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: AUG 2 1 2013

Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. The petitioner appealed this decision to the Administrative Appeals Office (AAO), and, on March 20, 2013, the AAO dismissed the appeal. The matter is now before the AAO on a motion to reopen and for reconsideration. The motion will be granted, and the AAO's decision dismissing the appeal will be affirmed. The petition will remain denied.

The petitioner is a software development and consulting firm. It seeks to employ the beneficiary permanently[1] in the United States first as a system analyst. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition.

The Form I-140, Immigrant Petition for Alien Worker was filed on February 29, 2012. The ETA Form 9089 established a May 7, 2008, priority date. The position of system analyst as stated on the ETA Form 9089 required the following:

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

4-B. Major Field Study: Computer Science

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

The petitioner checked "yes" to this question.

7-A. The petitioner states the alternate field of study is engineering, math or equivalent.

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

The petitioner checked "yes" to this question.

8-A. If yes, specify the alternate level of education required:

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[1]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.

The regulation at 8 C.F.R. § 204.5(l)(3) also provides:

> (ii) *Other documentation*—
>
> > (A) *General.* 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 petitioner states "Other."

8-B. If Other is indicated in question 8-A, indicate the alternate level of education required.

The petitioner states "[C]ombination of Degree and Diploma for four years Equivalent."

8-C If applicable, indicate the number of years of experience acceptable in question 8.

The petitioner states "2."

9. Is a foreign educational equivalent acceptable?

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

6. Experience: 2 yrs (24 mos.) experience is indicated by the petitioner

10. Is experience in an alternate occupation acceptable?

The petitioner checked "Yes."

10-A. If Yes, number of months experience in alternate occupation required:

The petitioner states "24."

10-B. Identify the job title of the acceptable alternate occupation.

Senior Software Engineer, Programmer Analyst, Systems Engineer, Consult [remainder unreadable]

14. Specific skills or other requirements-If submitting by mail, add attachment if necessary. Skills description must begin in this space.

The petitioner states:

> Bachelors Degree in Computer Science, Engineering or Math plus Two years experience or Equivalent* (*Combination of Degree & Diploma equivalent to Four years degree).

The director denied the petition, determining that the petitioner had failed to establish that the labor certification at a minimum required a baccalaureate degree to meet the terms of the professional category, for which the petitioner filed.

The AAO dismissed the appeal on March 20, 2013, concurring with the director's decision that the minimum educational requirements set forth on the labor certification by the petitioner do not support the visa designation as a third preference professional made by the petitioner on the Form I-140. The

AAO also noted that the petitioner had not established that the beneficiary acquired the two years of employment experience as set forth on the ETA Form 9089.

Through counsel, the petitioner submits a motion to reopen and for reconsideration of the AAO's decision. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or United States Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

The AAO accepts counsel's submission as a motion to reopen and for reconsideration. Accompanying the motion are copies of [redacted] notes from April 2007, copies of January 2003 and July 2003 letter(s) signed by [redacted] of the formerly named [redacted] to counsel in other cases, expressing his opinion about the possible means to satisfy the requirement of a foreign equivalent of a U.S. advanced degree, copies of the beneficiary's Bachelor of Technology degree and marks sheets, and a copy of another employment verification letter from [redacted]

Counsel asserts on motion that the labor certification met the Bachelor's degree requirement necessary for a third preference professional visa designation. In this case, the AAO does not concur. At the outset, it is noted that private discussions and correspondence solicited to obtain advice from USCIS are not binding on the AAO or other USCIS adjudicators and do not have the force of law. *Matter of Izummi, 22* I&N 169, 196-197 (Comm. 1968); *see also,* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S Immigration & Naturalization Service, *Significance of Letters Drafted* By *the Office of Adjudications* (December 7,2000). Additionally, the [redacted] letters were offering opinions as to the elements of an advanced degree professional under 8 C.F.R. § 204.5(k)(2), not a third preference professional.

As set forth on the ETA Form 9089, the petitioner was asked if an alternate combination of education and experience was acceptable from an applicant. The petitioner answered this question "yes," and allows for "other" education, less than a bachelor's degree. In H.8-A of the ETA Form 9089, seven different levels of education were given to choose from in order to specify the alternate combination of education and experience that the petitioner was describing. They were "None, High School, Associate's, Bachelor's, Master's, Doctorate, and Other." The petitioner selected "Other," not "Bachelor's." In H.8-B, if "other" was selected, the petitioner was to indicate the alternate level of education required. The selection of "other," qualified by a "degree and diploma" allows for an unspecified combination of education, which could, in theory, allow a combination of an Associate's degree with another diploma. As certified, "other" represents less than a bachelor's degree. The petitioner stated "Combination of Degree and Diploma for four years Equivalent." The regulation at 8 C.F.R. § 204.5(l)(3)(i) specifically provides that the "job offer portion of an individual labor certification, Schedule A application, or Pilot Program application for a professional must demonstrate that the job requires the minimum of a baccalaureate 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 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). The AAO does not conclude that the petitioner specified an alternate level of education of a minimum of a baccalaurate degree.

Relevant to the beneficiary's claimed two years of employment experience, as noted above, the ETA Form 9089 specified in H.6 that the beneficiary was to have two years (24 months) of experience in the job offered as a system analyst. In H.10B, the petitioner specified the alternate occupations from which the beneficiary could substitute two years of experience for the primary requirement. The alternate occupations are listed as senior software engineer, programmer analyst, systems engineer, and consul (the rest is unreadable). On Part K of the ETA Form 9089, signed by the beneficiary on February 13, 2012, the beneficiary claimed that he worked as a system analyst for [redacted] from October 27, 2003 to April 15, 2007. The first employment verification letter submitted to the record by the petitioner to confirm this employment was from one of the beneficiary's colleagues, rather than an employer or trainer as required by 8 C.F.R. § 204.5(l)(3)(ii). That letter stated that the beneficiary was a full-time Senior Software Engineer with [redacted] for the period stated.

On motion, the petitioner submits another letter from [redacted] It is authored by [redacted] Project Lead, [redacted] Mr. [redacted] states that the beneficiary was a full-time employee of this firm and worked as a [redacted] on October 27, 2003. The beneficiary then was promoted to Software Engineer on October 14, 2004 and then was employed as a Senior Software Engineer on July 1, 2006. None of these jobs was described as a system analyst as claimed on the ETA Form 9089. Further, the only qualifying alternate occupation confirmed by Mr. [redacted] that the beneficiary filled for approximately nine and one-half months was that of Senior Software Engineer. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The second letter differs in assigning different titles for different time periods, where the first letter stated only one position title for the entire time period. Neither letter confirms what position the authors' held with the company at the time of the beneficiary's employment and how they were in a position to verify the beneficiary's dates of employment, titles and job duties. In this case, the petitioner has not demonstrated that the beneficiary obtained the full two years of required experience in the job offered or in one of the alternate occupations as of the priority date.

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 motion to reopen and for reconsideration is granted. The AAO's decision of March 20, 2013 is affirmed. The petition remains denied.