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: JUN 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 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,

Rachel Nitsio for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is an extended service contracts business. It seeks to employ the beneficiary permanently in the United States as a programmer analyst pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification approved by the United States Department of Labor (DOL).

The director determined that the ETA Form 9089 failed to demonstrate that the job requires a professional possessing a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree; and therefore, the beneficiary cannot be found qualified for classification as a member of the professions holding a bachelor's degree or equivalent. 8 C.F.R. § 204.5(l)(3)(ii). The director determined that the terms of the ETA Form 9089 did not require, at minimum, a bachelor's degree. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely. 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.

Section 203(b)(3)(A)(ii) of 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.

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 Dec. 158 (Acting Reg'l Comm'r 1977). The priority date of the petition is June 6, 2011, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).[1] Here, the Form I-140 was filed on September 13, 2011. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional (at minimum, possessing a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree).

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.

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[1] 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.

On appeal, counsel asserts that the alternate combination of education and experience is specified in the petitioner's support letter; that the ETA Form 9089 accepted an alternate combination of education and experience; and that the beneficiary's bachelor's degree in computer science or related fields with three years of experience is an alternate combination of education, training, and experience that is acceptable and equivalent to a bachelor's degree. Counsel submitted a copy of an ETA Form 9141, Application for Prevailing Wage Determination, Addendum, which indicates that a special requirement was a bachelor's degree "or foreign equivalent or experience equivalent or any combination of education, training and/or experience." Counsel further asserts that the new Form I-140 is confusing and that a wrong box checked on the form should not prohibit approval of the petition. Counsel infers that the evidence in the record demonstrates that the beneficiary has obtained a foreign equivalent to a US bachelor's degree in computer science.

The evidence in the record of proceeding shows that the beneficiary received a Bachelor of Science degree in Chemistry on December 15, 2001 from . Contrary to counsel's claim, there is no evidence in the record to demonstrate that a bachelor's degree in chemistry is equivalent to a bachelor's degree in computer science, engineering, or a related field of study. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon 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 lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The regulation at 8 C.F.R. § 204.5(l)(3)(i) states in pertinent part that "[t]he 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 this case, the job offer portion of the ETA Form 9089 indicates that the minimum required for the position is the foreign equivalent to a bachelor's degree or experience equivalent or any combination of education, training and/or experience. The petitioner indicated on the ETA Form 9089 at Part H.7 and H.7 A that an alternative field of study in computer information science, engineering or a related field is acceptable. The petitioner indicated at Part H.8 that an alternate combination of education and experience would be acceptable. At Part H.8 A through B, the petitioner indicated that it required at a minimum, a bachelor's degree or a combination of experience, education, and training. And, at Part H.8 C the petitioner further indicated that it would accept three years of experience. The petitioner indicated at Part H.14 that the beneficiary must have a bachelor's degree or foreign equivalent or experience equivalent. Accordingly, the job offer portion of the ETA Form 9089 does not require a professional, who at a minimum possesses a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree. However, the petitioner requested on the Form I-140 classification as a professional, a qualified immigrant who holds at least a baccalaureate degree.

Although counsel claims that there is no discrepancy in that the beneficiary holds a bachelor's degree that is a foreign equivalent to a U.S. bachelor's degree, the petitioner did not list such a requirement on the ETA Form 9089. The requirements listed on the ETA Form 9089 are

inconsistent with what has been indicated on the Form I-140. Contrary to counsel's claim, a minimum requirement on the ETA Form 9089 of a bachelor's degree or equivalent or a combination of education, training, and experience is not equivalent to at a minimum of a bachelor's degree or a foreign degree equivalent. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to re-adjudicate a petition under a different visa classification in response to a petitioner's request to do so. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Accordingly, the petition must be denied and the appeal dismissed.

The evidence submitted does not establish that the ETA Form 9089 requires a baccalaureate degree or the equivalent, and the appeal must be dismissed. The AAO finds that the petitioner could have instead filed the petition for a skilled worker.

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.