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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: APR 16 2013 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]

Beneficiary:

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, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, is a custom business display company and seeks to employ the beneficiary permanently in the United States as a maintenance engineer. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification.

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.[1]

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on May 28, 2008.[2] The Immigrant Petition for Alien Worker (Form I-140) was filed on March 10, 2011.

The proffered position's requirements are found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. The instructions for the ETA Form 9089, Part H, provide:

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 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).

[2] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

On the ETA Form 9089, the "job offer" position description for a maintenance engineer provides:

> In charge of maintenance of all machinery. See that machines are in good working order. See to the lubrication, installation, change, design and refabrication of parst [*sic*] as required.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the labor certification reflects the following requirements:

H.4. Education: Minimum level required: "Bachelor's."

4-B. Major Field Study: "Engineering."

6. Is experience in the job offered required for the job?

The petitioner checked "yes."

6-A. If yes, number of months experience required:

The petitioner indicated "24" months.

7. Is there an alternate field of study that is acceptable?

The petitioner checked "no" to this question.

8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked "no" to this question.

9. Is a foreign educational equivalent acceptable?

The petitioner checked "yes" that a foreign educational equivalent would be accepted.

10. Is experience in an alternative occupation acceptable?

The petitioner checked "no" to this question.

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See 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).

As set forth above, the proffered position requires four (4) years of college culminating in a Bachelor's degree in Engineering plus two years of experience in the job offered, maintenance engineer.

The ETA Form 9089, signed by the petitioner and the beneficiary on May 21, 2008, states that the beneficiary's highest level of achieved education related to the requested occupation was "Bachelor's," the institution of study where the beneficiary obtained his education as "[redacted]" and the year completed as "1984."

In support of the beneficiary's educational qualifications, the petitioner submitted a copy of a document from [redacted] that the beneficiary has attended the [redacted] between 1981 and 1983, and has passed the Diploma of Associate Engineer examination in "Air Conditioning & Refrigeration Technician" in January 1984. It states that the beneficiary was awarded a Diploma of Associate of Engineer on May 24, 1984. Another document from the same board indicates that the beneficiary has successfully completed his "Commercial Refrigeration and Air Conditioning" course for the 1981-1983 session in second division. The petitioner failed to submit a copy of the beneficiary's Bachelor's degree in engineering obtained in 1984 from "[redacted]" as indicated on ETA Form 9089. The petitioner also submitted a transcript from the [redacted] indicating that the beneficiary had successfully passed the first annual examination for "B.A." that was held in May/June 1985. The transcript lists Islamic studies, history, economics, and English as the subjects in which the beneficiary was tested. The AAO notes that a notation on the transcript indicates "[a]n entry appearing in it does not in itself confer any right or privilege independently to the grant of proper Certificate/Degree which will be issued under the Regulations in due course." The record does not contain evidence of a proper certificate or degree that was granted to the beneficiary by the [redacted]. Moreover, the beneficiary's purported degree from the [redacted] was not listed on the ETA Form 9089.

The record also contains the beneficiary's intermediate and secondary education transcripts, dated September 1980; certificates of studies in English that the beneficiary completed in 1989 and 1990; certificates of several continuing education courses in maintenance related topics that the beneficiary completed in 2003, 2005, and 2008; and certificates of two training courses that the beneficiary completed in 2009 through the petitioner.

If all required initial evidence is not submitted with the application or petition, or does not demonstrate eligibility, USCIS, in its discretion, may deny the petition. 8 C.F.R. § 103.2(b)(8)(ii) (rule effective for all petitions filed on or after June 18, 2007). The record does not contain a copy of a bachelor's degree in engineering that was awarded to the beneficiary as required by the labor certification.

