the instant case, we find that the plain language of section H.14 is that the petitioner would accept less than an actual bachelor’s degree or foreign equivalent degree, which is less than the minimum requirements for the professional category. Therefore the position does not qualify for classification as a professional.

Beyond the decision of the director,³ 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 as the record lacks evidence in conformance with the regulation. *See* 8 C.F.R. § 204.5(g)(2). The proffered wage is \$76,149.00 per year. The regulation at 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner’s ability to pay the proffered wage. That regulation further provides: “In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer’s ability to pay the proffered wage.” (Emphasis added.)

The petitioner submitted a letter dated November 24, 2014 from [REDACTED] Vice President, stating that the petitioner “employs 800 employees and has annual revenues of approximately \$153 million.” However, the petitioner has not established that [REDACTED] is a financial officer of the company.⁴ Therefore, it is not clear that the letter from [REDACTED] can be accepted as evidence of the petitioner’s ability to pay the proffered wage because the petitioner has not established that [REDACTED] is a financial officer of the company. The record of proceeding accordingly does not contain the regulatory required evidence

³ We may deny an application or petition that fails to comply with the technical requirements of the law 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 we conduct appellate review on a *de novo* basis).

⁴ The petitioner’s website indicates that [REDACTED] is a Vice President of Human Resources. [REDACTED] (accessed March 25, 2015). The website also lists the names of the petitioner’s other leaders, including a Director of Finance and a Vice President of Financial Services.

of the petitioner's ability to pay the proffered wage.⁵ Pursuant to the regulation at 8 C.F.R. § 204.5(g)(2), the petitioner did not submit annual reports, federal tax returns, or audited financial statements establishing that it had the continuing ability to pay the proffered wage as of the January 17, 2014 priority date. Without the regulatory required evidence, we are unable to accurately assess the petitioner's ability to pay the proffered wage. Therefore, the petitioner has failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Further, we note that USCIS records indicate that the petitioner annually filed over one hundred Form I-140 petitions and Form I-129 nonimmigrant petitions with USCIS since the priority date. In circumstances involving multiple beneficiaries, we may decline to accept a statement from a financial officer of a prospective United States employer that employs 100 or more workers to establish the prospective employer's ability to pay the proffered wage.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

⁵ While we decline to accept the letter as evidence of the petitioner's ability to pay the proffered wage, we will examine the other financial evidence provided. The record contains an undated "Company Profile" for the petitioner, but it is not an annual report. On page one, it states that the petitioner has "2,500 highly qualified and experienced professionals." On page three, it states that it has "4000+ employees." The "Company Profile" does not contain audited financial information for the petitioner and does not indicate that the employee data relates to 2014, the year of the priority date. The record also contains an excerpt dated May 12, 2014 from [REDACTED] indicating that the petitioner had revenues in 2013 of \$153,000,000; and revenues in 2012 of \$135,000,000. The record also contains an excerpt dated December 30, 2013 from [REDACTED] indicating that the petitioner had revenues in 2012 of \$135,000,000; revenues in 2011 of \$116,000,000; that it employed 185 full-time local employees in January 2013, and that it employed 5,000 worldwide employees in January 2013. The excerpts do not indicate that they contain audited financial information and the data does not include financial information for 2014, the year of the priority date. Based on the various numbers of employees and figures cited the revenue attributable to the petitioner's U.S. company, Federal Employer Identification number [REDACTED] is unclear.