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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington, DC 20529-2090

U.S. Citizenship
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Services

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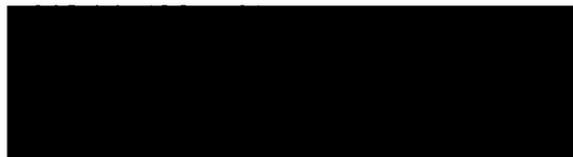
Office: NEBRASKA SERVICE CENTER

Date: JUL 06 2009

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

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) (3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b) (3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. On appeal, the Administrative Appeals Office (AAO) withdrew the director's decision and remanded the case to the director for further investigation and entry of a new decision related to the beneficiary's qualifications to perform the duties of the proffered position. The case is now before the AAO on certification.¹ The director's decision to deny the petition will be affirmed. The appeal will be dismissed.

The petitioner is a software technology company. It seeks to employ the beneficiary permanently in the United States as a computer programmer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director concluded that the petitioner had failed to establish that the petitioner had the continuing financial ability to pay the proffered wage and denied the petition on December 21, 2006.

The petitioner filed an appeal contending that the petitioner had demonstrated its ability to pay. On August 18, 2008, the AAO determined that the petitioner had established its ability to pay the proffered salary and withdrew the director's decision on this issue. The AAO, however, found that the petitioner had submitted insufficient documentation in support of the beneficiary's educational credentials, as well as insufficient and inconsistent evidence that the beneficiary met the training and experiential requirements described on the Form ETA 750. The AAO remanded the case to the director to obtain additional evidence from the petitioner.

¹ The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

The regulation at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) states in pertinent part:

(iii) Appellate Authorities. In addition, the Associate Commissioner for Examinations exercises appellate jurisdiction over decisions on;

(B) Petitions for immigrant visa classification based on employment or as a special immigrant or entrepreneur under Secs. 204.5 and 204.6 of this chapter except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act;

Pursuant to the delegation cited above, the AAO exercises the appellate jurisdiction formerly exercised by the Associate Commissioner for Examinations.

On February 12, 2009, the director issued a request for evidence to the petitioner relevant to the beneficiary's qualifications for the proffered job and notified the petitioner that its response must be received by March 26, 2009. The petitioner failed to respond to this request and the director denied the petition and certified his decision to the AAO on April 20, 2009.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 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. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The procedural history of this case is documented by the record and incorporated into this decision. Further reference to the procedural history will be made only as necessary.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (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.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry in to the occupation.

The regulation at 8 C.F.R. § 204.5(l)(3) further provides:

(ii) *Other documentation*—

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d);

Matter of Wing's Tea House, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on July 2, 2003.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, United States Citizenship and Immigration Services (USCIS) is bound to follow the pertinent regulatory guidelines pursuant to 203(b)(3)(A)(i) of the Act. USCIS jurisdiction includes the authority to examine an alien's qualifications for preference status and to investigate the petition under section 204(b) of the Act, 8 U.S.C. § 1154(b). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by the DOL. *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary v. Coomey*, 662 F.2d 1 (1st Cir. 1981); *Denver v. Tofu Co. v. INS*, 525 F. Supp. 254 (D. Colo. 1981); *Chi-FengChang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989). In evaluating the beneficiary's qualifications, USCIS must look to 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 *Matter of Silver Dragon Chinese Dragon Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986).

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position of computer programmer must possess. In this matter, item 14 reflects the following minimum requirements in order for a worker to perform the duties of the position:

Education	College 4 (years)	College Degree Required Bachelor of Science in Engineering	
		Major Field of Study Industrial and Production Engineering	
Training	No. Yrs. 2	No. Mos. 6	Type of Training on eSchool Data program
Experience	Job Offered 2 (yrs.) 6 Mos.	Related Occupation 4 (yrs.)	Related Occupation (specify) Software Engineer

As noted above, the beneficiary must have completed four years of college culminating in the award of a Bachelor of Science in Engineering with a major field of study in industrial and production engineering.

The beneficiary must also have received two years and six months of training in eSchool Data programming. Additionally, the beneficiary must have either two years and six months of employment experience in the job offered as a computer programmer or four years of work experience in the related occupation as a software engineer.

Regarding the petitioner's evidence of the beneficiary's academic credentials, the AAO's prior decision noted that the record did not contain a complete copy of the beneficiary's baccalaureate diploma or a statement of marks. The AAO further noted that training and experience are not interchangeable and determined that "while the beneficiary has the requisite two and a half years of training in eSchooldata based on his training while with the petitioner, the same two and a half years cannot be utilized to establish the requisite two and a half years of work experience in the proffered position." Therefore the petitioner must show that the beneficiary acquired four years of work experience in a related occupation as a software engineer.

The AAO further determined that two periods of claimed employment described on Part B of the ETA 750, signed under penalty of perjury by the beneficiary on June 11, 2003, were inconsistent with dates alleged by two employment verification letters from Mastech Corporation and Hindustan Aeronautics and would not be considered. Additionally, no corroborating evidence of claimed employment with System Logic was provided. The AAO concluded that the record failed to establish that the beneficiary possessed a United States or foreign equivalent Bachelor of Science degree in engineering and failed to show that the beneficiary had both the two and a half years of training in eSchool Data programming and two and a half years of work experience in the proffered job, or four years of experience in the related occupation as a software engineer.

On remand, the director requested additional documentation and clarification of the discrepancies noted in the AAO's decision related to both the beneficiary's educational documents, as well as his experience. The request for evidence directed the petitioner to submit pay vouchers or other similar objective evidence to demonstrate that the beneficiary had attained the required experience and training.

As noted by the AAO and the director, it is incumbent on 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Further, the purpose of the remand and the director's subsequent request for evidence relating to the beneficiary's academic credentials and relevant training and work experience was to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In this matter, the petitioner failed to respond to the director's request for evidence. It failed to resolve the discrepancies noted in the AAO's August 18, 2008 decision and failed to demonstrate that the beneficiary possesses the minimum educational credentials, training, and work experience as specified by the ETA 750. The petitioner was additionally afforded 30 days to submit evidence to the AAO in connection with the director's certification. The petitioner did not submit any evidence in response to the notice of certification.

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 director's decision to deny the petition is affirmed. The appeal is dismissed.