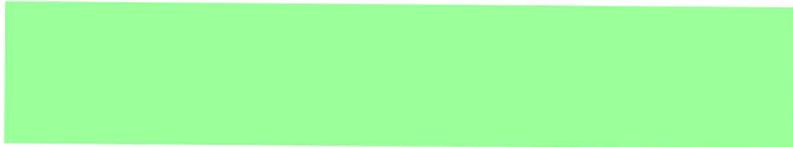




U.S. Citizenship  
and Immigration  
Services

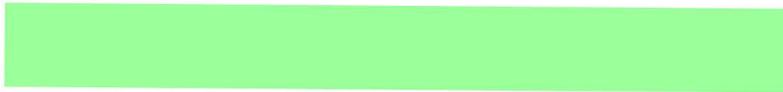
(b)(6)



DATE: **SEP 04 2013** OFFICE: NEBRASKA SERVICE CENTER

FILE: 

IN RE: 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) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



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,

*Rachel NiJuno*  
for

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a provider of engineering and design services. It seeks to permanently employ the beneficiary in the United States as an engineer. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).

The director's decision denying the petition concluded that the petition cannot be approved because the labor certification does not require a member of the professions holding an advanced degree, as the labor certification states that a bachelor's equivalency based upon a combination of degrees is acceptable.

On appeal, counsel states that an individual possesses the equivalent of a single source four-year bachelor's degree even though the four-year degree is based on credit or degrees that were transferred from unrelated colleges or universities. Counsel states that the beneficiary has the equivalent of a single source degree because he completed a diploma in mechanical engineering from [REDACTED] India, in 1990, then completed a Bachelor of Technology degree in Mechanical Engineering from [REDACTED] India, in 1993. Counsel states that as conveyed in the letter from [REDACTED] the Bachelor of Technology degree in Mechanical Engineering is a four-year degree program, and the beneficiary was admitted into the program as a second-year student because of his prior education. Counsel asserts that this scenario is similar to an individual in the United States who attends courses at a university then transfers to an unrelated university and completes a bachelor's degree there.

Counsel also asserts that the labor certification does not preclude EB-2 classification. Counsel states that the labor certification reflects that the proffered position requires, at minimum, a bachelor's degree in mechanical engineering and 60 months of experience. Counsel asserts that the statement "bachelor's equivalency based upon a combination of degree acceptable" [sic] is intended to clarify that the bachelor's degree requirement includes an individual who transfers credit, a diploma, or a degree from a college or university towards a bachelor's degree program at an unrelated college or university. Counsel contends that the petitioner will accept a combination of degrees or courses equating to a bachelor's degree for the proffered position, and if the petitioner had not stated its willingness to accept a combination of degrees or courses, U.S. Citizenship and Immigration Service (USCIS) would have determined the beneficiary was not qualified for the proffered position because he earned his bachelor's degree in three years.

The 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.<sup>1</sup> The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup> A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision.<sup>3</sup>

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)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

[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. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

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:

---

<sup>1</sup> *See* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also* *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, 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).

<sup>3</sup> *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003).

- (A) An official academic record showing that the alien has an 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.

In addition, the regulation at 8 C.F.R. § 204.5(k)(4)(i) states, in part:

The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

In summary, a petition for an advanced degree professional must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Specifically, for the offered position, the petitioner must establish that the labor certification requires no less than a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

In the instant case, Part H of the labor certification submitted with the petition states that the offered position has the following minimum requirements:

- H.4. Education: Bachelor's in mechanical engineering.
- H.5. Training: None required.
- H.6. Experience in the job offered: 60 months.
- H.7. Alternate field of study: None accepted.
- 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 as a mechanical engineer, lead engineer, design engineer, or a related title.
- H.14. Specific skills or other requirements: 5 years experience in the job duties. May require work at client sites throughout the U.S. Bachelor's equivalency based upon combination of degrees acceptable.

Counsel asserts that the labor certification statement "bachelor's equivalency based upon a combination of degree acceptable" [sic] is intended to include an individual who transfers credit, a diploma, or a degree earned from a college or university towards a bachelor's degree program at an unrelated college or university. Counsel states that had the petitioner not stated a willingness to accept a combination of degrees or courses, the beneficiary would have been found unqualified for

the proffered position because he earned a bachelor's degree in three years due to his transfer of prior education from an unrelated educational institution.

