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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

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date:

FEB 28 2011

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Beneficiary Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be an information technology business. It seeks to permanently employ the beneficiary in the United States as a software engineer. The petitioner requests classification of the beneficiary as a skilled worker or professional pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).[1]

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 8, 2007, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

The director denied the petition on April 10, 2008, and affirmed the denial on June 4, 2008, after

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[1] 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. 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.

Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) provides:

> If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

considering the petitioner's motion to reconsider the decision. The director concluded that the petitioner failed to establish that the beneficiary possesses the minimum required education set forth on the labor certification. The petitioner appealed the decision to the Administrative Appeals Office (AAO) on July 3, 2008.

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.

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.[2]

At the outset, we emphasize that federal circuit courts have upheld our authority to inquire as to whether the alien is qualified for the classification sought.

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977).

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). *See also Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984). A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977).

The minimum requirements for the offered position of software engineer are set forth at Part H of the labor certification. The labor certification states that the offered position requires a bachelor's degree in computer science and 24 months of experience in the job offered. Part H, Item 8 states that the employer will not accept an alternative combination of education and experience.

In Part J of the labor certification, the beneficiary indicated that the highest level of education achieved relevant to the requested occupation is a bachelor's degree in computer science from Andhra University, India. The record contains a copy of the beneficiary's Bachelor of Science from Andhra University. The petitioner did not submit a copy of the beneficiary's transcripts.

In support of its claim that the beneficiary has earned the foreign equivalent to a U.S. bachelor's degree in computer science, the petitioner submitted three evaluations of the beneficiary's educational qualifications. The first evaluation, which is from [redacted]

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[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).

[redacted] dated January 13, 2000, concludes that the beneficiary's Bachelor of Science degree from Andhra University is "equivalent to a three-year program of academic studies in Mathematics, Physics & Electronics and transferable to an accredited university in the United States." The second and third evaluations [redacted] were submitted for the first time on motion. Both of these evaluations conclude that the beneficiary's degree from Andhra University is equivalent to a U.S. bachelor's degree in computer science. However, neither evaluation corroborates its assignment of credit hours to the courses taken by the beneficiary and, crucially, neither explains how the beneficiary could have earned the equivalent of a computer science degree without having taken a single computer science course.

Accordingly, given the inconsistencies between the three evaluations, in determining whether the beneficiary possessed a U.S. bachelor's degree in computer science or a foreign equivalent degree, we have reviewed the [redacted] created by [redacted] according to its [redacted] is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for [redacted] is "a web-based resource for the evaluation of foreign educational credentials."

[redacted] provides a great deal of information about the educational system in India, and while it confirms that a bachelor of science degree is awarded upon completion of two or three years of tertiary study beyond the Higher Secondary Certificate (or equivalent) and represents attainment of a level of education comparable to two to three years of university study in the United States, it does not suggest that a three-year degree from India may be deemed a foreign equivalent degree to a U.S. baccalaureate.

In the instant case, the evidence in the record does not establish that the beneficiary holds a four-year U.S. bachelor's degree or foreign equivalent degree in computer science. Therefore, on October 20, 2010, the AAO issued a Notice of Derogatory Information and Request for Evidence (NDI/RFE) instructing the petitioner to submit such evidence. The petitioner was also requested to submit a copy of the beneficiary's transcripts from Andhra University.

On appeal, counsel also implies that the minimum academic requirements of a bachelor's degree might be met through a lesser degree and/or a quantifiable amount of work experience. In Part H of the labor certification, the petitioner requires a bachelor's degree in computer science. The petitioner did not indicate that it would accept a lesser degree, a combination of degrees, or a quantifiable amount of work experience as an alternative method to meet the requirements for the proffered position. The record does not contain any evidence showing that the petitioner actually used these defined equivalent requirements in the petitioner's labor market test. Therefore, in the

NDI/RFE, the AAO also requested evidence of the petitioner's intent concerning the actual minimum requirements of the position as that intent was explicitly and specifically expressed to the DOL during the labor market test conducted during the labor certification process. The AAO requested a complete copy of the petitioner's recruitment efforts, including the notice of the filing, job order, advertisements in newspapers or professional journals and additional recruitment efforts for a professional job, and the recruitment report to establish that the petitioner intended to delineate an equivalency to the bachelor degree requirement as set forth in Part H of the labor certification to a lesser three-year bachelor's degree, or a combination of degrees, diplomas, and experience, as the actual educational minimum requirement for the offered position.

Beyond the decision of the director, the NDI/RFE also instructed the petitioner to submit additional evidence establishing its ability to pay the beneficiary the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The priority date in the instant case is January 8, 2007, and therefore, the petitioner must establish the ability to pay the beneficiary the proffered wage of $46,654.00 from that date. Based on the evidence in the record, the AAO cannot determine whether the petitioner established its ability to pay the proffered wage from the priority date to the present. Therefore, the AAO also requested the petitioner to submit any Forms W-2 or 1099 issued to the beneficiary by the petitioner in 2008 and 2009, as well as the petitioner's complete federal tax returns or audited financial statements for 2008 and 2009.

The NDI/RFE afforded the petitioner 45 days to submit a response. *See* 8 C.F.R. § 103.2(b)(8)(iv). The NDI/RFE stated that if the petitioner did not respond, the AAO would dismiss the appeal without further discussion.

To date the AAO has not received a response to the NDI/RFE from the petitioner. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The AAO is unable to substantively adjudicate the appeal without a meaningful response to the line of inquiry set forth in the NDI/RFE. Thus, the petitioner failed to establish that the beneficiary possesses the minimum education required to perform the job offered as set forth in the labor certification, and the petitioner also failed to establish that it has possessed the ability to pay the proffered wage from the priority date until the present.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting

the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director 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 at 145.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States,* 229 F. Supp. 2d at 1043.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.