



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: APR 09 2014

OFFICE: NEBRASKA SERVICE CENTER

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,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the immigrant visa petition and the petitioner appealed the matter to the Administrative Appeals Office (AAO). On December 26, 2013, the AAO dismissed the appeal. The petitioner has now filed a motion to reopen and reconsider the AAO's decision. The motion will be granted. The previous decision of the AAO, dated December 26, 2013, will be reopened, a new decision entered, and the petition will remain denied.

The petitioner describes itself as a business in the "electronic payment systems industry." It seeks to permanently employ the beneficiary in the United States as a "Hyperion Lead Systems Analyst." 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).

At issue in this case is whether the beneficiary possesses 60 months of experience in the job offered or in a computer-related occupation as required by the terms of the labor certification to meet the requested preference classification as an advanced degree professional.

#### I. PROCEDURAL HISTORY

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).<sup>1</sup> The priority date of the petition is December 7, 2012.<sup>2</sup>

Part H of the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Bachelor's degree in Computer Science, Engineering, Math, Physics, or related technical field.
- H.5. Training: None required.
- H.6. Experience in the job offered: 60 months.
- 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 of experience in computer-related occupation.
- H.14. Specific skills or other requirements: "Employer will accept Bachelor's degree in Computer Science, Engineering, Math, Physics or related technical field, followed by five years of progressive, post-baccalaureate work experience in job offered or five years of progressive, post-baccalaureate work experience in a computer-related occupation. Experience must include: 1) 5 years progressively responsible experience in Hyperion application administration, development and support, including 4 to 5 years of experience with Hyperion Planning and Essbase applications, and at least 2 years of experience with current versions

<sup>1</sup> See section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); see also 8 C.F.R. § 204.5(a)(2).

<sup>2</sup> The priority date is the date the DOL accepted the labor certification for processing. See 8 C.F.R. § 204.5(d).

(11.x) of the Hyperion EPM products; 2) 5 years of experience with gathering business requirements, business processes, and technical requirements analysis, drafting system requirements and specifications, business process, and data modeling mapping; 3) coordinating user support, system maintenance and development among local IT staff members and IT staff at other sites; 4) understanding of application architecture and technology infrastructure typically found in Hyperion environments; 5) Standard Development Life Cycle (SDLC) methodology; and, 6) leading system projects or enhancements from development through implementation. Any suitable combination of education, training, or experience is acceptable.”

Part K of the labor certification states that the beneficiary possesses the following employment experience:

- As a Hyperion Lead Systems Analyst for the petitioner since January 30, 2012.
- As a Senior Staff, Enterprise SWE with [REDACTED] from July 12, 2010 until January 27, 2012.
- As a Senior Hyperion Consultant with [REDACTED] from October 1, 2009 until July 9, 2010.
- As a Hyperion Consultant with [REDACTED] from June 25, 2007 until September 30, 2009.
- As a part-time Graduate Assistant with [REDACTED] from August 22, 2005 until May 5, 2007.

The record reflects that on July 2, 2013, the director sent the petitioner a notice of intent to deny the instant petition because “Service records indicate that [REDACTED] was created fraudulently.” The director requested that the petitioner provide evidence that the beneficiary had obtained the required qualifying evidence from employers other than [REDACTED] prior to the priority date. The petitioner responded to the director’s NOID and included an experience letter from [REDACTED] stating that the beneficiary had been employed there as a Software Engineer from January 5, 2004 until August 12, 2005.

The director’s decision denying the petition concluded that the petitioner had not demonstrated that the beneficiary had the five years of progressive post-baccalaureate experience in the job offered prior to the priority date.

In its December 26, 2013 decision, the AAO dismissed the petitioner’s appeal and stated that the record reflected that the beneficiary had the following qualifying experience<sup>3</sup>:

- **Ten months** of qualifying experience with Radford University from August 22, 2005 until May 5, 2007.

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<sup>3</sup> The experience letters contained in the record and addressed in the AAO’s December 26, 2013, decision are incorporated into this decision and will be discussed further only as necessary.

