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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

[REDACTED]

FILE:

[REDACTED]

Office: NEBRASKA SERVICE CENTER

Date:

FEB 11 2011

IN RE:

Petitioner:

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:

[REDACTED]

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 manufactures and sells tires and other rubber products. It seeks to permanently employ the beneficiary in the United States as an SAP – Basis Administrator. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).<sup>1</sup>

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 November 15, 2004, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

As set forth in the director's denial, the primary issue in this case is whether the beneficiary meets the minimum requirements of the offered position as set forth in the labor certification.<sup>2</sup>

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 at 145. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>3</sup>

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).

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<sup>1</sup> Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

<sup>2</sup> 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> 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).

<sup>3</sup> 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).

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 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 (1<sup>st</sup> 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 position has the following minimum requirements:

EDUCATION

Grade School: 8 years

High School: 4 years

College: 4 years

College Degree Required: (left blank)

Major Field of Study: Computer Science

TRAINING: None

EXPERIENCE: 8 years in the job offered

OTHER SPECIAL REQUIREMENTS: None

Therefore, the labor certification states that the offered position requires four years of college education in the field of computer science and eight years of experience in the offered position. The labor certification does not state that a bachelor's degree is required to perform the position.

On Part B of the labor certification, signed by the beneficiary under penalty of perjury, the beneficiary does not list any schools, colleges or universities attended (including training or vocational training facilities).

The record of proceeding contains a copy of a Letter of Achievement for fulfilling the requirements for the Introduction to Business Administration section of the Correspondence Program in Business Management from The Advanced Management Center of Dalhousie University. The record also contains two SAP training certificates. The beneficiary's resume does not list any postsecondary education other than SAP training.

Regarding his experience, Part B of the labor certification states that the beneficiary was employed as [REDACTED] from 1997 until 2000; and then by the petitioner as a SAP Security Administrator from April 2001 until July 2003, and then by the petitioner as a SAP - Basis Administrator from July 2003 to "Present."

The resume in the record lists additional experience not listed on the labor certification: it states that

the beneficiary was also employed as [REDACTED] from 1987 until 1997; and as [REDACTED] from 1979 until 1986. However, the stated duties for these positions do not involve SAP.

The record contains a letter of [REDACTED]. The letter states that the company employed the beneficiary from January 1987 to July 2000 in the positions of Mainframe Computer Operator, Application Programmer, Production Controller, and SAP Security Administrator. The letter describes the dates of employment and duties of each position. According to the letter, the only position involving the use of SAP was the position of SAP Security Administrator, which the letter states the beneficiary was employed in from March 1998 to July 2000. Specifically, the letter states that in this position the beneficiary:

still performed his Production Control duties, but gradually began to transition to the duties of SAP Security Administrator during the early stages of the project, receiving guidance and knowledge transfer from onsite IBM consultants who were part of the SAP project implementation team, then transferring fulltime to the SAP project early in 1999 in preparation for the project go-live.

The record also contains a letter of [REDACTED]. The letter states that [REDACTED] worked as an IBM consultant [REDACTED]s from July 1997 to January 2001, and was hired to train [REDACTED] employees on the new SAP software. The letter states that [REDACTED] trained the beneficiary on a daily basis in SAP.

According to the two letters, the beneficiary was not trained in SAP and did not perform the duties of the SAP Security Administrator position until sometime in 1999.

Therefore, the evidence in the record does not establish that the beneficiary possessed the required four years of college education in the field of computer science by the November 15, 2004 priority date. The record also does not establish that the beneficiary possessed the required eight years of experience in the offered position by the November 15, 2004 priority date.

On appeal, counsel asserts that the director failed to consider the materials generated during the labor certification process.<sup>4</sup> The record contains copies of documents generated during the labor certification process, including a notice of job opportunity (Notice) and copies of print

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<sup>4</sup> Citing *California Redwood Signs*, 90-INA-348 (June 20, 1991), counsel claims that the DOL Board of Alien Labor Certification Appeals (BALCA) has held that the determination of the actual minimum requirements of an offered position requires an examination of the labor certification and the advertisements and internal postings conducted during the labor certification process. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA cases do not constitute precedent binding on the AAO.

advertisements in *The Tennessean* and *Rubber & Plastics News* for the position of SAP-Basis Administrator. The Notice and ads state that the position requires:

Bachelor's Degree in Computer Science, Engineering or relative discipline plus 8 years of listed Information Technology experience or 10 years of listed Information Technology experience that includes three years minimum experience in AIX and/or S/390 and three years minimum SAP Basis Administration and specific SAP training in SAP Basis Technology, R/3 System Management, R/3 Workload Analysis, Workbench Organize and ABAP/4 Data Dictionary.

It is noted that the requirements for the job offered in the Notice and advertisement is substantially different from the requirements stated on the labor certification.

At this point, it is important to provide an overview of the general process of procuring an employment-based immigrant visa and the respective roles of the DOL and USCIS.

As noted above, the labor certification is certified by the DOL. The DOL's role in this process is defined by section 212(a)(5)(A)(i) of the Act, which states:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the responsibilities assigned to the DOL by the Act or the implementing regulations at 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by Federal Circuit Courts.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).<sup>5</sup> *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14)

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<sup>5</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

\* \* \*

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

*Madany v. Smith*, 696 F.2d at 1012-1013.

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d at 1008. The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own

determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

*Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9<sup>th</sup> Cir. 1984).

Therefore, it is the DOL's responsibility to certify the terms of the labor certification, but it is the responsibility of USCIS (formerly INS) to determine if the petition and the alien beneficiary are eligible for the classification sought.

In carrying out this responsibility, USCIS is obligated 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)(emphasis added). 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. "To require USCIS to go beyond the [labor] certification's plain language [would] undermine the agency's role in independently determining whether the alien meets the specified requirements." *Id.*

The requirements of the offered position as set forth on the labor certification are unequivocal. USCIS cannot change or modify the labor certification. Even if counsel submits evidence demonstrating that the labor certification states something different than what the petitioner intended it to say, the USCIS is bound by the plain language of the labor certification. When the terms of a labor certification are ambiguous, USCIS may consult additional evidence of the petitioner's intent to determining the meaning of that term. However, there is no ambiguity here.

Thus, the petitioner has not established that the beneficiary possesses the experience or education required to perform the proffered position as set forth on the labor certification. 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)).

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.