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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

FILE:



Office: NEBRASKA SERVICE CENTER

Date:

FEB 28 2011

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Beneficiary 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:

SELF REPRESENTED

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 (director), 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 medical staffing business. It seeks to permanently employ the beneficiary in the United States as a "system 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).

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 September 7, 2004, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

The director evaluated the petition under the skilled worker category and issued a denial on April 15, 2008. The decision concludes that the beneficiary does not have a U.S. bachelor's degree or foreign degree equivalent required by the terms of the labor certification application. The petitioner filed a motion to reopen and reconsider the decision on May 8, 2008, and the director affirmed the denial of the petition on June 17, 2008. The petitioner appealed the decision to the AAO on July 11, 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.¹

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) provides:

If the petition is for a skilled worker, the petition must be accompanied by evidence that the beneficiary meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation,

¹ 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).

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.

Federal circuit courts have upheld our authority to inquire as to whether the beneficiary is qualified for the classification sought.

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).

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). *See also Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984).

An issue on appeal in this case is whether the petitioner demonstrated that the beneficiary is qualified to perform the duties of the proffered position as set forth on the labor certification. That is, whether the beneficiary possesses a U.S. bachelor's degree in computer science, information systems, "elec," or mathematics. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977).

The labor certification does not specify that the minimum academic requirements of a bachelor's degree might be met through a combination of lesser degrees or diplomas and/or a quantifiable amount of work experience.

On Part B of the labor certification, the beneficiary represents that he earned a bachelor's degree after completing three years of education at Maninagar Science College, Ahmedabad, India. The beneficiary also claims that, prior to entering the three-year bachelor's degree program, he completed a one-year certificate program in information technology systems at the Industrial Training Institute, Ahmedabad, India. After completing his three-year bachelor's degree, the beneficiary claims that he completed a one-year certificate program in "e.commerce" at Information Technology Solutions, Ahmedabad, India.

The record contains two evaluations of the beneficiary's education. The first evaluation is from [REDACTED] dated November 12, 2001. The author concludes that the beneficiary's three-year bachelor's degree is "transferable" to a regionally accredited university in the United States. The evaluator does not conclude that the three-year degree is equivalent to a U.S. bachelor's degree. The second evaluation is from [REDACTED] of the [REDACTED]. Unlike the first evaluation, [REDACTED] concludes that the beneficiary's three-year degree is equivalent to a U.S. bachelor's degree in mathematics and statistics from an accredited college or university in the United States.

Given these inconsistent conclusions, in determining whether the three-year bachelor's degree from Maninagar Science College is the foreign equivalent of a U.S. bachelor's degree, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of

Collegiate Registrars and Admissions Officer (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.” According to the registration page listed on their website, EDGE is “a web-based resource for the evaluation of foreign educational credentials.”

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 beyond the Higher Secondary Certificate (or equivalent) 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 a three-year degree from India may be deemed a foreign equivalent degree to a U.S. baccalaureate.

EDGE also discusses both Post Secondary Diplomas, for which the entrance requirement is completion of secondary education, and Post Graduate Diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate. EDGE provides that a Post Secondary Diploma is comparable to one year of university study in the United States but does not suggest that, if combined with a three-year degree, may be deemed a foreign equivalent degree to a U.S. baccalaureate. EDGE further asserts 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.” The “Advice to Author Notes,” however, 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.

The record does not suggest that a three- or even a two-year baccalaureate is required for admission to the beneficiary’s one-year certificate program in e.commerce at Information Technology Solutions, Ahmedabad, India. Nowhere does it indicate that this program is accredited by AICTE. Therefore, the AAO issued an Request for Evidence and Notice of Derogatory Information (RFE/NDI) instructing the petitioner to provide such evidence.

The documentation in the record of proceeding created ambiguity concerning the actual minimum requirements of the proffered position. Although the clearly stated requirements of the position on the certified labor certification application do not include alternatives to a U.S. bachelor’s degree, it is the petitioner's contention now during the petition process before USCIS that the actual minimum requirements do include at least what the beneficiary has achieved through education and/or experience.

Because of that ambiguity, the RFE/NDI also requested evidence of the petitioner's intent concerning the actual minimum requirements of the position as that intent was explicitly and specifically expressed to the DOL while that agency oversaw the labor market test and determination of the actual minimum requirements set forth on the certified labor certification application. Such intent may have been illustrated through correspondence with the DOL, amendments to the labor certification application initialed by the DOL and the petitioner, results of recruitment, or other forms of evidence relevant and probative to illustrate the petitioner's intent about the actual minimum requirements of the proffered position. The AAO also instructed the petitioner to provide a copy of all supporting documents summarizing the petitioner's recruitment efforts, as previously presented to the DOL, which might overcome any deficiencies or defects in the record outlined above, for example, advertisements, posted notices, results of recruitment reports, correspondence to the DOL, etc.

In addition, the AAO also noted that the evidence in the record does not establish that the petitioner has the ability to pay the proffered wage to the beneficiary. The regulation at 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 priority date in the instant case is September 7, 2004, and therefore, the petitioner must establish the ability to pay the beneficiary the proffered wage of \$76,000.00 from that date until the beneficiary obtains lawful permanent residence.

The petitioner did not submit tax returns from 2004, 2007, 2008, or 2009 and therefore, the AAO was not able to determine whether the petitioner established its ability to pay the proffered wage from the priority date in 2004 to the present. Accordingly, the RFE/NDI requested that the petitioner submit complete federal tax returns or audited financial statements from 2004, 2007, 2008, and 2009 and any Forms W-2 or 1099 issued to the beneficiary by the petitioner in 2004, 2008, and 2009.

Furthermore, if the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the

predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). In this matter, USCIS electronic records indicate that the petitioner has filed multiple Forms I-140 which have been pending simultaneously. Therefore the AAO also requested that the petitioner submit evidence to demonstrate that it had the ability to pay the proffered wage for all the petitions pending or approved from 2004 to the present. The RFE/NDI also instructed the petitioner to list all Forms I-140 by receipt number that it has filed beginning in 2003 to the present and indicate the priority date of each petition, the proffered wage of each job offer, the status of each petition (pending, approved, denied, or on appeal), the status of each beneficiary of the approved petitions (e.g., adjustment to permanent residence pending, approved, or denied), and evidence of all wages paid to each beneficiary from 2004 to the present.

The RFE/NDI afforded the petitioner 45 days to submit a response. *See* 8 C.F.R. § 103.2(b)(8)(iv). The RFE/NDI 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/NDI from the petitioner. 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). The AAO is unable to substantively adjudicate the appeal without a meaningful response to the line of inquiry set forth in the RFE/NDI. Thus, the petitioner failed to establish that the beneficiary possesses the minimum education 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. 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.