

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

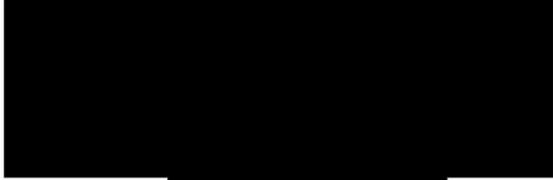
U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY

B6



FILE:



Office: NEBRASKA SERVICE CENTER

Date:

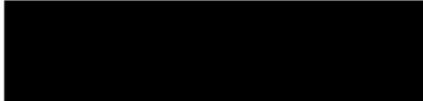
OCT 06 2009

LIN 07 028 52966

IN RE:

Petitioner:

Beneficiary:



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)

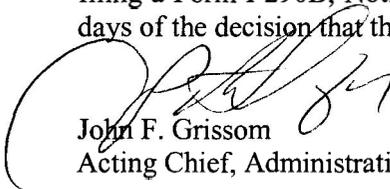
ON BEHALF OF PETITIONER:



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 employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a manufacturing firm. It seeks to employ the beneficiary permanently in the United States as an industrial engineer pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). The petition is accompanied by a Form ETA 9089, Application for Permanent Employment Certification, which was certified by the Department of Labor.

The director determined that the petitioner failed to establish that the beneficiary met the requirements specified on the Form ETA 9089 and denied the petition on February 28, 2008.

On appeal, counsel asserts that the beneficiary's combination of education and experience qualifies him as an advanced degree professional and that the petition should be approved.

Counsel advises on Part 2 of the Form 1290B, Notice of Appeal or Motion, filed on April 1, 2008, that a brief and/or additional evidence will be submitted to the AAO within 30 days. As of this date, more than sixteen months later, this office has received nothing further. This decision will be rendered on the record as it currently stands.

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).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, at 1002 n. 9.

In this case, the I-140, Immigrant Petition for Alien Worker is not approvable because the Form ETA 9089 does not support the visa classification of professional as selected by the petitioner on paragraph "e" of the I-140. Additionally, notwithstanding this selection, the record fails to demonstrate that the beneficiary is qualified as an advanced degree professional as defined by the terms of the labor certification.

The record shows that the appeal is properly filed and timely. 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.

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date, the day the ETA Form 9089 was accepted

for processing by any office within DOL's employment 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 ETA Form 9089 was accepted for processing on December 6, 2005.

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 who are members of the professions.

Section 203(b)(2)<sup>1</sup> of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "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." *Id.*

Here, the Form I-140 was filed on November 7, 2006. On Part 2, paragraph e of the Form I-140, the petitioner indicated that it was filing the petition for a "professional (at a minimum, possessing a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree) or a skilled worker (requiring at least two years of specialized training or experience)."

The regulation at 8 C.F.R. § 204.5 (l)(3)(ii)(C) requires that a petition for a professional must include evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation. DOL instructions for completing the ETA Form 9089 also specify that in Part H of the application, the petitioner must designate the minimum level of education required for an applicant to adequately perform the duties of the job being performed.<sup>2</sup> In this case, the job offer portion of the Form ETA 9089 at Part H, 4, indicates that the minimum level of education required for the position is a master's degree. As this exceeds the minimum level of education of a baccalaureate degree required for a visa classification of a professional under section 203(b)(3)(A)(ii) of the Act, which the petitioner designated on the I-140, the petition may not be approved on this basis because the labor certification does not support the visa classification sought.

Part H of the ETA Form 9089, also sets forth additional requirements for the job. Part H, 4-B, specifies that the applicant's major field of study must be in industrial engineering. Part H, 6, provides that the applicant must have 24 months of experience in the job offered.<sup>3</sup> The petitioner

---

<sup>1</sup>Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

<sup>2</sup><http://www.foreignlaborcert.doleta.gov/pdf/9089inst.pdf>.

