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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**

B6



FEB 11 2011

FILE:



Office: NEBRASKA SERVICE CENTER

Date:

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, Nebraska 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 a software consultancy and development business. It seeks to permanently employ the beneficiary in the United States as a systems 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 March 25, 2005, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner filed the instant petition on April 16, 2007.

The director denied the petition on July 25, 2009. The decision states that the petitioner failed to establish that the beneficiary meets the minimum educational requirements of the offered position as set forth on the labor certification.

The petitioner appealed the decision to the AAO on August 19, 2009. 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 Katigbak*, 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 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 offered position requires a "Bachelor's Degree or equiv." in engineering, computer science, mathematics or business. The labor certification also requires one year of experience developing database applications using Java, Super Base and Centura SQL Windows.

The record contains the following educational credentials relating to the beneficiary:

- Diploma and transcripts for a two-year Master of Science degree in Zoology (Fishery Science) from Nagarjuna University, India.
- Diploma and transcripts for a three-year Bachelor of Science degree in Botany, Zoology and Chemistry from Nagarjuna University, India.
- Diploma and transcripts for a one-year Postgraduate Diploma in Computer Applications from Pondicherry University Directorate of Distance Education.
- Diploma and transcripts for a two-year professional diploma in Network-Centered Computing from the National Institute of Information Technology (NIIT), India.
- Certifications in C computer language, software testing, Javascript, Java Server Pages, Java 2, and RDBMS Concepts from Brainbench.

The record also contains an evaluation of the beneficiary's educational credentials. The evaluation, prepared by [REDACTED] on January 5, 2009, states that Nagarjuna University is a recognized (accredited) public institution of higher education in India. The evaluation also states that the beneficiary's three-year bachelor's degree is equivalent to three years of undergraduate study in Botany, Zoology and Chemistry at a regionally accredited institution of higher education in the United States. The evaluation states that the beneficiary's two-year master's degree is equivalent to a Bachelor of Science in Zoology and a Master of Science in Zoology with a specialization in Fishery Biology from a regionally accredited institution of higher education in the United States.

The evaluation also states that Pondicherry University is a recognized (accredited) public institution of higher education in India. The evaluation states that the beneficiary's one year of distance education resulting in a postgraduate diploma in computer applications is equivalent to a "Bachelor of Science in Computer Applications through distance education earned at regionally accredited institution of higher education in the United States." The evaluation's course-by-course analysis of the beneficiary's educational credentials indicate that he passed 11 computer-related courses for the equivalent of 33 credits at Pondicherry University.³

³ The evaluation also states that NIIT is not a recognized (accredited) degree-granting institution in

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 AAO reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).⁴ EDGE provides another source to consider in the evaluation of foreign credential equivalencies. AACRAO, according to its website at 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." According to its registration page, EDGE is "a web-based resource for the evaluation of foreign educational credentials."⁵

Authors for EDGE are not merely expressing their personal opinions. Rather, authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.⁶ If placement recommendations are included the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire council. *Id.* at 11-12.

EDGE provides a great deal of information about the educational system in India. According to EDGE, a three-year Bachelor of Science degree from India "represents attainment of a level of education comparable to three years of university study in the United States."⁷ EDGE also states

India, and that the beneficiary's two-year professional diploma from NIIT is equivalent to two years of study in computer science from a post-secondary vocational institution in the United States. On appeal, counsel does not argue that the educational equivalency is based on the beneficiary's studies at this or any other non-recognized educational institution.

⁴ In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the District Court in Minnesota determined that the AAO provided a rational explanation for its reliance on information provided by the AACRAO to support its decision.

⁵ <http://aacraoedge.aacrao.org/register/index/php>.

⁶ *See An Author's Guide to Creating AACRAO International Publications*, 5-6 (First ed. 2005), at www.aacrao.org/publications/guide_to_creating_international_publications.pdf.

⁷ <http://aacraoedge.aacrao.org/credentialsAdvice.php?countryId=99&credentialID=128> (last accessed February 10, 2011).

that a two-year Master of Science degree from India "represents attainment of a level of education comparable to a bachelor's degree in the United States."⁸

EDGE also discusses Postgraduate Diplomas, for which the entrance requirement is completion of a three-year baccalaureate. EDGE provides 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."⁹ However, the "Advice to Author Notes" provides:

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.

Id. Pondicherry University is one of India's Central Universities recognized by the country's University Grants Commission. See <http://www.ugc.ac.in/inside/centraluni.html>. The university's website contains correspondence from Indira Gandhi National Open University Distance Education Council stating that Pondicherry University's distance education programs are recognized by the council. See <http://www.pondiuni.edu.in/dde/postfacto080908.pdf>. The school's distance education program is recognized as a distance education institute by India's Department of Higher Education. See http://www.education.nic.in/dist_inst.asp#Distance.

However, according to the school's website at <http://www.pondiuni.edu.in/dde/courses.html>, its Directorate of Distance Education does not currently offer a Postgraduate Diploma in Computer Applications.

Therefore, on October 27, 2010, the AAO issued a Request for Evidence (RFE). The RFE instructed the petitioner to submit additional evidence to establish that the beneficiary meets the educational requirements of the offered position. Specifically, the RFE instructed the petitioner to provide a letter from Pondicherry University confirming that, in 1999 and 2000, the school's Directorate of Distance Education offered a Postgraduate Diploma in Computer Applications, and that this program required completion of at least a three-year bachelor's degree for admission. In addition, the RFE requested evidence establishing that a degree in computer applications from India is equivalent to a degree in computer science.

Beyond the decision of the director, the RFE noted that the evidence in the record did not establish that the beneficiary possessed the required experience for the offered position. The labor certification submitted with the petition states that the offered position requires one year of

⁸ <http://aacraoedge.aacrao.org/credentialsAdvice.php?countryId=99&credentialID=140> (last accessed February 10, 2011).

⁹ <http://aacraoedge.aacrao.org/credentialsAdvice.php?countryId=99&credentialID=131> (last accessed February 10, 2011).

experience using Java, Super Base and Centura SQL Windows. The record contains an employment experience letter, authored by [REDACTED]

[REDACTED] The letter does not describe in detail the duties performed by the beneficiary. The letter does not state whether the beneficiary was employed on a full time basis. The letter only states that the beneficiary "is equipped with high level of technical skills in" Java, Super Base and Centura SQL Windows. However, the letter does not state that the beneficiary possessed at least one year of full-time employment experience with each item. Evidence relating to qualifying experience shall be in the form of letters from current or former employers and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien. 8 C.F.R. § 204.5(g). Therefore, the employment experience letter is not sufficient to establish that the beneficiary possesses one year of experience developing database applications using Java, Super Base and Centura SQL Windows. Accordingly, the RFE instructed the petitioner to submit a letter that meets the requirements of 8 C.F.R. § 204.5(g) and establishes that the beneficiary possesses the experience required by the terms of the labor certification.

Also beyond the decision of the director, the petitioner did not establish its ability to pay the proffered wage. The petitioner must 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.

The petitioner must establish that it has possessed the continuing ability to pay the proffered wage beginning on the March 25, 2005 priority date.

The proffered wage stated on the labor certification is \$51,106.00 per year. On the petition, the petitioner claimed to have been established in 1995, to have a gross annual income of \$4.5 million, and to employ 50 workers. According to the tax return in the record, the petitioner is structured as an S corporation with a fiscal year based on a calendar year.

The instant petition was filed on April 16, 2007. By that date, the petitioner's 2006 federal tax return would have been due. The regulation 8 C.F.R. § 204.5(g)(2) states that the petitioner must demonstrate its ability to pay the proffered wage "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence," and that the evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." (Emphasis added.). While additional evidence may be submitted to establish the

petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Accordingly, the RFE also requested that the petitioner provide the following additional evidence of the company's ability to pay the proffered wage:

- Tax returns, annual reports or audited financial statements for 2006, 2007, 2008 and 2009.
- Any Forms W-2, Wage and Tax Statement, issued to the beneficiary for 2008 and 2009.
- Most recent Form 941, Employer's Quarterly Federal Tax Return.

Further, according to USCIS records, the petitioner has filed over 50 immigrant petitions on behalf of other beneficiaries. Where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must establish that its job offers to each beneficiary are realistic, and therefore, that it has 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.

The record must establish the priority dates and proffered wages for each beneficiary of the other petitions, whether the beneficiaries have withdrawn from the petition process, or whether the petitioner has withdrawn its job offers to the beneficiaries. The record must also establish whether the petitioner has employed the beneficiaries or the wages paid to the beneficiaries, if any. Accordingly, the RFE also instructed the petitioner to provide the following information for each beneficiary:

- Exact dates employed by the petitioner.
- Whether the immigrant 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 the each beneficiary from 2005 to the present.
- Forms W-2, Wage and Tax Statement, issued to each beneficiary from 2005 to the present.

The RFE afforded the petitioner 45 days to submit a response. *See* 8 C.F.R. § 103.2(b)(8)(iv). The RFE stated that if the petitioner did not respond, the AAO would dismiss the appeal without further discussion.

To date the AAO has not received a response to the RFE from the petitioner or counsel of record. 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). Thus, the petitioner failed to establish that the beneficiary possesses the minimum education and experience required to perform the job offered as set forth in the labor certification; and the petitioner failed to establish that it has possessed the

ability to pay the proffered wage from the priority date until the present. 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. at 165.

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 at 145 (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.