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

[redacted]

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DATE: DEC 1 0 2012 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: [redacted]

PETITION: Immigrant Petition for Alien 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a software development and consulting 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 professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[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, which is the date the DOL accepted the labor certification for processing, is December 11, 2008. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess the minimum education and experience required to perform the offered position by the priority date.

The record shows that the appeal is properly filed 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] On appeal, counsel submits a memorandum of law and facts, three new credentials evaluations, an experience letter for the beneficiary and a letter from the petitioner attesting to the beneficiary's professional experience.

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

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[1] Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. 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.

[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 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).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also 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).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

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 and engineering
H.5. Training: None required.
H.6. Experience in the job offered: 12 months.
H.7. Alternate field of study: computer science or engineering or related field.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: analyst/programmer.
H.14. Specific skills or other requirements: Minimum 12 months experience performing the stated duties of the offered with the specified skills or 12 months related experience as analyst/programmer. Will accept any suitable combination of education, training or experience.

On the ETA Form 9089, signed by the beneficiary on January 18, 2010, the beneficiary represented that the highest level of achieved education related to the requested occupation was "bachelor's degree in computer science and engineering." He listed the institution of study where that education was obtained as the University of Madras, and the year completed as 1999.

In support of the beneficiary's educational qualifications, the petitioner submitted a copy of the beneficiary's diploma from the University of Madras. It indicates that the beneficiary was awarded a bachelor of engineering in computer science and engineering in April 1999. The petitioner additionally submitted a credentials evaluation, dated April 14, 2006, from Universal Evaluators, L.L.C. The evaluation describes the beneficiary's diploma from the University of Madras as a

bachelor of engineering degree in computer science and engineering and concludes that it is equivalent to a bachelor's degree in computer science and engineering in the United States.

On appeal, the petitioner submitted credentials evaluations from the American Association of Collegiate Registrars and Admissions Officers (AACRAO), Career Consulting International and European-American University, dated April 30, 2010, April 20, 2010 and April 20, 2010, respectively. The evaluations describe the beneficiary's diploma from the University of Madras as a bachelor of engineering degree in computer science and engineering and conclude that it is equivalent to a bachelor's degree in computer science and engineering in the United States.

The AAO concludes that the director erred in determining that the beneficiary's bachelor of engineering degree could not be accepted as a foreign equivalent degree to a U.S. bachelor's degree in computer science and engineering. The AAO has reviewed the Electronic Database for Global Education (EDGE) created by AACRAO. According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." *See* http://www.aacrao.org/About-AACRAO.aspx. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." http://edge.aacrao.org/info.php. Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[3] If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[4]

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[3] *See An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx.

[4] In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

According to EDGE, a bachelor of engineering/technology degree from India is comparable to "a bachelor's degree in the United States."

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a software engineer with Cognizant Technologies & Solutions in New Jersey from June 23, 2003 until November 15, 2006; and a senior software engineer with Patni Computer Systems (p) Ltd. in Mumbai, India from September 30, 2002 until June 20, 2003.[5] The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

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

> Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record contains an experience letter, dated February 16, 2007, from [redacted], talent manager-human resources on Cognizant Technology Solutions US Corporation letterhead stating that the company employed the beneficiary from June 23, 2003 until November 15, 2006 in New Jersey and the beneficiary left the company as an associate. However, the letter does not describe the beneficiary's duties in sufficient detail or state whether the beneficiary was employed on a full time basis.

On appeal, the petitioner submits an experience letter, dated April 24, 2010, from [redacted] manager-human resources on Cognizant Technology Solutions India Pvt. Ltd. (Cognizant India) letterhead stating that the company employed the beneficiary in Chennai, India from June 23, 2003 until November 15, 2004 as an associate-projects for Cognizant Technology Solutions India Pvt. Ltd. The letter states that as an associate the beneficiary:

> . . . was responsible for implementing the projects using the Waterfall Software development life cycle model and Rational Unified Process (RUP) methodology. Involved in providing design, participated in implementing and developing business requirements, testing or integration of the applications and services. As a software engineer developer responsible for implementing of various client/server architectures and quality assurance of distributed enterprise applications. Responsible for implementing services in the system/application for distributed computing. Responsible for providing UML designs and held reviews of software architecture, technical and system specification document. Based up on (sic) the project needs and requirements, customized the existing business intelligence applications and insured the system/application performance. Designed and developed Scalable enterprise

[5] The only other experience listed on the labor certification is that gained with the petitioner in the proffered position.

> applications using design patents to ensure the scalability, portability transaction aware across integrated database and distributed computing systems. Involved in performance tuning of the applications to ensure the better performance through put (sic) of the applications. Involved in developing test plans and performed system testing for applications integration of enterprise applications/services.

The letter goes on to state that the beneficiary gained experience in technologies including Unix, Linux, Solaris, Java, JSP, Servlets, EJB, J2EE design patterns, Eclipse, Weblogic application server, Weblogic workshop, J2EE, Websphere application server, WSAD, JMS, JUnit, Java script, Advanced servers, Toad, Rapid SQL, Struts, Weblogic NET-UL, Oracle, Sybase, Rational Clear case, XML, XSL and Jprobe reports.

However, the letter conflicts with the information provided on the labor certification and the letter from Cognizant Technology Solutions US Corporation (Cognizant US). The letter from Cognizant US dated February 16, 2007 and the labor certification indicate that the beneficiary was employed by Cognizant in the United States from June 23, 2003 until November 15, 2006[6], while the letter from Cognizant India indicates that the beneficiary was employed by them from June 23, 2003 until November 15, 2004. Second, the labor certification and the Cognizant US letter indicate that the beneficiary was employed by Cognizant US in New Jersey, while the letter from Cognizant India states that the beneficiary was employed by Cognizant India in Chennai, India. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal, the petitioner submits a letter attesting to the beneficiary's professional experience. The petitioner states that it was able to verify that the beneficiary was employed with Cognizant India in Chennai from June 23, 2003 until November 14, 2004 and was then deputed to the branch office of Cognizant Technology Solutions in New Jersey from November 2004 until November 2006. The petitioner states that the beneficiary was employed by Patni Computer Systems (Pvt.) Ltd. from September 30, 2002 until June 20, 2003; and was previously employed by Object Frontier Software Pvt. Ltd. as an analyst/programmer/s'ware. While the letter from the petitioner provides further detail in regard to the beneficiary's duties and dates of employment with the above-referenced employers, such information must be provided by the beneficiary's previous employer in the employment experience letter(s). The letter from Cognizant India in Chennai does not confirm that the beneficiary was subsequently transferred to Cognizant US and there is no letter from Cognizant US explaining why it stated that it employed the beneficiary in New Jersey during June 23, 2003 through November 15, 2004, when Cognizant India claims to have employed the beneficiary in Chennai India. Lack of such documentation may only be waived when obtaining the regulatory-prescribed letter is impossible and must be certified with two properly sworn affidavits. *See*

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[6] The record also contains a letter from Cognizant US, dated January 12, 2005, indicating that the beneficiary had been employed there as an associate since June 23, 2003.

8 C.F.R. § 103.2(b)(2)(i). There is no evidence in the record to suggest that obtaining fully-compliant experience letters from the beneficiary's previous employers is impossible. Accordingly, the petitioner has failed to submit evidence to sufficiently explain or reconcile the inconsistencies in the record or to establish that the beneficiary possessed the minimum requirements for the proffered position.

If indeed the beneficiary was employed by Cognizant India in Chennai during the period in question, this employment was not reflected on the labor certification and conflicts with the experience letter from Cognizant US. Additionally, any experience the beneficiary claims he gained with Object Frontier Software Pvt. Ltd. was not reflected on the labor certification and cannot be considered here. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL, lessens the credibility of the evidence and facts asserted.

The record also contains an experience letter, dated July 16, 2003, from [redacted], senior manager (human resources) on Patni Computer Systems (P) Ltd. letterhead stating that the company employed the beneficiary from September 30, 2002 until June 20, 2003 and the beneficiary left the company as a senior software engineer. However, the letter does not describe the beneficiary's duties in sufficient detail or state whether the beneficiary was employed on a full time basis. Further, even if the AAO were to accept this letter, it does not establish that the beneficiary possess the 12 months of experience as required on the ETA 9089.

On appeal, counsel contends that the beneficiary has the education and experience required for the position; however, as discussed above, the petitioner has failed to submit documentation sufficient to establish that the beneficiary has the required 12 months of experience in the proffered position or the related position of analyst/programmer.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

Beyond the decision of the director, the petitioner has also failed to establish its continuing ability to pay the proffered wage as of the priority date. *See* 8 C.F.R. § 204.5(g)(2).

According to USCIS records, the petitioner has filed multiple I-140 and I-129 petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, it is also concluded that the

petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.[7]

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.

[7] In any future filings, the petitioner should also submit other relevant ability to pay documentation for 2009 until the date of the future filing, such as tax records.