



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 25462998

Date: MAR. 29, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Exceptional Ability)

The Petitioner, a wholesale retailer, seeks classification of the Beneficiary as a member of the professions holding an advanced degree or as an individual of exceptional ability, for employment as a SAP security analyst. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not establish that the offered position requires a professional holding an advanced degree. The matter is now before us on appeal. 8 C.F.R. § 103.3.

On appeal, the Petitioner asserts that the Director erred in ignoring evidence and failing to consider the request for classification as an individual with exceptional ability. The Petitioner also asserts that the petition is approvable under the advanced degree professional classification, as section 203(b)(2) of the Act does not require a labor certification for the second preference classification. The Petitioner contends that the regulation requiring a labor certification is *ultra vires* and “cannot be relied upon to determine whether a beneficiary qualifies under the advance degree category.”

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter *de novo*. *Matter of Christo’s, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we withdraw the Director’s decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id.* Labor certification also indicates that the employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

Second preference immigrant visas are available for qualified individuals who are advanced-degree professionals or who, because of their exceptional ability in the sciences, arts, or business, will

substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States. Section 203(b)(2) of the Act. An advanced degree is one above a baccalaureate.¹ 8 C.F.R. § 204.5(k)(2). Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *Id.*

To demonstrate that a beneficiary is an individual of exceptional ability a petitioner must initially submit documentation that satisfies at least three of six categories of evidence. 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F).² Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.³ If a petitioner does so, we will then conduct a final merits determination to decide whether the evidence in its totality shows that they are recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

Every petition under this classification must include one of the following three documents: (1) an individual labor certification from DOL, (2) an application for Schedule A designation,⁴ or (3) documentation to establish that the beneficiary qualifies for one of the shortage occupations in the DOL's Labor Market Information Pilot Program. 8 C.F.R. § 204.5(k)(4)(i). Additionally, "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." *Id.*

II. ANALYSIS

At the outset, we will address the Petitioner's argument that the Act does not require a labor certification. Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5), states in pertinent part:

(5) Labor certification and qualifications for certain immigrants

(A) Labor certification

(i) In general

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General

...

¹ The definition of advanced degree also includes a baccalaureate followed by at least five years of progressive experience. 8 C.F.R. § 204.5(k)(2).

² If these types of evidence do not readily apply to the individual's occupation, a petitioner may submit comparable evidence to establish their eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

³ USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of aliens of exceptional ability. 6 *USCIS Policy Manual* F.5(B)(2), <https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5>.

⁴ Petitions for Schedule A occupations do not require a petitioner to test the labor market and obtain a certified ETA Form 9089, Application for Permanent Employment Certification, from DOL prior to filing the petition with USCIS. Schedule A occupations are codified at 20 C.F.R. § 656.5(b), for which DOL has determined that there are not sufficient U.S. workers who are able, willing, qualified, and available, and that employment of foreign workers in these positions will not harm the wages or working conditions of U.S. employees in similar positions. Instead, the petition is filed directly to USCIS with an uncertified ETA 9089 in duplicate. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15.

...

(D) Application of grounds

The grounds for inadmissibility of aliens under subparagraphs (A) and (B) shall apply to immigrants seeking admission or adjustment of status under paragraph (2) or (3) of section 1153(B) of this title.

Although the Act references only “skilled or unskilled labor” in subparagraph (A), the reference to section 203(b)(2), 8 U.S.C. § 1153(b)(2) in subparagraph (D) demonstrates that a labor certification is also required for the admission of members of the profession holding advanced degrees or individuals with exceptional ability.

Further, USCIS has no authority to declare a regulation ultra vires unilaterally. *See, e.g., Gor v. Holder*, 607 F.3d 180, 191 (6th Cir. 2010) (recognizing the legal principle that an agency is bound to follow its regulations. The regulation at 8 C.F.R. § 204.5(k)(4)(i) clearly requires a labor certification. The Petitioner does not present legal authority showing that we may consider the legality of a regulation. As an administrative appellate body within the Department of Homeland Security, we lack the authority to determine that the regulation at 8 C.F.R. § 204.5(k)(4)(i) is ultra vires. We are bound by the Act, regulations and published Supreme Court decisions and those from the federal court of appeals in whose circuit an action arises. *See* section 103(a)(1) of the Act; *see also N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987).

Here, on the Form I-140, the Petitioner checked box 1.d in Part 2 (Petition Type), indicating that the petition is filed for “A member of the professions holding an advanced degree or an alien of exceptional ability (who is NOT seeking a National Interest Waiver (NIW)).” In its cover letter, the Petitioner states “We believe that [the Beneficiary] qualifies for Employment-Based Second Preference Category under the Exceptional Ability classification. [The Beneficiary] has an exceptional ability in business which substantially benefits not only the country, but also those whose services in business are sought by an employer in the United States.” The Petitioner did not check box 2.b in Part 2 of the Form I-140 to indicate that it was requesting Schedule A Group I or Group II designation.⁵

The petition is accompanied by a labor certification certified by DOL which states the minimum requirements of the offered position of SAP security analyst as three years of experience in an alternate occupation with no required education. The Director determined that the certified labor certification did not support the requested classification of advanced degree professional because it states that no education is required, which is less than an advanced degree.

⁵ Occupations for individuals with exceptional ability are designated as Schedule A, Group II occupations. This designation requires that a petitioner submit evidence that the beneficiary satisfies criteria demonstrating exceptional ability (for example, documentation of widespread acclaim and international recognition, play bills and star billings, published material about the beneficiary) as outlined in 20 C.F.R. § 656.15(d)(2)((i)-(vi)). Beyond demonstrating the beneficiary’s exceptional ability, the documentation presented must establish that the beneficiary worked for the past year in a position that requires an individual of exceptional ability and that the beneficiary’s services are sought for a position that requires an individual of exceptional ability. 20 C.F.R. § 656.15(d)(2). The petition must also include a prevailing wage determination in accordance with 20 C.F.R. § 656.40 and a notice of filing in accordance with 20 C.F.R. § 656.10(d). *See* 20 C.F.R. § 656.15(b).

The Director did not address in his decision whether the labor certification supports the classification of an individual with exceptional ability or whether the Petitioner has established that the Beneficiary is an individual of exceptional ability. As discussed above, the Petitioner's initial filing requested classification of the Beneficiary as "a member of the professions holding an advanced degree **or** as an individual of exceptional ability" (emphasis added). The Petitioner's cover letter specifically identified the filing as an "exceptional ability petition." Accordingly, the matter will be remanded to the Director to determine in the first instance whether the Petitioner has established eligibility for the requested classification of the Beneficiary as an individual with exceptional ability. The Director may request any additional evidence considered pertinent to the new determination. Such evidence may include, but is not limited to, evidence that the offered position requires an individual of exceptional ability.⁶

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

⁶ In employment-based immigration, if a job offer is required, the petitioning employer must meet the classification-specific requirements and have the ability to pay the proffered wage. See 6 *USCIS Policy Manual* E.2, <https://www.uscis.gov/policy-manual/volume-6-part-c-chapter-2> (listing the general eligibility requirements for employment-based immigration).