<sup>3</sup> It is noted on the copy of the state prevailing wage request contained in the record that the

indicates in Part H, 7, and 7-A that an alternate field of study in program management and strategic planning is acceptable. In Part H, 8, the petitioner answers “no” to the question of whether an alternate combination of education and experience is acceptable. The petitioner confirms in Part H-10, that experience in an alternate occupation is not acceptable.

It is noted that on Part J, 11, of the ETA Form 9089, the beneficiary claims to have obtained a master’s degree in industrial engineering in 2000 from the Universidad Anahuac, Huixquilucan, Mexico.

In support of the beneficiary’s academic credentials, the petitioner submitted:

- 1) An undated document from Anahuac University, Mexico, stating that it recognized the beneficiary as completing studies “corresponding to the Master’s program in Industrial Engineering.”
- 2) A letter from \_\_\_\_\_ dated March 24, 2000, congratulating the beneficiary for completing his studies as an Industrial engineer.
- 3) A document from The Anahuac University to the beneficiary dated June 1998 stating that he is a Member of the Generation of 1994-1998 in the career of Industrial Engineering.
- 4) A certificate of recognition issued to the beneficiary from The Anahuac University indicating that he participated in a seminar called ‘Anahuac Leaders’ on August 15, 1997.
- 5) A certificate from Cranfield University, dated January 27, 2000, indicating the beneficiary completed a course called Industry Knowledge for Industry Solutions.

The information above is based on the English translations of Spanish language documents submitted to the record. It is noted that additional documents appearing to be grade transcripts are also contained in the record, but are in Spanish, almost illegible, and are not accompanied by English translations as required by 8 C.F.R. § 103.2(b)(3), which provides:

*Translations.* Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator’s certification that he or she is competent to translate from the foreign language into English.

A copy of an evaluation report was additionally provided by the petitioner in response to the director’s request for additional evidence. It is signed by \_\_\_\_\_ of the Foundation for International Services, Inc. and is dated November 1, 2007. She determined that the beneficiary has the equivalent of a bachelor’s degree in industrial engineering and one year of graduate-level

---

petitioner describes an alternative to two years in the job offered as 8 years of experience in a related occupation of program management and strategic planning. This alternative work experience option does not appear on the ETA Form 9089. The eight years of experience in program management and strategic planning also appears as the only experiential requirement on a copy of a notice of job availability posting contained in the record. The petitioner did not list Master’s degree and two years of experience on the posting as required by the labor certification.

credit in industrial engineering from a regionally accredited college or university in the United States. It is noted that her evaluation appeared to be based on documents not submitted to the record of proceedings including a copy of a diploma, dated May 22, 2000, indicating that the beneficiary had received a "Licentiate in Industrial Engineering." Accordingly, the director determined that the beneficiary did not have the education that the labor certification required.

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 Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany 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 of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). As noted by the director, the ETA Form 9089 does not specify that the requirements can be met through any alternate level of education or alternate combination of education and experience in lieu of a master's degree in industrial engineering or in the field of study of program management and strategic planning.

Counsel asserts on appeal that his brief will demonstrate that the beneficiary's academic and experiential credentials have been evaluated as the equivalent of a Bachelor's and Master's degree in industrial engineering. As noted above, no brief and/or additional evidence has been received at this office since the appeal was filed.

The AAO concurs with the director in finding that the petitioner has not demonstrated that the beneficiary holds a master's degree in industrial engineering or the alternate field of study of program management and strategic planning. The petitioner has additionally failed to submit the required official academic record of such a credential as required by 8 C.F.R. § 204.5(k)(3)(i) or the requisite English translations as required by 8 C.F.R. § 103.2(b)(3).<sup>4</sup> Finally, the evidence submitted reflects that the minimum requirements of the Form ETA 9089 does not support the visa classification sought. Therefore, the appeal must be dismissed.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 appeal is dismissed.

---

<sup>4</sup> The petitioner additionally failed to submit evidence that the beneficiary had the special skills required in H. 14, "proficient in APOP, FMEA, SPC and Lean Manufacturing."