(b)(6)

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

DATE: FEB 19 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
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:

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 consulting firm. It seeks to permanently employ the beneficiary in the United States as a management analyst. 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).

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment 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 January 25, 2007. *See* 8 C.F.R. § 204.5(d).

The director's decision concluded that the petitioner had not adequately resolved multiple inconsistencies in the record pertaining to the beneficiary's relationship with the petitioner. The director denied the petition accordingly.

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.[1]

The petitioner must establish that the job is *bona fide*, or clearly open to U.S. workers. *See Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (*en banc*). A relationship invalidating a *bona fide* job offer may also arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 2000-INA-93 (BALCA May 15, 2000). In determining whether the job is subject to the alien's influence and control, the adjudicator will look to the totality of the circumstances. *See Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*). The same standard has been incorporated into the PERM regulations. *See* 69 Fed. Reg. 77326, 77356 (ETA) (Dec. 27, 2004).

Matter of Silver Dragon Chinese Restaurant, 19 I&N Dec. 401 (Comm'r 1986), discussed a beneficiary's 50% ownership of the petitioning entity. The decision quoted an advisory opinion from the Chief of DOL's Division of Foreign Labor Certification as follows:

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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 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).

> The regulations require a 'job opportunity' to be 'clearly open.' Requiring the job opportunity to be bona fide adds no substance to the regulations, but simply clarifies that the job must truly exist and not merely exist on paper. The administrative interpretation thus advances the purpose of regulation 656.20(c)(8). Likewise requiring the job opportunity to be bona fide clarifies that a true opening must exist, and not merely the functional equivalent of self-employment. Thus, the administrative construction advances the purpose of regulations 656.20.

Id. at 405.

The ETA Form 9089 specifically asks in Section C.9: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" The petitioner answered "no" to this question.

The PERM regulation specifically addresses this issue at 20 C.F.R. § 656.17(l) and states in pertinent part:

> (l) Alien influence and control over job opportunity. If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation:
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> (1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
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> (2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;
>
> (3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and
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> (4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.
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> (5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

The petitioner has the burden of establishing that a *bona fide* job opportunity exists when asked to show that the job opportunity is clearly open to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *see also* 8 U.S.C. § 1361.

The director's decision stated the following findings:

- The beneficiary established the petitioner in 1999.
- The beneficiary served as the president of the petitioner from 1999 until 2005. In 2005, was named president.
- The beneficiary submitted the petitioner's annual reports for 2006, 2007 and 2009, signing as an "officer or director."
- The petition states that the petitioner has three employees, but the Forms 941 in the record for 2007 and 2008 state that the petitioner only had one employee.
- The petitioner's 2006 Form 1120 has the beneficiary's home address as its business address.
- The petitioner's 2006 federal income tax return states that the company's officer compensation was $60,000, which is the same amount the beneficiary received from the petitioner that year.
- The signatory on the petitioner's 2007 return appears to have been altered.

Based on the facts set forth above, the director concluded that the labor certification underlying the petition was not supported by a *bona fide* job opportunity available to U.S. workers.

On appeal, counsel stated that the petitioner has only one U.S. employee and had two employees in Venezuela, which explains why they were not reflected on the Forms 941. Counsel also submitted a copy of the 2005 contract for the sale of the business to and claimed that the beneficiary is merely an employee of the petitioner. Counsel also stated that it was an innocent and inadvertent mistake on the part of the tax filer for the petitioner's 2006 and 2007 tax returns to have listed the beneficiary's personal residence is the corporate address.

On appeal, the petitioner failed to address all of the issues raised by the director.[2] The evidence in the record demonstrates that the beneficiary founded the petitioner, was the president of the petitioner for six years, remained an officer and/or director of the petitioner after purportedly selling the business, and is the company's only U.S. employee. Therefore, it is concluded that there did not exist a *bona fide* job opportunity that was open to U.S. workers. Considering all of the facts in this case, the job opportunity was subject to the beneficiary's influence and control. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986). Accordingly, the director's decision is affirmed.

Beyond the decision of the director, the petitioner also failed to establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the

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[2] With regard to the director's conclusion that the petitioner's 2007 tax return contained an altered signature, the petitioner submitted new copy of the 2007 tax return with the signature of with no explanation for the altered signature. Counsel also failed to submit any evidence of the two employees in Venezuela.

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). S*ee 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 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); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

The required education, training, experience and skills for the offered position are set forth at Part H 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 business administration (or an equivalent field of study).
H.5. Training: None required.
H.6. Experience in the job offered: None required.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: bachelor's degree and 12 years of experience.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: None.

Part J of the labor certification states that the beneficiary's highest level of education related to the offered position is a bachelor degree in automotive technology from the Venezuela, completed in 1985.

The record of proceeding contains a copy of the beneficiary's diploma issued on July 13, 1985 from the (no transcripts were submitted); A To Whom It May Concern Letter from which states the beneficiary enrolled on February 7, 1996, in the Bachelor of Business Administration program, and completed three courses (Introduction to Business, Principles of Accounting, and Principles of Marketing); a letter and Certificate of Registration from the) showing the beneficiary is registered as an EMS auditor; and, a degree from the granting the beneficiary the degree of Specialist in Group Dynamics.

The record also contains an evaluation of the beneficiary's credentials prepared by for on July 23, 2003. The evaluation concludes that the beneficiary's Degree of Technician in Automotive from the combined with his "at least twelve years of experience" are equivalent to a bachelor's degree in business administration. The evaluation states "having reviewed academic history, it becomes apparent that has satisfied requirements which are substantially similar to those required toward the completion of academic studies leading to an Associate's Degree from an

accredited institution." However, there is no indication that the evaluator reviewed the beneficiary's transcripts from the [redacted] Further, the evaluation in the record used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H-1B petitions, not to immigrant petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(*5*).

The petitioner also submitted two additional evaluations prepared by [redacted], for [redacted] dated November 4, 2012 and November 9, 2012. The evaluations are verbatim to each other, except for the summary paragraphs, with the later evaluation summary being more complete. The summary of the November 9, 2012 evaluation states, "totally he had completed equivalent to twelve years of US high school diploma and over five years of postsecondary education. His qualification is equivalent or exceeding to an individual who had completed U.S. high school diploma and a Bachelor Degree in Automotive Technology from an accredited University in the United States."

This evaluation does not conclude the beneficiary has a degree that is the foreign equivalent of a bachelor's degree. The evaluation instead combines the high school courses completed by the beneficiary in mechanical technology; the beneficiary's six semesters of attendance at the [redacted], resulting in a Tecnico Superior; the history and literature courses completed by the beneficiary at the [redacted] Republic of Venezuela; the Certificate from the [redacted] and the three courses in business administration completed by the beneficiary at the [redacted] to reach the equivalent of a bachelor's degree.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)); *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 AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (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]

According to EDGE, "The *Técnico superior* or *Tecnólogo* represents attainment of a level of education comparable to 2 to 3 years of university study in the United States."

Based on the conclusions of EDGE, the evidence in the record is not sufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree.

The petitioner submitted evidence to establish the beneficiary sought clarification and an evaluation from EDGE, but stated that at a timely response had not yet been received due to disruption and damage consequent to Hurricane Sandy. The petitioner submitted copies of e-mails between the beneficiary and AACRAO/International Education Services ("IES.") The e-mails show IES received the beneficiary's application for an evaluation and documents on October 30, 2012, and stated its office was closed that day due to Hurricane Sandy. However, a later e-mail the same day informs the beneficiary that the normal processing time is approximately two weeks, and made no mention of any "damage" as claimed by the petitioner. The petitioner's response to the AAO's request for evidence was received by the AAO on November 13, 2012. To date, no supplemental documentation has been received.

The petitioner failed to establish that that the terms of the labor certification are ambiguous and that the petitioner intended the labor certification to require less than a four-year U.S. bachelor's or

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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.

foreign equivalent degree, as that intent was expressed during the labor certification process to the DOL and potentially qualified U.S. workers.

We note the decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). In that case, the labor certification specified an educational requirement of four years of college and a "B.S. or foreign equivalent." The district court determined that "B.S. or foreign equivalent" relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Snapnames.com, Inc.* at 11-13. Additionally, the court determined that the word "equivalent" in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Snapnames.com, Inc.* at 14.[5] In addition, the court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at 7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id. See also Maramjaya v. USCIS, Civ. Act No. 06-2158* (D.D.C. Mar. 26, 2008)(upholding USCIS interpretation that the term "bachelor's or equivalent" on the labor certification necessitated a single four-year degree).

In the instant case, the term "or equivalent" was added to the field of study, not the type of degree. The AAO provided the petitioner the opportunity to establish its intent regarding the term "or equivalent" on the labor certification and the minimum educational requirements of the labor certification. The petitioner failed to establish that "or equivalent" was intended to mean that the required education could be met with an alternative to a four-year U.S. bachelor's degree or foreign equivalent.

In summary, the petitioner has failed to establish that the beneficiary possessed a U.S. bachelor's degree or a foreign equivalent degree from a college or university as of the priority date as required by the terms of the labor certification. Therefore, the petition must also be denied for this reason.

Also beyond the decision of the director, the evidence in the record does not establish that the beneficiary possesses the required experience for the offered position. As is discussed above, the

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[5] In *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), the court concluded that USCIS "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." However, the court in *Grace Korean* makes no attempt to distinguish its holding from the federal circuit court decisions cited above. Instead, as legal support for its determination, the court cites to *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)(the U.S. Postal Service has no expertise or special competence in immigration matters). *Id.* at 1179. *Tovar* is easily distinguishable from the present matter since USCIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws. *See* section 103(a) of the Act.

petitioner must demonstrate that the beneficiary possessed all of the requirements stated on the labor certification as of the January 25, 2007 priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The labor certification states that an alternative to the applicant having a bachelor degree in business administration, the applicant could qualify for the offered position with a bachelor degree and twelve years of experience as a management analyst.

On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a management analyst for the petitioner from September 1, 2003 to January 30, 2007; as a general manager with the petitioner from February 1, 1994 to September 1, 2003; and, as a production manager for Valencia, Venezuela from July 1, 1989 to February 1, 1994.

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 a letter from on letterhead, stating the company employed the beneficiary as a diesel mechanic technician from May 26, 1983 to March 14, 1986; a letter from Engineer, Plant Manager, on letterhead, stating the company employed the beneficiary as a production engineer from May 1986 to July 1989; a letter, from executive of , which states met the beneficiary at in July 1989 while working at and the company employed the beneficiary as a Chief Machining, Production Manager from July 1989 to February 1994; a declaration from Eng. Plant Manager for also stating that employed the beneficiary as a production manager from July 15, 1989 to February 28, 1994; and a letter dated July 15, 2003, from Vice President of , stating the company employed the beneficiary as a general manager from February 1994 to the present.

However, none of the letters state the beneficiary was in the position of a management analyst as required on the labor certification, or state the position held by the beneficiary was full-time.

The beneficiary's employment with Venequip and EATO are not listed on the labor certification. *See Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976)(a claim to possess experience that is not listed on the labor certification is less credible). The instructions for Form ETA 750B state that the beneficiary must list all jobs held during the last three years as well as "any other jobs related to the occupation for which the alien is seeking certification." The failure to list this newly claimed employment on the labor certification creates an inconsistency. The petitioner must resolve any inconsistencies in the record by independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. at 591-92. The record does not contain and independent, objective evidence of the beneficiary's employment with Venequip and EATO other than the employment letters.

In the response to the AAO's request for evidence, the petitioner submitted a letter from attorney which states that shift work in Venezuela will be between the hours of 5:00 a.m. and 7:00 p.m. and would not exceed eight hours. However, this letter is not sufficient to establish that the beneficiary's prior positions were full-time. It only establishes his shifts could not exceed eight hours.

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.

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.

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ORDER: The appeal is dismissed.