

(b)(6)

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

DATE **OCT 10 2012** OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an IT development and consulting company. It seeks to employ the beneficiary permanently in the United States as a software engineer as a skilled worker or professional pursuant to Section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹ As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the U.S. Department of Labor (DOL).

The director's decision denying the petition concluded that the petitioner failed to submit the required initial evidence to demonstrate that the beneficiary satisfied the minimal education requirements set forth on the labor certification.

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 record shows that the appeal is properly filed 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 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'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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).

¹ 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.

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).

In the instant case, the labor certification states that the offered position requires a bachelor's degree in information technology, engineering, computer science, computer information systems or a related field. The position also requires 24 months of experience in the offered position or as an IT professional.

Upon review of the entire record, including evidence submitted on appeal, the AAO concludes that the petitioner has established that the beneficiary's Postgraduate Diploma in computer applications from [REDACTED] following a three-year Bachelor of Commerce from [REDACTED] is the foreign equivalent of a U.S. bachelor's degree in computer information systems. In addition, the petitioner has established that it is more likely than not that it possessed the continuing ability to pay the proffered wage from the priority date. *See* 8 C.F.R. § 204.5(g)(2); *see also*, *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

However, the petitioner failed to establish that the beneficiary possessed 24 months of experience in the offered position or as an IT professional. The ETA Form 9089 states that the beneficiary qualifies for the offered position based on his employment as a programmer analyst for [REDACTED] from February 16, 2007 until July 23, 2007, a period of only five months.

On appeal, the petitioner claims that these dates of employment are incorrect as the result of a typographical error. In support of this claim, the petitioner submitted an undated experience letter from [REDACTED] President of [REDACTED] stating that the beneficiary was employed as a software quality assurance engineer with the company from January 1, 2004 until July 31, 2007. The petitioner also submitted a copy of the Form I-797 approval notice for the change of the beneficiary's status to H-1B with [REDACTED] with validity dates of February 6, 2004 until January 5, 2007; and also for the beneficiary's subsequent three-year extension of H-1B status with [REDACTED]. Therefore, the dates of employment differ between the ETA Form 9089, the Form I-797 and the experience letter. In addition, the title of the beneficiary's former position differs between the ETA Form 9089 and the experience letter.

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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

The AAO issued a request for evidence on June 22, 2012 instructing the petitioner to submit documentation resolving the inconsistencies between the experience letter and the ETA Form 9089. In response, the petitioner supplemented the record with the Forms I-797 described above. However, these approval notices do not establish that the beneficiary was actually employed by [REDACTED] during the approval periods. In addition, as is described above, the Forms I-797 introduce an additional inconsistency regarding the claimed dates of employment.

In summary, the petitioner failed to provide a full explanation for all of the inconsistencies in the record, and failed to submit sufficient independent, objective evidence establishing that the beneficiary was employed by [REDACTED] for 24 months in the offered position or as an IT professional by the priority date.

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.