The petitioner additionally submitted two expert opinions evaluating the beneficiary's education and work experience. In his November 29, 2011 evaluation, concluded that the beneficiary's work experience in the field of engineering is equivalent to a Bachelor of Science degree in Engineering. Likewise, in his November 29, 2011 evaluation, with the Mechanical and Aeronautical Engineering Department at concluded that using the equivalency ratio of three years of work experience for one year of college training, the beneficiary's work experience of more than 28 years equals to at least a Bachelor of Science degree in Engineering from an accredited institution of higher education in the United States.

The director denied the petition on March 2, 2012. He determined that the beneficiary did not possess a Bachelor's degree in Engineering; and therefore, did not meet the requirements of the labor certification.

On appeal, counsel asserts that the director erred in not considering beneficiary's experience in the field of engineering to satisfy the educational requirements. Counsel further asserts that the labor certification does not require a Bachelor of Engineering Degree; rather it requires only a bachelor's degree with the major field of study in engineering. Counsel states that the petitioner submitted the beneficiary's Bachelor's degree reflecting a major in engineering studies. Furthermore, counsel contends that the director's decision is inconsistent with previous determinations made regarding the beneficiary's qualification for his H1B status as a maintenance engineer.

The AAO does not agree. The evaluations from Professors state that the beneficiary was awarded a Bachelor of Arts degree, and has, as a result of progressively more responsible employment experiences in the field of engineering, an educational background equivalent to that of an individual with a Bachelor's degree in Engineering from an accredited university in the United States. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988); *Matter of Sea, Inc.*, 19

I&N Dec. 817 (Comm'r 1988). *See also Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

The evaluations in the record used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5). On the ETA Form 9089, signed by the petitioner on May 21, 2008, the beneficiary was required to have a bachelor's degree with a major field of study in engineering. On this form, the petitioner specifically indicated on questions 7 and 8 of Part H that an alternate field of study and an alternate combination of education and experience was not acceptable. The petitioner's actual minimum requirements could have been clarified or changed before the ETA Form 9089 was certified by the DOL. As that was not done, the director's decision to deny the petition must be affirmed.

Beyond the decision of the director, the petitioner also has not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. 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* v. *Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon*, 699 F.2d 1006 (9th Cir. 1983).

In the instant case, on the ETA Form 9089, the petitioner indicated that the offered position requires a minimum of 24 months of experience as a maintenance engineer in charge of maintenance of all machinery ensuring that all machines are in good working order. On the labor certification, the beneficiary claims to qualify for the offered position based on his experience as a maintenance engineer at from July 1999 to July 2002.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains two letters from The first undated letter was signed by the manager of human resources on letterhead. The letter indicates that the beneficiary was employed as a "maintenance worker" responsible for maintaining machinery and was required to lubricate, troubleshoot the machines, replace and fabricate parts as required, and perform other routine machinery maintenance. The second letter, dated July 4, 2002, also on letterhead signed by the director of engineering and production, and states that the beneficiary was employed as a "maintenance engineer" and was "in charge" of maintenance of all machinery. Both letters indicate that the beneficiary was employed from July 1999 to July 2002 and that he worked

48 hours a week earning 4,550 Saudi riyals per month. The job titles and responsibilities in both letters are significantly different from one another; the first letter describes the beneficiary's job and responsibilities as a technician, the second letter describes his job and responsibilities as a professional and a supervisor. The AAO notes that it is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). The current record fails to explain or reconcile the inconsistencies between the two letters by the same employer regarding the beneficiary's position and experience through which the beneficiary claims to qualify for the offered position.

The petitioner also submits additional experience letters from however, the beneficiary has not listed these employers on ETA Form 9089. 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 on the beneficiary's ETA Form 750B, lessens the credibility of the evidence and facts asserted.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

Furthermore, 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 one other Form I-140 petition on behalf of another beneficiary and Form I-129 petitions for six 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.

We further note that on ETA Form 9089, the petitioner indicated that it employed 59 employees in 2008. Its 2008 income tax return indicates that it paid $523,166 in total salaries and wages, which averages to $8,867 annual salary per employee, raising questions about the accurateness of the reported annual salaries and the petitioner's ability to pay the beneficiary the proffered wages. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. at 591.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.