- **Six months** of qualifying experience with [REDACTED] from January 4, 2010 until July 9, 2010. The AAO did not accept three of the months asserted by the petitioner because the Asset Purchase Agreement detailing the acquisition of [REDACTED] stated that the transfer of employees from [REDACTED] would have an effective date of November 16, 2009 and that these employees would be on [REDACTED] payroll effective January 4, 2010. Therefore, the AAO acknowledged this employment experience as constituting qualifying experience from January 4, 2010 until July 9, 2010.
- **Eighteen months** of qualifying experience with [REDACTED] from July 12, 2010 until January 27, 2012.

The AAO did not accept the beneficiary's employment with [REDACTED], or the petitioner as constituting qualifying experience to meet the terms of the labor certification.

On motion, counsel for the petitioner submitted a letter from [REDACTED] Manager for [REDACTED] each attesting to the beneficiary's employment with [REDACTED] as a full-time Hyperion Consultant from June 25, 2007 to September 30, 2009.

On motion, the petitioner also states that the beneficiary's employment with [REDACTED] Information [REDACTED], in addition to the other qualifying experience previously accepted by the AAO, sufficiently demonstrate that the beneficiary meets the experience requirements of the labor certification.

The instant motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted. The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the director and the AAO made an erroneous decision through misapplication of law or policy. Therefore, the petitioner's motion is properly filed. 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 motion.

## II. LAW AND ANALYSIS

### The Roles of the DOL and USCIS in the Immigrant Visa Process

At the outset, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984) (stating that the INS makes its own determination of the alien's entitlement to sixth preference status and whether the alien is in fact qualified to fill the certified job offer); *see also Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983) (stating that "there is no doubt that the authority to make preference classification decisions rests with INS").

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and the beneficiary are eligible for the requested employment-based immigrant visa classification.

#### **Eligibility for the Classification Sought**

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to 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 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:

- (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.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

Therefore, an advanced degree professional petition 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. Further, an “advanced degree” is 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, the petitioner claims that the beneficiary may be classified as an advanced degree professional based on a foreign equivalent degree to a U.S. bachelor’s followed by at least five years of progressive experience in the specialty.

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). If such evidence is unavailable, USCIS may consider other documentation relating to the beneficiary’s experience. *Id.*

As discussed above, the record contains experience letters establishing that the beneficiary has the following experience:

- **Ten months** of qualifying experience with [REDACTED] from August 22, 2005 until May 5, 2007.
- **Six months** of qualifying experience with [REDACTED] from January 4, 2010 until July 9, 2010. The AAO did not accept three of the months asserted by the petitioner because the Asset Purchase Agreement detailing the acquisition of [REDACTED]

██████████ would have an effective date of November 16, 2009 and that these employees would be on ██████████ payroll effective January 4, 2010.

- **Eighteen months** of qualifying experience with ██████████ from July 12, 2010 until January 27, 2012.

The AAO did not accept the beneficiary's employment with ██████████ or the petitioner as constituting qualifying experience to meet the terms of the labor certification. The AAO did not accept the beneficiary's employment with ██████████ because the record did not contain a letter from the employer as required by 8 C.F.R. § 204.5(g)(1). The AAO cited further discrepancies in the record regarding why the beneficiary's home address was listed on the Forms W-2 as the company's address. The AAO also noted that the evidence in the record demonstrates that ██████████ but the petitioner also provided a printout from ██████████ website, dated September 4, 2013, which indicate that ██████████ is still in operation.

The AAO did not accept the experience letter from ██████████ dated July 18, 2013, because this employment was not stated on the labor certification and the experience letter did not state the beneficiary's job duties. The AAO acknowledged the letter from the senior project manager for ██████████ who stated that he supervised the beneficiary as a full-time software engineer at Melstar Information Technologies, but stated that the petitioner had not established any reasons why secondary evidence should be accepted in lieu of the primary evidence under 8 C.F.R. § 103.2(b)(2).

The AAO also did not accept the beneficiary's employment with the petitioner as constituting qualifying experience because the beneficiary was employed a Hyperion Lead Systems Analyst, which is the same position as the job offered. DOL regulations state that the petitioner cannot rely on experience gained with the petitioner if it is gained in a position that is "substantially comparable" to the position offered. See 20 C.F.R. § 656.17(i)(3). Question J.21 of the labor certification asks "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?" The petitioner responded "no" to this question. On motion, counsel for the petitioner has not asserted that any of the beneficiary's experience with the petitioner constitutes qualifying experience in the job offered.

