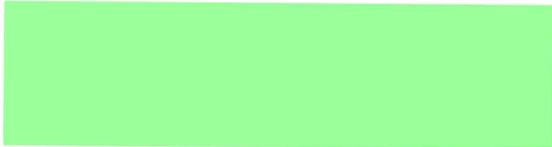


(b)(6)

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



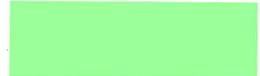
U.S. Citizenship
and Immigration
Services



DATE: NOV 12 2013

OFFICE: TEXAS SERVICE CENTER

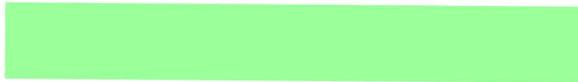
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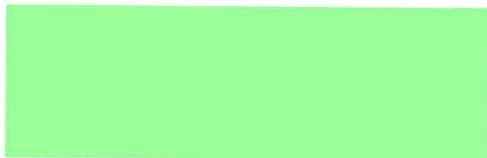
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(A)

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.

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn, and the matter will be remanded to the director for further action, consideration, and the entry of a new decision in accordance with below.

The petitioner is an international energy and petrochemicals company. It seeks to permanently employ the beneficiary in the United States as a geoscience systems support advisor. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A).¹

As the Act requires, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the United States Department of Labor (DOL), accompanies the petition. The petition's priority date, which is the date the DOL accepted the labor certification for processing, is November 12, 2012. *See* 8 C.F.R. § 204.5(d).

The director found that the petitioner failed to demonstrate that the beneficiary, as of the petition's priority date, possessed an advanced degree as the terms of the labor certification and the requested preference classification require. Accordingly, the director denied the petition on June 19, 2013.

The petitioner's appeal is properly filed and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.²

Section 203(b)(2) of the Act provides for the granting of immigrant classification to eligible members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the term "advanced degree" as:

¹ U.S. Citizenship and Immigration Services (USCIS) records show that, after the filing of this appeal, USCIS approved a new petition filed by the petitioner for the beneficiary in the same offered position for the same requested preference classification. As a matter of prudence, however, the AAO declines to dismiss this appeal as moot because the petitioner has not withdrawn it and the beneficiary has not obtained lawful permanent resident status as of this date. *See Matter of Luis-Rodriguez*, 22 I&N Dec. 747, 753-54 (BIA 1999) (Article III of the U.S. Constitution, which prevents federal courts from considering moot cases, does not apply to administrative tribunals, which may or may not dismiss appeals as moot for prudential reasons).

² The instructions to Form I-290B, Notice of Appeal or Motion, which 8 C.F.R. § 103.2(a)(1) incorporates into the regulations, allows the submission of additional evidence on appeal. 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, 766 (BIA 1988).

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

- (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
- (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

The petitioner must also establish that the beneficiary satisfied all of the educational, training, experience and any other requirements of the offered position by the priority date. 8 C.F.R. § 103.2(b)(1), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the job offer portion of the labor certification to determine the requirements for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

Part H of the ETA Form 9089 states the following minimum requirements for the offered position of geoscience systems support advisor:

- H.4. Education: Bachelor's degree in geoscience, science, engineering, or a related field.
- H.5. Training: None required.
- H.6. Experience in the job offered: None required.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: 60 months in "[a]ny suitable related geology/geophysics systems related position."
- H.14. Specific skills or other requirements:

Bachelor's degree (or foreign equivalent) in Geoscience, Science, Engineering, or a related field plus 5 years of progressive post-baccalaureate experience involving each of the following: systems administration of Geophysics and Geology application software; Devkit (e.g., Open Geo); Linux; well headers, markers, and logs; deviation and checkshots; interpretation of picks, faults, and surface data; pre- and post-stack

seismic data; and cultural data. Experience to include two years involving each of the following: EPOS and paradigm applications. Any suitable combination of education, experience, and/or training is acceptable.

Thus, the labor certification states that the offered position requires a bachelor's degree or a foreign equivalent degree in geoscience, science, engineering or a related field, plus 5 years of progressive, post-baccalaureate experience in a geology/geophysics systems related position.³ The 5 years of experience must involve: systems administration of Geophysics and Geology application software; Devkit (e.g., Open Geo); Linux; well headers, markers, and logs; deviation and checkshots; interpretation of picks, faults, and surface data; pre- and post-stack seismic data; and cultural data. In addition, at least 2 years of the experience must include work with EPOS and paradigm applications.

