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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 27 2014**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

SELF REPRESENTED

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, Texas 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 an information technology consulting services firm. It seeks to permanently employ the beneficiary in the United States as a senior software 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).

At issue in this case is whether the beneficiary possesses the experience required by the terms of the labor certification and the requested preference classification.

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).¹ The priority date of the petition is December 14, 2011.²

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

- H.4. Education: Bachelor's in Computers.
- H.5. Training: None required.
- H.6. Experience in the job offered: 60 months.
- H.7. Alternate field of study: MIS, Engineering or related field.
- 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 programmer analyst.
- H.14. Specific skills or other requirements: Will accept progressive experience for H-6A. Will accept any suitable combination of education or experience. Frequent travel to client sites.

Part J of the labor certification states that the beneficiary possesses a Bachelor's degree in Computer Technology from [REDACTED] completed in 1998. The record contains a copy of the beneficiary's Bachelor of Engineering degree in Computer Technology and transcripts from [REDACTED] issued in 1998.

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

- Programmer analyst with the petitioner in [REDACTED] New Jersey from September 1, 2009 until the date of signing, October 19, 2012.

¹ 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).

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

- Programmer analyst with [REDACTED] in [REDACTED] New Jersey from May 26, 2009 until August 31, 2009.
- Programmer analyst with the petitioner in [REDACTED] New Jersey from March 3, 2008 until May 25, 2009.
- Programmer analyst with [REDACTED] in [REDACTED] New Jersey from May 14, 2007 until February 29, 2008.
- Senior [REDACTED] engineer with [REDACTED] in [REDACTED] India from November 11, 2002 until May 10, 2007.
- Programmer analyst with [REDACTED] in [REDACTED] India from December 5, 2000 until October 31, 2002.
- Systems officer with [REDACTED] in [REDACTED] India from January 27, 1999 until November 28, 2000.

The director's decision denying the petition states that the letters submitted did not demonstrate that the beneficiary had five years of progressive experience in positions of increasing complexity and involving greater responsibility. The director denied the petition accordingly.

On appeal, the petitioner states that the letters in the record establish that the beneficiary possesses in excess of the five years of experience required by the terms of the labor certification through his work with [REDACTED] and that the beneficiary's work with both of these companies was in Oracle database, which is one of the main job duties of the proffered position.

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.³ The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁴ 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.⁵

³ 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).

⁴ 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).

⁵ See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

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:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).⁶ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

⁶ Based on revisions to the Act, the current citation is section 212(a)(5)(A).

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

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.

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."

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.*

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).

The record contains the following experience letters:

- A December 28, 2009 letter from [REDACTED] CEO of [REDACTED] stating that the beneficiary worked as an Oracle database administrator from May 26, 2009 to August 31, 2009.
- A May 17, 2008 letter from [REDACTED] the beneficiary's co-worker at [REDACTED] stating that the beneficiary was employed as a programmer analyst, Oracle database administrator, from May 14, 2007 to February 29, 2008.
- An August 26, 2013 affidavit from [REDACTED] reiterating that he worked with the beneficiary from May 14, 2007 to February 29, 2008 at [REDACTED] as a programmer analyst and containing a greater description of the job duties of the position.⁷
- An October 5, 2010 letter from [REDACTED] Business manager for [REDACTED] stating that the beneficiary worked as a programmer analyst, Oracle database administrator from May 14, 2007 to February 29, 2008.
- A June 28, 2008 letter from [REDACTED] the beneficiary's co-worker at [REDACTED] stating that he worked with the beneficiary as a senior [REDACTED] Engineer from November 11, 2002 to May 10, 2007.⁸
- A May 10, 2007 service certificate from [REDACTED] human resources manager for [REDACTED] stating that the beneficiary worked as a senior [REDACTED] Engineer from November 11, 2002 to May 10, 2007. The certificate contains no details about the beneficiary's job duties in the position.
- A July 19, 2008 affidavit from [REDACTED] the beneficiary's co-worker at [REDACTED] stating that he worked with the beneficiary as an oracle database manager from December 5, 2000 to October 31, 2002.
- A November 1, 2002 letter from [REDACTED] vice president of human resources for [REDACTED] stating that the beneficiary worked as an analyst programmer from December 5, 2000 to October 31, 2002.
- A November 28, 2000 letter from [REDACTED] with [REDACTED] stating that the beneficiary worked as a systems officer from January 27, 1999 to November 28, 2000. This letter does not contain any duties of the position.

