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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

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Be

FILE:



Office: TEXAS SERVICE CENTER

Date: OCT 05 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner claims to be an information technology consulting business. It seeks to permanently employ the beneficiary in the United States as a programmer analyst. The petitioner requests classification of the beneficiary as a skilled worker or professional pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).¹ The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is October 24, 2003, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

The director denied the petition on September 19, 2008. The decision states that the petitioner failed to establish that the beneficiary meets the minimum requirements of the offered position and for classification as a member of the professions pursuant to section 203(b)(3)(A) of the Act. The petitioner appealed the decision to the AAO on October 15, 2008.

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. 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 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 appeal.²

The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of 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 (Acting Reg. Comm. 1977); *see also Matter of Katighak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, U.S. Citizenship and Immigration Services (USCIS) must look to the job offer portion of the labor

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of 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.

² 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).

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, 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 of Massachusetts, Inc. v. Coorney*, 661 F.2d 1 (1st Cir. 1981).

The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer exactly as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve "reading and applying the plain language of the [labor certification]." *Id.* at 834.

Even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* at *7.

The minimum education, training, experience and skills required to perform the duties of the offered position is set forth at Part A of the labor certification. In the instant case, the labor certification states that the position has the following minimum requirements:

EDUCATION

College Degree Required: "Bachelor's Degree or equiv edu"

Major Field of Study: "Computer Science, Science, Engineering, or Info Systems"

TRAINING: None

EXPERIENCE: Two years in the job offered or in software design and development or programming.

OTHER SPECIAL REQUIREMENTS: None

The labor certification does not state that the petitioner would accept a combination of degrees that are individually less than a four-year U.S. bachelor's degree or its foreign equivalent.³

³ According to DOL field guidance, when a labor certification requires a bachelor's degree and the beneficiary has a foreign four-year bachelor's degree, the employer need not include the term "or equivalent" on the labor certification or in its recruitment efforts. *See* Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994)(Hall Memorandum). Further, if the labor certification states that the offered position requires a U.S. bachelor's degree "or equivalent." and "equivalent" is not defined in the labor certification or in the employer's recruitment efforts, then the term is interpreted to mean that the employer is willing to accept an equivalent foreign degree. *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS

On appeal, counsel argues that the terms of the labor certification permit an individual to qualify for the offered position with a combination of education that is equivalent to a U.S. bachelor's degree.

In support of this claim, counsel submitted evidence of the recruitment conducted during the labor certification process for the offered position. However, the submitted evidence does not appear to relate to the offered position. The print advertisements are for the positions of "Business Dev Analyst" and "Software Engineer/Prog. Analyst," and contain substantially different education and experience requirements than those listed on the labor certification. The online advertisement placed at www.vault.com for a "Programmer Analyst" position also states substantially different educational and experience requirements than those listed on the labor certification.

Accordingly, on July 28, 2010, the AAO issued a Request for Evidence (RFE), requesting that the petitioner provide the signed, detailed written report of its good faith efforts to recruit U.S. workers prior to filing the labor certification as required by the regulation at 20 C.F.R. § 656.21(b)(1) in effect at the time the labor certification was filed with the DOL, as well as other documentation generated during the labor certification process.⁴

In addition, the petitioner also claims that the beneficiary possesses a combination of education equivalent to a U.S. bachelor's degree. The record contains the following evidence of the beneficiary's education:

- Diploma from the Electronics Corporation of India, Limited (hereinafter "ECIL") for a "Certificate Course in MS-Office, C, Visual Basic, Oracle and ASP," dated July 23, 2002.
- Diploma and memorandum of marks from ECIL for a "PG Diploma in Computer Applications." An undated letter on ECIL letterhead states that the beneficiary attended ECIL from August 1994 until October 1997. The diploma is dated November 1, 2002. The memorandum of marks indicates that the beneficiary completed 13 computer-related courses.
- Diploma and transcripts for a three-year bachelor of science degree in Chemistry, Botany and Zoology from Nagarjuna University, India. The diploma was issued on October 25, 1996. The transcripts indicate that the beneficiary's coursework was completed in 1979.

(October 27, 1992). If the offered position requires a bachelor's degree, but the employer will accept work experience or a combination of lesser degrees in lieu of a bachelor's degree, then the employer must specifically state on the labor certification and throughout all phases of the recruitment process exactly what will be considered an acceptable equivalent alternative to the bachelor's degree. *See* Hall Memorandum.

⁴ The current regulatory scheme governing the labor certification process went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM, for Program Electronic Review Management. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The instant labor certification was filed prior to March 28, 2005 and is therefore governed by the prior regulations.

The record contains an academic credentials evaluation prepared by [REDACTED] of International Education Consulting. [REDACTED] claims to be a member of Association of Collegiate Registrars and Admissions Officers (AACRAO), and of the NAFSA Association of International Educators. [REDACTED] states that the beneficiary's three-year bachelor of commerce degree is equivalent to three years of study towards a four-year bachelor of science degree from an accredited U.S. college or university. [REDACTED] also states that the beneficiary's diploma from ECIL is "indicative of approximately one year of full-time studies in similar subjects at a computer training institute or college in the U.S." The evaluation concludes that the beneficiary has "substantially satisfied the curriculum requirements for completion of a Bachelor of Science with minor concentration in Information Technology from an accredited institution of higher education in the U.S."