Part J of the labor certification states that the beneficiary possesses a 2004 bachelor's degree in data processing engineering from the [REDACTED] in Venezuela. The record contains a copy of the beneficiary's transcripts and professional title of data processing engineer from the [REDACTED] issued in 2004.

The record also contains five evaluations of the beneficiary's foreign educational credentials. Four of the five evaluations conclude that the beneficiary's Venezuelan title equates to a U.S. Bachelor of Science degree in computer engineering. The fifth evaluation finds that the beneficiary's title is the equivalent of a U.S. bachelor's degree in computer information systems.

The petitioner also submitted copies of a report from the Electronic Database for Global Education (EDGE), which was created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, the AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration

³ The petitioner's acceptance of 60 months of experience in an alternate occupation, without requiring any experience in the job offered, is unusual. In upholding the denial of a labor certification on another ground, the Board of Alien Labor Certification Appeals (BALCA) described similar requirements as "conflicting." See *Matter of Microsoft Corp.*, 2011-PER-00200, 2012 WL 1074397 at *3 (BALCA Mar. 27, 2012) (the certifying officer accepted the employer's claimed intention to require a bachelor's degree and 6 months of experience despite its "conflicting answers that no experience was required (Section H-6) but 6 months of experience in an alternate occupation would be acceptable (Section H-10).") *Id.* However, the DOL's Office of Foreign Labor Certification (OFLC) appears to allow PERM applications to require experience in an alternate occupation without requiring experience in the job offered. See OFLC Frequently Asked Questions and Answers, "Advertisement Content," 9., available at <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#adcont9> (accessed Oct. 4, 2013) ("No, the employer is not required to include the [*Matter of Kellogg*] statement on the application if the employer has indicated it requires experience in an alternate occupation and not in the job offered.") Based on the OFLC's online guidance, the AAO interprets the petitioner's labor certification to require 60 months of experience in an alternate occupation and no experience in the job offered.

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.* The EDGE is “a web-based resource for the evaluation of foreign educational credentials.” See <http://edge.aacrao.org/info.php>. USCIS considers the EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.⁴

The EDGE report concludes that a Venezuelan professional title is “comparable to a bachelor’s degree in the United States.”

The director found that the beneficiary’s title was only a 3-year educational credential. See *Matter of Shah*, 17 I&N Dec. 244, 245 (Reg’l Comm’r 1977) (a bachelor’s degree generally requires 4 years of education). However, the evaluations and the beneficiary’s transcripts state that he completed a 5-year program, which ran from January 2000 through November 2004. The EDGE report also states that Venezuelan universities issue professional titles after students complete “5- to 6-year programs.” Contrary to the director’s finding, the AAO finds that the preponderance of the evidence demonstrates that the beneficiary possesses a foreign professional degree equivalent to a U.S. Bachelor of Science degree in computer engineering. Because the labor certification states that the petitioner will accept a foreign equivalent degree of a U.S. bachelor’s degree in engineering, the beneficiary’s Venezuelan title is an acceptable foreign educational credential.

To establish that the beneficiary possesses an advanced degree and that he satisfies the requirements of the labor certification, the record must also demonstrate that the beneficiary had at least 5 years, or 60 months, of progressive, post-baccalaureate experience in the specialty as of the petition’s priority date. See 8 C.F.R. § 204.5(k)(2). Evidence relating to qualifying experience must be in the form of letters from current or former employers and must include the names, addresses, and titles of the writers, and specific descriptions of the beneficiary’s experience. 8 C.F.R. § 204.5(g)(1). If such evidence is unavailable, USCIS may consider other documentation relating to the beneficiary’s experience. *Id.*

Part K of the ETA Form 9089 states that the beneficiary possesses the following employment experience:

- about 21 months as a data management coordinator with [REDACTED] in Venezuela from July 15, 2005 to April 10, 2007;

⁴ See *Tisco Group, Inc. v. Napolitano*, No. 09-10072, 2010 WL 3464314 at *4 (E.D. Mich. Aug. 30, 2010) (USCIS properly weighed the educational evaluations the petitioner submitted and information from the EDGE to conclude that the beneficiary’s foreign degrees were comparable to only a U.S. bachelor’s degree); *Sunshine Rehab Servs., Inc. v. USCIS*, No. 09-13605, 2010 WL 3325442 at **8-9 (E.D. Mich. Aug. 20, 2010) (USCIS was entitled to prefer the information in the EDGE and did not abuse its discretion in reaching its conclusion); *Confluence Int’l, Inc. v. Holder*, No. 08-2665, 2009 WL 825793 at *4 (D. Minn. Mar. 27, 2009) (the AAO provided a rational explanation for its reliance on information from the AACRAO to support its decision).

