

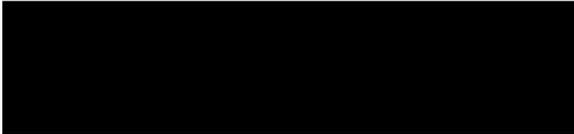
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**



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DATE: DEC 01 2011

OFFICE: TEXAS SERVICE CENTER

FILE: 

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.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was initially approved by the Director, Texas Service Center (Director). The approval was subsequently revoked by the Director.<sup>1</sup> That decision is now on appeal before the Administrative Appeals Office (AAO). The appeal will be sustained, and the approval of the petition reinstated.

The petitioner is a software development and consultancy company. It seeks to employ the beneficiary permanently in the United States as a market research analyst and to classify him as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).

Section 203(b)(3)(A)(i) of the Act 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.

The petitioner must demonstrate that on the priority date – which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL – the beneficiary had the qualifications stated on the application. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In this case, the ETA Form 9089 – which was accepted for processing by the DOL on December 13, 2006 (and certified by the DOL on December 14, 2006) – specified that a high school level education and two years of “experience in the job offered” was required.

The petitioner filed its Form I-140, Immigrant Petition for Alien Worker, accompanied by the approved ETA Form 9089 (labor certification), with the Texas Service Center on July 17, 2007. The petition was approved on January 29, 2009.<sup>2</sup>

On April 9, 2009, however, the Director issued a Notice of Intent to Revoke (NOIR). In his notice the Director stated that a letter in the record from [REDACTED] – an Indian company with whom the beneficiary claimed to have gotten his two years of experience as a market research analyst – “may not be legitimate.” The petitioner was advised to submit additional documentation of

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<sup>1</sup> Section 205 of the Immigration and Nationality Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security] may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *See Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

<sup>2</sup> The Director initially denied the petition on December 22, 2008, on the ground that the petitioner failed to establish its ability to pay the wages of the beneficiary and at least eight other employees working pursuant to approved or pending I-140 petitions. Upon further review of the evidence, however, the Director granted a motion to reopen/reconsider and approved the petition.

the beneficiary's qualifying work experience for the proffered position.<sup>3</sup> The petitioner responded by stating that the beneficiary worked for [REDACTED] located in Chennai, India – from June 2, 2002 to August 13, 2004, and by submitting (1) a copy of a B1/B2 visa issued to the beneficiary on December 8, 2003, valid for three months, allowing him to come to the United States on business for [REDACTED], (2) an affidavit from the beneficiary, dated May 4, 2009, attesting to his employment by [REDACTED] from June 2002 to August 2004, and (3) an affidavit from the beneficiary's supervisor at [REDACTED], [REDACTED] dated May 1, 2009, attesting to the beneficiary's employment as a market research analyst from June 2002 to August 2004. [REDACTED] (who stated that he worked as a marketing manager for [REDACTED] [REDACTED] from March 2000 to December 2005) listed the beneficiary's duties as follows:

- Planned and evaluated purchasing activities.
- Maintained cost, quality, and shipping.
- Researched and analyzed information technology trends to determine potential increase in computer consulting and offshore projects.
- Established research methodology and design format for data gathering. Prepared questionnaires, conducted surveys on pricing / availability of projects using MS Project.
- Inspected equipment / machinery in national and international markets.
- Provided strategic analysis, market sizing and competitive market scenario analysis using MS Access database solutions.
- Maintained relationship with clients by using CRM software.
- Gathered data on competitors and analyzed their prices, purchases, sales, and methods of marketing and distribution.

On May 13, 2009, the Director issued his decision revoking the approval of the immigrant visa petition. The Director cited the labor certification's requirement of two years experience as a market research analyst, and referred to evidence in the record which, in his view, undermined the beneficiary's claim to have met that requirement. U.S. Citizenship and Immigration Services (USCIS) records, the Director pointed out, showed that the beneficiary entered the United States with his B1/B2 visa on January 11, 2004, with a notation on the visa that his business in the country – “inspecting equipment in Dallas” – would take about a week. The beneficiary subsequently got two extensions to his B visa, and then changed status to an H-1B nonimmigrant worker.<sup>4</sup> The

<sup>3</sup> The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for “good and sufficient cause” when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof.