On motion, the petitioner has submitted the following letters:

- A letter from ██████████ Virginia, who states that he worked as a Lead Hyperion Consultant for ██████████ and supervised the beneficiary there as his direct manager. ██████████ states that the beneficiary was employed at ██████████ as a full-time Hyperion Consultant from June 25, 2007 until September 30, 2009 and explains what his duties were. He states that the reason the Forms W-2 for the beneficiary list his residence as being in Virginia when ██████████ is located in New Jersey is because the beneficiary worked primarily at the

worksite of [REDACTED]. He further states that he cannot provide a letter on [REDACTED] letterhead because he is no longer employed there.

- A letter from [REDACTED] who states that the beneficiary was employed by [REDACTED] as a full-time Hyperion Consultant from June 25, 2007 until September 30, 2009. [REDACTED] in approximately October or November 2009.

On motion, the petitioner asserts that the beneficiary's experience with [REDACTED] and [REDACTED] should constitute qualifying experience for the position offered. As stated above, the evidence in the record demonstrates that [REDACTED] Inc. acquired [REDACTED] but the petitioner also provided a printout from [REDACTED] website, dated September 4, 2013, which indicate that [REDACTED] is still in operation. The record also contains a [REDACTED] printout, which is included as part of the exhibit of the printout from [REDACTED] website, that indicates an address for [REDACTED] that is the same as the address on the labor certification. Accordingly, it appears that [REDACTED] is still in business, which calls into question the alleged acquisition of this company by [REDACTED].

As it appears that [REDACTED] is still in business, this further raises the question as to why the beneficiary was unable to provide an experience letter from this company. The petitioner did not address the documents in the record which indicate that [REDACTED] is still in business. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). 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, in fact, lies, will not suffice. *Id.* The petitioner has not overcome the inconsistencies in the record regarding the beneficiary's alleged employment with [REDACTED] with sufficient independent, objective evidence. Therefore, the AAO will not consider the beneficiary's alleged experience with [REDACTED] as constituting qualifying experience for the job offered.

Even if the AAO were to accept the beneficiary's employment with [REDACTED] from January 5, 2004 until August 12, 2005, the total months of qualifying experience for the beneficiary would be as follows:

- **Nineteen months** of qualifying experience with [REDACTED] from January 5, 2004 until August 12, 2005.
- **Ten months** of qualifying experience with [REDACTED] from August 22, 2005 until May 5, 2007.
- **Six months** of qualifying experience with [REDACTED] from January 4, 2010 until July 9, 2010.

- **Eighteen months** of qualifying experience with [REDACTED] from July 12, 2010 until January 27, 2012.

Thus, even taking into account the beneficiary's employment with [REDACTED] he would only have 53 months of qualifying experience required for the instant position. Therefore, the submitted experience letters do not establish that the beneficiary possessed five years of post-baccalaureate experience in the specialty.

After reviewing all of the evidence in the record, it is concluded that the petitioner has failed to establish that the beneficiary possessed at least 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. Therefore, the beneficiary does not qualify for classification as an advanced degree professional under section 203(b)(2) of the Act.

#### **The Minimum Requirements of the Offered Position**

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 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).

In evaluating 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*, 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). Even though the labor certification may be prepared with the beneficiary in mind, USCIS has an independent role in determining whether the beneficiary meets the labor certification requirements. *See Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 \*7 (D. Or. Nov. 30, 2006).

In the instant case, the labor certification states that he offered position requires a Bachelor's degree in "Computer Science, Engineering, Math, Physics, or related technical field" and 60 months of experience in the job offered or in a computer-related occupation.

For the reasons explained above, the petitioner has failed to establish that the beneficiary possesses the required experience for the offered position.

The petitioner failed to establish that the beneficiary possessed the minimum requirements of the offered position set forth on the labor certification by the priority date. Accordingly, the petition must also be denied for this reason.

### III. CONCLUSION

In summary, the petitioner failed to establish that the beneficiary possessed an advanced degree as required by the terms of the labor certification and the requested preference classification. Therefore, the beneficiary does not qualify for classification as a member of the professions holding an advanced degree under section 203(b)(2) of the Act.

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 motion is granted. The petition remains denied.