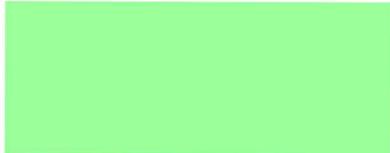




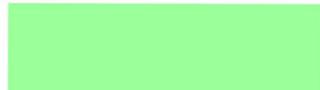
U.S. Citizenship
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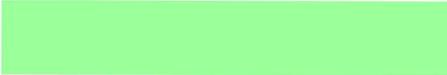


DATE: SEP 13 2013

OFFICE: NEBRASKA SERVICE CENTER



IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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 Director, Nebraska Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The director's decision will be remanded for further review and entry of a new decision.

The petitioner is an IT business. It seeks to permanently employ the beneficiary in the United States as a Senior ASIC Engineer. On the Form I-140, Immigrant Petition for Alien Worker, the petitioner requested classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).

The director's decision denying the petition concluded that the petition cannot be approved because the labor certification does not require a member of the professions holding an advanced degree.

On appeal, the petitioner asserts that the labor certification supports the advanced degree professional visa designation with the use of "bachelor's degree or equivalent" without further elaboration.

The appeal is properly filed and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis.¹ The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

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)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

¹ *See* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also* *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

² The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 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).

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "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(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

- (A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or
- (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the regulation at 8 C.F.R. § 204.5(k)(4)(i) states, in part:

The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

In summary, a petition for an advanced degree professional must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Specifically, for the offered position, the petitioner must establish that the labor certification requires no less than a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

In the instant case, Part H of the labor certification submitted with the petition states that the offered position has the following minimum requirements:

- H.4. Education: Bachelor's in Electrical Engineering.
- H.5. Training: None required.
- H.6. Experience in the job offered: 60 months in the job offered.

- H.7. Alternate field of study: Eng/EE/Tech/Elect/CS/Elec & Comm/Comp Eng/related
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted
- H.10. Experience in an alternate occupation: 60 months as Sr. ASIC Engineer/Lead Engineer/Lecturer/Engineer Trainee or related.
- H.14. Specific skills or other requirements:

Employer will accept a Bachelor's Degree or equivalent and five years of progressive, post baccalaureate work experience. Must have one year of experience in the following: ASIC and FPGA design, verification and validation; DO-254 hardware design life cycle knowledge; and system level verification.

The director determined that since the employer had used the word "equivalent" following "Bachelor's Degree" and had not stated that it would accept a "Bachelor's Degree or equivalent *foreign degree*" then an individual could qualify for the offered position with less than a degree above a baccalaureate, or a baccalaureate followed by five years of progressive experience in the specialty, and the petition would not qualify for advanced degree professional classification.

In this case, the AAO does not concur that the omission of the words "foreign degree" after "equivalent" is fatal to the labor certification's support of the advanced degree designation. It is noted that the consideration of the beneficiary's actual credentials is a separate question from the consideration whether the terms of the labor certification comply with 8 C.F.R. § 204.5(k)(4)(i) and may support the visa designation of an advanced degree professional. A labor certification that requires either, at a minimum, a Master's or foreign equivalent, or a bachelor's or foreign equivalent plus five years of progressive post-baccalaureate experience is sufficient to support the advanced degree visa designation set forth in the Form I-140, Immigrant Petition for Alien Worker.³ Following a review of the record, the AAO finds that neither the labor certification (H.8) nor the recruitment materials submitted by the petitioner indicate that by "equivalent," it intended to accept a combination of lesser degrees, diplomas or work experience as a foreign educational equivalency of a U.S. bachelor's degree.⁴

³ See Memorandum by Michael D. Cronin, Acting Associate Commissioner, "Educational and Experience Requirements for Employment-Based Second Preference (EB-2) Immigrants," HQ 70/6.2 (March 20, 2000), in which several variations of requirements appearing on labor certifications are considered to be acceptable language to describe an advanced degree professional including an example given of "B.S. (or foreign equiv.) comp. science, elec. eng., or related field" and "5 years of experience in job offered or 5 years related occupation software engineer." In that example, the only question was whether the experience was meant to be post-baccalaureate, progressive experience. In this matter, H.14 explicitly states that experience should be post-baccalaureate and progressive.

⁴ It is noted that in *Snappnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The court noted that in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the

Rather, H.14 appears directed at modifying the experience requirement to specifically define the required experience as progressive.

The offered position's requirements set forth on the ETA Form 9089 complies with 8 C.F.R. § 204.5(k)(4)(i) and requires an advanced degree. The director's decision will be withdrawn in this regard and the case will be remanded for further review as the record does not clearly establish the petitioner's ability to pay the proffered wage from the priority date onward.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.

USCIS properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at 17, 19. See also *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (RCL) (D.C. Cir. March 26, 2008)(upholding an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree).