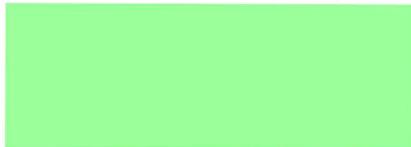


(b)(6)

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



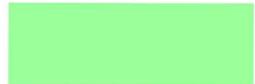
**U.S. Citizenship
and Immigration
Services**



DATE: **APR 12 2013**

OFFICE: TEXAS SERVICE CENTER

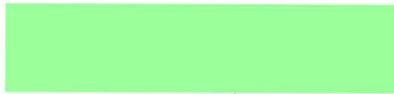
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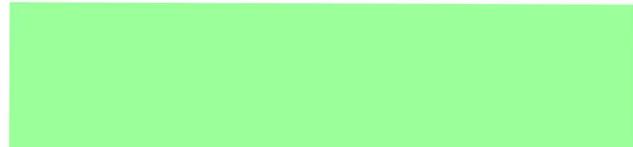
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Professional Pursuant to Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(ii)

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Acting Director, Texas Service Center, denied the employment-based immigrant visa petition and dismissed the petitioner's motion to reopen and reconsider the petition. The petitioner appealed to the Administrative Appeals Office (AAO). The acting director's decision will be withdrawn. The appeal will be remanded to the acting director for further action, consideration, and the entry of a new decision in accordance with below.

The petitioner is an international producer, processor, seller, and marketer of meat products. It seeks to employ the beneficiary permanently in the United States as a senior programmer analyst. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the Department of Labor (DOL), accompanied the petition.

Upon reviewing the petition, the acting director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification. She denied the petition accordingly.

The petitioner timely moved to reopen the denial of the petition. The acting director determined that the motion did not meet applicable requirements and dismissed it. *See* 8 C.F.R. § 103.5(a)(4). The petitioner timely appealed the decision. Because the AAO would have had jurisdiction over an appeal of the petition's denial, the AAO has jurisdiction over this appeal of the acting director's decision. *See* 8 C.F.R. § 103.5(a)(6).

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 its Form I-140, Petition for Alien Worker, the petitioner² checked box "e" in Part 2, indicating that it wished to classify the beneficiary as a professional. Section 203(b)(3)(A)(ii) of the

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).

² The Form I-140, which was signed under penalty of perjury, identifies the signer as the petitioner's "President." The petitioner's letter in support of the petition, however, identifies the signer both as a "Manager of Professional Employment" and a "Director of Professional Employment." *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) ("[d]oubt 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"). The petitioner's website does not list the signer as an executive or officer. *See* [http://\[REDACTED\]](http://[REDACTED]) (accessed January 31, 2013). As it is therefore unclear that [REDACTED] has authorized the filing of this petition, the petitioner must address these inconsistencies in any response to the director. *See Matter of Ho*, 19 I&N Dec. at 591-592 (the petitioner must resolve inconsistencies by independent objective evidence).

Immigration and Nationality Act (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.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the DOL accepted the ETA Form 9089 for processing on January 14, 2010. The immigrant visa petition was filed on July 2, 2010.

The proffered position's requirements are found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. The instructions for the ETA Form 9089, Part H, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

On the ETA Form 9089, the "job offer" position description for a senior programmer analyst states a lengthy list of job duties, a summary of which includes: assisting in the development of detailed system specifications for major system installations; the possible leading and directing of other programmer/analyst staff on issues involving detailed analysis, programming and/or configuration; and analyzing, designing, debugging and implementing software systems.

Part H of the labor certification reflects the following minimum levels of education and experience required for the proffered position:

H.4. Education: Minimum level required: "Bachelor's"

4-B. Major Field of Study: "Computer Science; Info Systems or a Technical area"

7. Is there an alternate field of study that is acceptable?

The petitioner checked "No" to this question.

7-A. If Yes, specify the major field of study:

[blank]

8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked "No" to this question.

8-A. If yes, specify the alternate level of education required:

[blank]

9. Is a foreign educational equivalent acceptable?

The petitioner indicated "Yes," a foreign educational equivalent would be accepted.

6. Experience: "36" months in the position offered

10. Is experience in an alternate occupation acceptable?

The petitioner indicated "No."

14. Specific skills or other requirements:

"REQUIRES A BACHELOR'S DEGREE IN COMPUTER SCIENCE, INFORMATION SYSTEMS OR A TECHNICAL AREA PLUS THREE YEARS OF EXPERIENCE IN INFORMATION SYSTEMS. MUST HAVE EXPERIENCE WITH ACMS, DECFORMS, VMS COBOL, C DMQ, DCL, CMS, CDD, RMS, ORACLE RDB, ALPHA VMS OPERATING SYSTEM."

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. 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 *Madany v. Smith*, 696 F.2d 1008, 1012-13 (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).

As set forth above, the proffered position requires a Bachelor's degree, or a foreign equivalent degree, in computer science, information systems or "a technical area," plus three years of experience in the job offered of senior programmer analyst. The position also requires experience with ACMS, DECFORMS, VMS COBOL, C DMQ, DCL, CMS, CDD, RMS, ORACLE RDB, and Alpha VMS operating system.

On the ETA Form 9089, signed by the beneficiary, the beneficiary represented that his highest level of achieved education related to the offered position was a "Master's" degree in computer science. He listed the institution of study where he obtained that education as [REDACTED] in India, and the year completed as 2000.

In support of the beneficiary's educational qualifications, the petitioner submitted copies of the beneficiary's diplomas from [REDACTED]. They indicate that the beneficiary was awarded a Bachelor of Science degree in April 1998 and a Master of Science degree in November 2000. The petitioner also submitted a credentials evaluation, dated July 2005, from [REDACTED]. The evaluation concludes that the beneficiary's foreign Bachelor of Science degree is equivalent to three years of education towards a Bachelor of Science degree from an accredited college or university in the United States. The evaluation concludes that the beneficiary's foreign Master of Science degree is equivalent to a U.S. Bachelor of Science degree in computer science.

On January 5, 2011, the Director, Texas Service Center, issued a Notice of Intent to Deny (NOID) the petition,³ informing the petitioner that its evidence failed to establish that the beneficiary has a bachelor's degree or a foreign equivalent degree as the labor certification requires. In response to the NOID, the petitioner submitted another credentials evaluation, dated January 13, 2011, from [REDACTED]. Like the first credentials evaluation, the [REDACTED] evaluation concluded that the beneficiary's Bachelor of Science degree equated to three years of university study in the U.S. and that his Master of Science degree equated to a U.S. Bachelor of Science degree in computer science.

The acting director denied the petition on March 8, 2011. She determined that the petitioner had not established that the beneficiary had a foreign degree equal to a U.S. bachelor's degree - as both classification as a professional and the labor certification require - because the beneficiary's foreign degree equivalency was based on a combination of two degrees. She noted that the petitioner stated on the labor certification form that it would not accept an alternate combination of degrees and experience to satisfy the offered position's educational requirements.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) provides:

(C) *Professionals.* If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the

³ The NOID is dated "January 5, 2010." But its referral to the petition's July 2, 2010 filing date and the petitioner's response, which was dated January 18, 2011 and received on January 19, 2011, make clear that the NOID's actual date of issuance was January 5, 2011.

professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

This regulation describes “a foreign equivalent degree” in the singular. Thus, the plain language of the regulation sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree to qualify as a professional for third preference visa category purposes.

In this case, the record demonstrates that the beneficiary holds a Master of Science degree from India in the field of computer science. Both credentials evaluations that the petitioner submitted conclude that the beneficiary’s Indian Master’s degree is the foreign equivalent of a U.S. Bachelor of Science degree in computer science. Moreover, the evaluations are consistent with the opinion of the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is “a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world.” See <http://www.aacrao.org/About-AACRAO.aspx>. Its mission “is to serve and advance higher education by providing leadership in academic and enrollment services.” *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.⁴

EDGE’s credential advice confirms that a (two year) Master of Science degree in computer science from India is “comparable to a Bachelor’s degree in the United States.” A copy of the EDGE report is attached.

The petitioner has therefore demonstrated that the beneficiary has a single degree that equates to a U.S. Bachelor’s degree in one of the required fields, computer science. As the beneficiary has a degree in a required field, which is the foreign equivalent of a U.S. bachelor’s degree, the petitioner can establish that the beneficiary meets the educational requirement of the certified labor certification of a bachelor’s degree in computer science, and the AAO finds this degree to meet the

⁴ In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien’s three-year foreign “baccalaureate” and foreign “Master’s” degree were only comparable to a U.S. bachelor’s degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien’s three-year bachelor’s degree was not a foreign equivalent degree to a U.S. bachelor’s degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

requirements of the regulations related to a professional. The beneficiary's Master's degree is a single degree in a required field of study. Thus, the beneficiary does qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act.

Because the beneficiary satisfies the educational requirements of the labor certification and the regulations for professional classification, the acting director's decision will be withdrawn.

While the petitioner has overcome the acting director's basis for denial, the petition is not approvable. Beyond the decision of the acting director, the AAO finds that the petitioner has failed to establish: (1) its continuing ability to pay the proffered wage; and (2) that the beneficiary has the required employment experience for the offered position.

The petitioner must demonstrate its continuing ability to pay the offered wage from the petition's priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2).

Evidence of ability to pay:

shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

8 C.F.R. § 204.5(g)(2).

The record before the acting director closed on January 19, 2011 with her receipt of the petitioner's submissions in response to the NOID. The petitioner, however, did not submit copies of its annual reports, federal tax returns or audited financial statements from 2010, the year of the petition's priority date. Rather, the record contains copies of only part of the petitioner's 2009 annual report. Also, while the petitioner states that it employs more than 100 workers, it did not submit a statement from a financial officer to establish its ability to pay the offered wage as the regulation at 8 C.F.R. § 204.5(g)(2) provides. While USCIS has discretion to accept additional evidence of the petitioner's ability to pay, the additional evidence may not substitute for evidence that the regulation requires. On remand, the petitioner must provide regulatory required evidence of its continuing ability to pay the offered wage from the petition's priority date onward.

The AAO also finds that the petitioner has failed to establish that the beneficiary has the required employment experience for the offered position. As previously indicated, 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 Wing's Tea House*, 16 I&N Dec. at 159; *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 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, e.g., Madany*, 696 F.2d at 1012-13.

In the instant case, the labor certification states that the offered position requires 36 months of full-time experience in the offered position of senior programmer analyst. On the labor certification, the beneficiary claims to qualify for the offered position based on: seven months of experience as a Senior Associate with [REDACTED] in [REDACTED] New Jersey; 24 months of experience as a Systems Analyst with [REDACTED] in [REDACTED] India; 19 months of experience as a Software Engineer with [REDACTED] in [REDACTED] India; and 26 months of experience as a Software Consultant with [REDACTED] in [REDACTED] India.

The petitioner must support the beneficiary's claimed qualifying experience with letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains numerous letters and certificates from the beneficiary's purported former employers. However, none of these letters and certificates contain a description of the beneficiary's job duties or experience as the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) requires.

Without descriptions of the beneficiary's duties in his previous employment positions, USCIS cannot determine whether the beneficiary obtained the qualifying experience, including experience with the various specified computer programming languages and systems, before the petitioner filed the labor certification. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Because the evidence of record does not establish that the petitioner has the continuing ability to pay the offered wage and that the beneficiary possessed the required employment experience set forth on the labor certification, the AAO will remand the petition to the acting director. The acting director should request additional, relevant evidence and allow the petitioner an opportunity to address these issues.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The acting director's decision of March 8, 2011 is withdrawn. Because the petition is unapprovable, however, it is remanded to the acting director for the collection and consideration of additional evidence and the issuance of a new, detailed decision, which, if adverse to the petitioner, is to be certified to the AAO for review.