⁷ It is noted that Mr. [REDACTED] claims to have worked for [REDACTED] from May 11, 2007 to November 15, 2007. It is unclear how Mr. [REDACTED] can attest to the beneficiary's job duties through February 2008 when this was more than three months after Mr. [REDACTED] claims to have left the employment of [REDACTED]

⁸ It is noted that Mr. [REDACTED] claims to have worked for [REDACTED] from December 29, 2003 to August 20, 2006. It is unclear how Mr. [REDACTED] can attest to the beneficiary's job duties from November 2002 and through February 2008 when this was more than one year before and nearly nine months after Mr. [REDACTED] claims to have been employed with [REDACTED] from December 2003 to August 2006.

- A July 28, 2008 affidavit from [REDACTED] the beneficiary's co-worker at [REDACTED] [REDACTED] stating that the beneficiary was employed as a systems officer from January 27, 1999 to November 28, 2000.⁹
- A December 29, 1998 letter from [REDACTED] human resources manager for [REDACTED] [REDACTED] stating that the beneficiary worked from October 2, 1998 to December 28, 1998. This letter contains no position details.

The letter from [REDACTED] stated that the beneficiary worked for three months for [REDACTED] from May 26, 2009 to August 31, 2009 as an oracle database administrator, "creat[ing] upgrad[ing] & maintain[ing] oracle databases on different flavors of UNIX and Windows environments." This experience matches the job requirements of analyzing and configuring oracle databases in UNIX and Windows.

As stated by the director in his decision, the submissions from [REDACTED] [REDACTED] do not contain any details of the beneficiary's previous position so that we are unable to determine whether the positions involved the duties required by the terms of the labor certification. The letters from [REDACTED] [REDACTED] were written by co-workers and not by employers as required by the terms of 8 C.F.R. § 204.5(g)(1). The letters are not independent, objective evidence as they are neither contemporaneous business records nor are they made in the course of employment and therefore, cannot be considered as evidence of the beneficiary's previous employment.

Even if these three letters could be considered as evidence supporting the letters from employers that do not contain job descriptions, as the director found that the letters do not contain evidence of progressive experience. The regulation at 8 C.F.R. § 204.5(k)(2) requires that experience used to qualify an applicant be progressive in nature. The description of the beneficiary's job duties provided by each co-worker were virtually the same in each affidavit and did not demonstrate additional job responsibilities or duties from one position to the other or that the beneficiary was given additional job responsibilities or duties during the course of his employment with any of his previous employers. Specifically, the affidavit from [REDACTED] states that the beneficiary had the following job duties as a system officer with [REDACTED]

He managed Oracle Databases on UNIX platforms (Sun Solaris, AIX, etc.). as part of his role & responsibilities, he had Administered Oracle Databases. He created tablespaces, and created and managed users, roles & their privileges. He took Backups of Databases. He also managed users, their roles, etc. He also took

⁹ It is noted that Mr. [REDACTED] claims to have worked for [REDACTED] from April 20, 1998 to October 13, 2000. It is unclear how Mr. [REDACTED] can attest to the beneficiary's job duties through November 2000 when this was more than one month after Mr. [REDACTED] claims to have left the employment of [REDACTED] in October 2000.

Databases backups. His skills were on Oracle Databases (7.2 version) on UNIX environments (Sun Solaris, AIX, etc.).

The next affidavit from [REDACTED] states that the beneficiary had the following job duties as an analyst programmer at [REDACTED] from October 16, 2000 to April 10, 2003:

He managed Oracle Databases on Windows platforms. As part of his role & responsibilities, he used to take Database Backups. He has also created Databases, tablespaces, tables, indexes, etc. He also managed users and their privileges. He also was involved in migration of SQL Server 2000 database to Oracle 8.1.7 version using Oracle's Migration Workbench tool. He was part of the HRMS, Time Management modules; etc, and also written SQL & PL/SQL coding. His skills were on Oracle Databases (8.1.7), SQL Server 2000 on Windows environments (Win2000, NT, etc.).

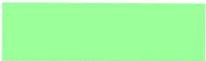
The affidavit from [REDACTED] addresses the next position held by the beneficiary and states that the job duties of the beneficiary as a senior SQA engineer from November 11, 2002 to May 10, 2007 were:

Manage Oracle Databases and QA/Testing tasks for [REDACTED] potential products [REDACTED] for Oracle, [REDACTED] for Oracle). He also migrated Oracle 8.1.7 database to 10g R1 (10.2.0.1) version. As part of his role, he had created Oracle Databases and administered them. His skills were on Oracle Databases (8.1.7, 9i, 10g) on Unix environments (AIX, Solaris, HP-UX, etc.). He used [REDACTED] product for space related issues for Oracle Databases. He had also Tuned SQL queries.

These three affidavits, written by the beneficiary's former coworkers, contain virtually the same job description and duties and, therefore, do not demonstrate progressive experience by the beneficiary to qualify him for the five years of experience required for a position requiring an advanced degree. As a result, they are insufficient to establish that the beneficiary has the experience required for the 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.



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.