- about 14 months as a geomodeller with [REDACTED] in Mexico from April 11, 2007 to June 15, 2008;
- about 28 months in [REDACTED] data management with [REDACTED] in the U.S. from June 30, 2008 to October 11, 2010; and
- since October 12, 2010 in the offered position with the petitioner in the U.S.

The record contains three experience letters from claimed former employers of the beneficiary. A June 7, 2012 letter from the beneficiary's purported former supervisor states that [REDACTED] employed the beneficiary full-time in Venezuela for about 21 months from July 15, 2005 to April 11, 2007 as a data management coordinator. An April 17, 2012 letter from another purported former supervisor of the beneficiary states that [REDACTED] in Mexico employed the beneficiary full-time in Mexico for about 14 months from April 11, 2007 to June 15, 2008 as a geophysics consultant. Finally, an April 16, 2012 letter from a North American support & services manager on [REDACTED] stationery states that the company employed the beneficiary full-time in the United States for about 33 months from January 7, 2008 to October 11, 2010 as an applications geoscientist-data management.

The letters regarding the beneficiary's purported experience with [REDACTED] identify different positions than stated on the labor certification. The letters state that the beneficiary worked as a geophysics consultant for [REDACTED] in Mexico and as an applications geoscientist-data management for the company in the U.S. The labor certification states that the beneficiary worked as a geomodeller for the company in Mexico and in [REDACTED] management for [REDACTED] in the U.S. However, the job duties stated in the letters match the job duties stated on the labor certification. The AAO therefore finds the discrepancies in the position titles to be immaterial.

More troubling is the discrepancy in the beneficiary's start date of employment with [REDACTED] in the U.S. The labor certification states that the beneficiary worked for the company in the U.S. from June 30, 2008 to October 11, 2010. However, the letter from his purported former supervisor at [REDACTED] in the U.S. states that he worked there from January 7, 2008 to October 11, 2010.⁵ The discrepancy in the beneficiary's start date with [REDACTED] in the U.S. casts doubt on the veracity of the experience letter from his former supervisor and on his qualifying experience for the offered position and requested classification. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (the petitioner must resolve inconsistencies in the record by independent, objective evidence).

In addition, the experience letters do not establish that the beneficiary possessed the required 60 months of experience involving Devkit (e.g., Open Geo) and Linux as the labor certification requires. The experience letters state that the beneficiary had about 21 months of experience involving Devkit and Linux at [REDACTED] in Venezuela and about 33 months of experience involving Devkit and Linux at

⁵ The record contains a copy of the beneficiary's passport, valid from April 2008 to April 2013, which includes an L-1 nonimmigrant visa issued to the beneficiary on June 18, 2008. The passport indicates that the beneficiary entered the U.S. in L-1 visa status for the first time on July 12, 2008 and again on December 31, 2008. The record does not reflect that the beneficiary was in the U.S. in January 2008, as claimed in the experience letter.

[REDACTED] in the U.S. However, the letter regarding his experience with [REDACTED] in Mexico does not state his involvement with Devkit or Linux. The record therefore establishes that the beneficiary possessed only about 54 months of experience involving Devkit and Linux, less than the 60 months of experience with those technologies required by the labor certification. The petitioner has failed to establish that the beneficiary meets the qualifications for the offered position as stated on the labor certification.

The AAO may deny a petition that fails to comply with the technical requirements of the law even if the director did not identify all of the grounds for denial in the initial decision. *See Spencer Enters., Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

In summary, the AAO finds that the petitioner has overcome the ground of denial specified in the director's decision. Accordingly, the director's decision of June 19, 2013 denying the petition will be withdrawn.

However, the petition is not approvable. The record does not establish the beneficiary's qualifying experience for the offered position as stated on the labor certification and as required for the requested classification of advanced degree professional. Therefore, the AAO will remand the petition to the director for consideration of these issues and any other issues the director deems appropriate. The director may request any evidence relevant to the outcome of the decision and should afford the petitioner a reasonable opportunity to respond. Upon review and consideration of any response, the director shall enter a new decision.

The petition is not approvable for the above stated reason. In visa petition proceedings, the petitioner must establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The director's decision of June 19, 2013 is withdrawn; however, the petition is not immediately approvable for the reasons discussed above, and therefore the AAO may not approve it. Because the petition is not immediately approvable, the petition is remanded to the director for additional consideration and the entry of a new, detailed decision.