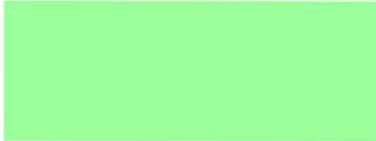




U.S. Citizenship
and Immigration
Services

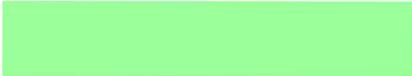
(b)(6)



DATE: **JUN 14 2012** OFFICE: TEXAS SERVICE CENTER

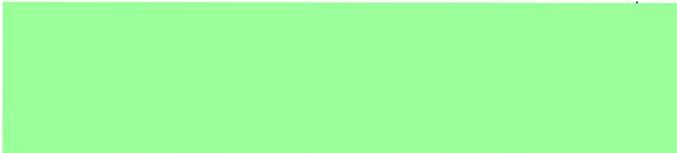
FILE: 

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

(b)(6)

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director for further action consistent with this decision.

The petitioner is a wool processing company. It seeks to employ the beneficiary permanently in the United States as a PLC technician. As required by statute, the petition is accompanied by labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the petition requires at least two years of training or experience and, therefore, that the beneficiary cannot be found qualified for classification as a skilled worker.

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.

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. Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Here, the Form I-140 was filed on October 15, 2008. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional or a skilled worker.

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 On appeal, counsel and the petitioner assert that the petition supports a skilled worker position, as the labor certification requires at least an associate's degree in electrical engineering plus six months of experience in an industrial wool PLC system position.

The regulation at 8 C.F.R. § 204.5(l) provides in pertinent part:

(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation 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 newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the labor certification indicates that an associate's degree in electrical engineering plus six months of experience in an industrial wool PLC system position is required for the proffered position. According to 8 C.F.R. §204.5(l)(2), relevant post-secondary education may be considered as training. Further, an associate's degree generally requires two years of education beyond graduation from secondary school.

The evidence in the record establishes that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker. Therefore, since the petition requires at least two years of training and/or experience, it was properly filed and qualifies for consideration for preference visa classification under section 203(b)(3)(A)(i) of the Act.

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 (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).

Beyond the decision of the director, a 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 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. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The required education, training, experience and skills for the offered position are set forth at Part H of the labor certification. In the instant case, the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Associate's Degree.
- H.4B: Major field of study: EE or equivalent.
- H.5. Training: None required.
- H.6. Experience in the job offered: 6 months.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.

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H.9. Foreign educational equivalent: Accepted.

H.10. Experience in an alternate occupation: 6 months in industrial wool PLC systems.

H.14. Specific skills or other requirements: Will accept any suitable combination of education, experience or training.

Part J of the labor certification states that the beneficiary's highest level of education related to the offered position is an Associate's Degree in Electrical Engineering from the [REDACTED] completed in 1997. However, a copy of this degree is not in the record.

The record of proceeding contains a copy of the following certificates issued to the beneficiary:

- Certificate for attending a course at the [REDACTED] August 19-22, 1997 ;
- Certificate for attending a 3 hour Module on Risk Prevention in Pressure Appliances, sponsored by the [REDACTED] October 27-28, 2003;
- Certificate for attending a 20 hour continuing professional education course at the [REDACTED] Faculty of Engineering, [REDACTED] Uruguay, August 6-30, 1996;
- Diploma for attending a one-day seminar on "New Ideas in Illumination," sponsored by [REDACTED] July 1999;
- Certificate for attending a one-day course on "Electrical Risk," sponsored by the [REDACTED] November 21, 2003; and
- Certificate for attending a 20 hour marketing course sponsored by [REDACTED] January 1999.

The record also contains an evaluation of the beneficiary's credentials prepared by [REDACTED] Ph.D. for [REDACTED] on May 3, 2004. The evaluation concludes that the beneficiary's "Bachelor of Science in Electrical Engineering" from the [REDACTED] in [REDACTED] Uruguay and the [REDACTED] along with several post-graduate courses and training, are equivalent to a Bachelor of Science degree in Electrical Engineering.

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 the letter from Ms. [REDACTED] 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 (Reg. Commr. 1972)); *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

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The record does not include any evidence of the “Bachelor of Science in Electrical Engineering” referred to by the evaluator as being a “combined degree from the [REDACTED] in [REDACTED] Uruguay and from the [REDACTED].”² In the instant case, the record does not contain sufficient evidence establishing that the beneficiary possessed the required education as of the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

Beyond the decision of the director, the petitioner has also failed to establish its continuing ability to pay the proffered wage as of the priority date. See 8 C.F.R. § 204.5(g)(2).

According to USCIS records, the petitioner has filed 3 (three) additional I-140 petitions, and twelve (12) I-129 H-1B petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg’l Comm’r 1977).

The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

In view of the foregoing, the director’s decision will be withdrawn. The petition is remanded to the director. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director’s decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.

² The AAO notes that the beneficiary’s claimed education on section J of the labor certification states that he received an Associate’s degree in “EE” from [REDACTED]. This contradicts the education referred to by the evaluator. 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).