



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **JAN 20 2015**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

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.

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner is an information technology consulting firm. It seeks to employ the beneficiary permanently in the United States as a lead software developer 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), certified by the U.S. Department of Labor (DOL). The director's decision concluded that the proffered position's minimum education and experience requirements did not meet the standard for classification as an advanced degree professional. The director denied the petition on September 23, 2014.

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.

Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2).

The regulation further states: "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." Id. 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an 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 of an alien of exceptional ability."

In the instant case, the minimum requirements as listed on the labor certification are a Master's degree in Computer Science or Engineering plus 12 months of experience or a Bachelor's degree plus five years of experience in the job offered or as a software designer, developer, or tester. The petitioner indicated in Part H.14 that any suitable combination of education, training, or experience, pursuant to 20 C.F.R. § 656.17(h)(4)(ii) would be acceptable.

The director determined that the language in Part H.14 allowed for a combination of education, training, or experience less than the minimum requirements. As a result, the director held that the position does not qualify under the criteria for classification as a member of the professions holding an advanced degree and denied the petition accordingly.

The regulation at 20 C.F.R. § 656.17(h)(4)(ii) states:

If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

This regulation was intended to incorporate the Board of Alien Labor Certification Appeals (BALCA) ruling in *Francis Kellogg* that "where the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications . . . unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable." *Francis Kellogg*, 1994-INA-465 and 544, 1995-INA 68 (Feb. 2, 1998) (en banc). The statement that an employer will accept applicants with "any suitable combination of education, training or experience" is commonly referred to as "*Kellogg* language."

As the language in Part H.14 of the labor certification uses *Kellogg* language and does not modify the minimum requirements of the proffered position, the minimum requirements are defined on the labor certification as requiring an advanced degree or the regulatory equivalent of an advanced degree. Therefore, the position requires an individual holding an advanced degree and qualifies for classification as a member of the professions holding an advanced degree. The director's decision is withdrawn.

While the petitioner has overcome the director's basis for denial, the petition is not approvable. We will remand the petition for the director's consideration of whether the petitioner can pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2). The record includes pay stubs issued by the petitioner to the beneficiary demonstrating a rate of pay below the proffered wage of \$121,202.¹ The record also includes the petitioner's annual report for 2012-2013 which details the petitioner's financial information through March 31, 2013. The priority date in the instant case is August 18, 2013, the date the ETA Form 9089 was received by the DOL. The evidence in the record does not demonstrate the petitioner's ability to pay the proffered wage from the August 18, 2013 priority date onward. The petition will be remanded to allow the director to consider whether the petitioner has demonstrated its ability to pay the proffered wage from the priority date onwards.

In view of the foregoing, the director's decision will be withdrawn. The petition is remanded to the director. 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.

¹ The paystubs demonstrate that the petitioner paid the beneficiary \$3,594.79 bi-weekly from February 1, 2014 to March 31, 2014. If the same rate of pay applies throughout the year, this amounts to \$93,464.54 for 26 pay periods.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.