<sup>4</sup> The record includes notices from the Vermont Service Center showing that the beneficiary was issued his first H-1B visa on September 15, 2004, valid from October 1, 2004 to September 30, 2007, for employment at [REDACTED], and his second H-1B visa on June 21, 2006, valid from June 19, 2006 to April 1, 2009, for employment at [REDACTED]. It was with the second H-1B visa that the beneficiary's employment with the petitioner began in June 2006.

Director concluded that the beneficiary never left the United States after his arrival in January 2004, that his work experience with [REDACTED] ended about a week after his arrival, and as a result the beneficiary did not complete two full years of work experience with [REDACTED]. The Director revoked the approved petition, therefore, on the ground that the petitioner failed to establish that the beneficiary fulfilled the requirement in the labor certification of two years experience as a market research analyst.

The petitioner appealed on June 1, 2009. The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. 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.<sup>5</sup>

The petitioner reiterates its claim that the beneficiary worked for [REDACTED] from June 2002 until August 2004, and submits the following additional documentation:

- Another affidavit from the beneficiary's supervisor at [REDACTED] [REDACTED] dated May 28, 2009, stating that the beneficiary was employed by the company from June 1, 2002 to August 13, 2004, that he was sent to the United States in January 2004 on a B-1 visa for what was originally planned as a one-week business trip, that the company decided to extend the beneficiary's stay in the United States to scout out U.S. products, that the company sent the beneficiary a letter on January 26, 2004 officially advising him that he was to be stationed in the United States for six additional months, that the company's attorney in the United States would handle the visa extension, that the beneficiary's visa was extended to August 2004, and that the beneficiary continued to work for [REDACTED] until his resignation on August 13, 2004, at which time he handed over his entire work product including business reports and client information.
- A copy of the "Letter of Deputation" on the letterhead of [REDACTED] dated January 26, 2004 and addressed to the applicant in Flushing, New York, advising that he would be "deputed" to New York for an additional six months after his B-1 visa extension and outlining the terms of his deputation. The letter was signed by [REDACTED] in his capacity as Marketing Manager, and countersigned by the beneficiary.
- Copies of two approval notices from the Vermont Service Center whereby the beneficiary's visa was extended for six months with the issuance of a B-1 (business)

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<sup>5</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 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 submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

visa valid from February 11, to August 10, 2004, and then another five months with a B-2 (visitor) visa valid from August 10, 2004 to January 9, 2005.

- A photocopy of the beneficiary's plane ticket to the United States in January 2004, showing flights from Chennai through Kuala Lumpur, Malaysia, to Newark, New Jersey on January 10-11, a flight from Newark to Dallas-Fort Worth on January 13 and a return flight to Newark on January 20, and a scheduled flight on January 22 back to Kuala Lumpur en route to Chennai (evidently not taken).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 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. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Based on the above documentation and all the evidence of record, the AAO determines that the petitioner has established, by a preponderance of the evidence,<sup>6</sup> that the beneficiary continued to work for [REDACTED] as a market research analyst during his first seven months in the United States – from January 11 to August 13, 2004 – and therefore had more than two years of “experience in the job

<sup>6</sup> In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *See Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988).

offered” on the priority date of the labor certification (December 13, 2006). Thus, the petitioner has overcome the ground for revocation in the Director’s decision of May 13, 2009. That decision will therefore be withdrawn.

The appeal will be sustained, and the petition approved.

The burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

**ORDER:** The Director’s decision of May 13, 2009, revoking his prior approval of the petition, is withdrawn. The appeal is sustained. The approval of the petition is reinstated.