The labor certification states that the petitioner accepts a U.S. "[b]achelor's equivalency based upon combination of degrees." Where there is a combination of lesser degrees which are each individually less than a bachelor's degree, the combination of educational credentials is not a "United States baccalaureate degree or a foreign equivalent degree" within the meaning of 8 C.F.R. § 204.5(k)(2). Since Part H-14 provides that an individual can qualify for the offered position with less than a baccalaureate followed by five years of progressive experience in the specialty, the petition does not qualify for advanced degree professional classification.

There is no provision in statute or regulation that compels USCIS to readjudicate a petition under a different preference classification once the director has rendered a decision. 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'r 1988).

In summary, the offered position does not require an advanced degree. Therefore, the petition cannot be approved for a member of the professions holding an advanced degree under section 203(b)(2) of the Act.

Beyond the decision of the director, the AAO finds that the record does not establish that the beneficiary has the required five years of progressive experience as stated in the labor certification prior to the priority date of July 9, 2012. 8 CFR 204.5(k)(2). The petitioner must 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 Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1).

Part K of the labor certification states that the beneficiary qualifies for the offered position of engineer based on experience as a lead design engineer with [REDACTED] from January 31, 2011 until May 9, 2012; a senior project engineer with [REDACTED] from January 5, 2009 until January 28, 2011; a design engineer with [REDACTED] from June 18, 2007 until January 5, 2009; a senior engineer (mechanical) with [REDACTED] from February 16, 2006 until April 1, 2007; a senior engineer (mechanical) with [REDACTED] From June 13, 2003 until February 15, 2006; a senior engineer (CAD/CAM) with [REDACTED] from March 11, 1999 until December 31, 2002; and as an engineer (CAD/CAM) with [REDACTED] India From February 5, 1996 until July 3, 1999. No other experience is listed.

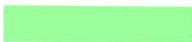
The record contains six letters regarding the beneficiary's employment experience. The experience letter from [REDACTED] Human Resources Manager, on [REDACTED]

Appliances letterhead states that the company employed the beneficiary as a full-time lead design engineer from January 31, 2011 until May 9, 2012, and describes the beneficiary's job duties. The experience letter from [REDACTED] Vice President, on [REDACTED] letterhead states that the company employed the beneficiary as a senior project engineer from January 5, 2009 until January 28, 2011, and describes the job duties performed by the beneficiary. The experience letter from [REDACTED] Vice President of [REDACTED] on [REDACTED] letterhead states that the company employed the beneficiary as a full-time design engineer from June 18, 2007 until January 5, 2009. The letter provides a description of the duties performed by the beneficiary. The experience letter from [REDACTED] human resources, on [REDACTED] letterhead states that the company employed the beneficiary as a full-time senior engineer CAD/CAM from March 11, 1999 until January 24, 2003, and describes the beneficiary's job duties. The experience letter from [REDACTED] Supply Chain Strategies Project Leader with [REDACTED] states that the beneficiary was employed full-time with [REDACTED] as a senior engineer (mechanical) from June 13, 2003 until February 15, 2006, and describes the beneficiary's job duties. The experience letter from [REDACTED] Human Resources Manager, on [REDACTED] letterhead, states that the company employed the beneficiary as a senior engineer (mechanical) since June 30, 2003, but does not state the beneficiary's ending employment date, describe the beneficiary's job duties, or state whether his employment was full-time.

The submitted letters do not establish that the beneficiary had five years of progressive employment in the specialty prior to the priority date. There is a discrepancy in the dates of employment in the labor certification with the letter from [REDACTED]. The labor certification states that the beneficiary was employed with [REDACTED] from March 11, 1999 until December 31, 2002, whereas the employment letter states the beneficiary was employed there from March 11, 1999 until January 24, 2003. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The letter from [REDACTED] is not from the employing entity [REDACTED] and therefore is not persuasive in establishing the beneficiary's dates of employment with [REDACTED] whether he was employed there full-time, and his job duties. The letters from [REDACTED] (1 year, 3 months, 9 days), [REDACTED] (2 years, 23 days), and [REDACTED] (1 year, 6 months, 18 days), establish less than five years of progressive employment. The petitioner has not established that the beneficiary possesses the required five years of progressive experience as stated in the labor certification as of the priority date of July 9, 2012. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the job opportunity.

In summary, the proffered position does not require an advanced degree and the petitioner has not demonstrated that the beneficiary qualifies for the proffered position. Therefore, the petition cannot be approved for a member of the professions holding an advanced degree under section 203(b)(2) of the Act. The director's decision denying the petition is affirmed.

(b)(6)



*NON-PRECEDENT DECISION*

Page 7

In visa petition proceedings, it is the petitioner's burden to 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 appeal is dismissed.