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

The evaluation of [REDACTED] uses qualifying language such as "indicative of," "approximately one year of," "in similar subjects," "at a computer training institute," and "substantially satisfied." The evaluation does not evaluate the individual courses completed by the beneficiary. The evaluation does not mention whether ECIL is an accredited or registered educational institution, and does not provide credit equivalents for each course completed by the beneficiary. The evaluation does not provide any explanation or analysis for its conclusions.

Given these issues, and since [REDACTED] claims to rely on an AACRAO publication, the AAO has reviewed the Electronic Database for Global Education (EDGE), created by AACRAO. AACRAO, according to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services."

EDGE provides a great deal of information about the educational system in India, and while it confirms that a bachelor of science degree is awarded upon completion of two or three years of tertiary study and represents attainment of a level of education comparable to two to three years of

university study in the United States, it does not suggest that an Indian bachelor's of science degree is equivalent to a U.S. bachelor's degree.⁵

EDGE also states that a Postgraduate Diploma following a three-year bachelor's degree "represents attainment of a level of education comparable to a bachelor's degree in the United States."⁶ However, the "Advice to Author Notes" for Postgraduate Diplomas states:

Postgraduate Diplomas should be issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE). Some students complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor's degree.

The AAO also reviewed AACRAO's Project for International Education Research (PIER) publications: the *P.I.E.R. World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* (1997). We note that the 1997 publication incorporates the first degree and education degree placements set forth in the 1986 publication. *Id.* at 43. As with EDGE, these publications represent conclusions vetted by a team of experts rather than the opinion of an individual. One of the P.I.E.R. publications also reveals that a year-for-year analysis is an accurate way to evaluate Indian post-secondary education. *A P.I.E.R. Workshop Report on South Asia* at 180 explicitly states that "transfer credits should be considered on a year-by-year basis starting with post-Grade 12 year." The chart that follows states that 12 years of primary and secondary education followed by a three-year baccalaureate "may be considered for undergraduate admission with possible advanced standing up to three years (0-90 semester credits) to be determined through a course to course analysis." As is stated above, the submitted evaluation does not contain a course-by-course analysis of the beneficiary's bachelor of science degree or ECIL diploma.

For the reasons set forth above, the RFE informed the petitioner that the submitted evaluation is not sufficient to establish that the beneficiary possesses education that is the equivalent of a U.S. bachelor's degree in "Computer Science, Science, Engineering, or Info Systems." 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).

⁵ <http://aacraoedge.aacrao.org/credentialsAdvice.php?countryId=99&credentialID=128> (accessed September 22, 2010).

⁶ <http://aacraoedge.aacrao.org/credentialsAdvice.php?countryId=99&credentialID=131> (accessed September 22, 2010).

In addition, the petitioner must also establish that its job offer to the beneficiary is a realistic one. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). The regulation 8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Therefore, the petitioner must establish that it has possessed the continuing ability to pay the proffered wage beginning on the priority date. Accordingly, the RFE also requests that the petitioner provide for following evidence of the petitioner's ability to pay the proffered wage:

- Tax returns, annual reports or audited financial statements for 2007, 2008 and 2009.
- Any Forms W-2 issued to the beneficiary for 2007, 2008 and 2009.
- Evidence that the petitioner is authorized to do business in Virginia.
- Evidence that the petitioner is currently in active corporate status.
- The petitioner's most recent Form 941, Employer's Quarterly Federal Tax Return.

Further, according to USCIS records, the petitioner has filed petitions on behalf of other beneficiaries.⁷ Where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must establish the ability to pay the proffered wage to each beneficiary as of the priority date of each petition and continuing until each beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). Accordingly, the RFE instructed the petitioner to submit the following evidence for any petitions the company has filed on behalf of any other beneficiaries:

- Exact dates employed.
- Whether the petition is inactive (meaning that the petition has been withdrawn, the petition has been denied but is not on appeal, or the beneficiary has obtained lawful permanent residence).
- The priority date of each petition.
- The proffered wage listed on the labor certification submitted with each petition.
- The salary paid to each beneficiary from 2003 to the present.
- Forms W-2, Wage and Tax Statement, issued to each beneficiary from 2003 to the present.

⁷ The Receipt Numbers of the petitioner's other petitions are: [REDACTED]

The RFE afforded the petitioner 45 days to submit a response. *See* 8 C.F.R. § 103.2(b)(8)(iv). The RFE states that if the petitioner does not respond to the RFE, the AAO will dismiss the appeal without further discussion. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

To date the AAO has not received a response to the RFE. Thus, the petitioner has not established that the beneficiary possesses the qualifications required to perform the proffered position; and the petitioner has not established its ability to pay the proffered wage. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

An application or 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. *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); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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.