

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**



(b)(6)

Date: **AUG 29 2013**

Office: TEXAS SERVICE CENTER

IN RE: Petitioner:

Beneficiary:

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

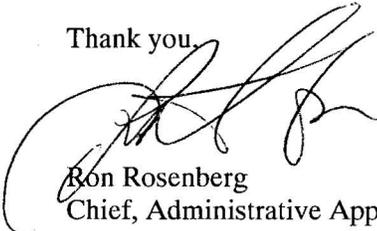
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you.


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal (April 16, 2013). The matter is again before the AAO on a motion to reopen and a motion to reconsider. The motion to reopen will be granted for the inclusion of new evidence submitted in support of the motion. The motion to reconsider will be granted for reconsideration of the AAO's prior decision. The petition remains denied. The AAO affirms its decision of April 16, 2013.

The petitioner is a custom business display company. It seeks to employ the beneficiary permanently in the United States as a maintenance engineer. As required by statute, the petition is accompanied by an ETA Form 9089 (labor certification), Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education required by the labor certification as the labor certification requires a bachelor's degree, the petitioner filed as a professional, and the petitioner sought to rely on a combination of the beneficiary's education and experience. On appeal from the director's decision, the AAO determined that the beneficiary did not meet the educational requirements of the labor certification and affirmed the director's decision. Beyond the decision of the director, the AAO determined that: the record did not establish that the beneficiary had two years of experience in the proffered profession as required by the labor certification; the petitioner failed to establish the ability to pay the proffered wage of the beneficiary plus all other sponsored workers.

The record shows that the motion to reopen and motion to reconsider is properly filed. 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 regulation at 8 C.F.R. § 103.5 provides in pertinent part that "a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." "New" facts are those that were not available and could not reasonably have been discovered or presented in the previous proceeding. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [USCIS] policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The petitioner makes the following assertions in its motion to reopen/motion to reconsider:

- The petitioner states that the beneficiary has been granted H-1B immigration status in unrelated proceedings, and that, accordingly, USCIS has accepted the beneficiary's academic credentials as equivalent to a bachelor's degree with a major in engineering. The petitioner states that the AAO's refusal to recognize the beneficiary's educational credentials as being equivalent to a bachelor's degree with a major in engineering in this instance represents an

inconsistent application of law which requires the reversal of the AAO's prior decision and approval of the petition.

The petitioner's assertion is incorrect and unsupported by law. As previously noted by the AAO the labor certification requires a Bachelor's degree in Engineering in H.4. The labor certification does not allow for any combination of education and experience in H.8. The labor certification does not qualify the educational requirement in H.14. The beneficiary claims in Part J that he has a bachelor's degree. Also as previously noted in the AAO's decision, in support of the beneficiary's educational qualifications, the petitioner submitted a copy of a document from [REDACTED] indicating that the beneficiary had attended the [REDACTED] between 1981 and 1983, and had passed the Diploma of Associate Engineer examination in "Air Conditioning & Refrigeration Technician" in January 1984. It states that the beneficiary was awarded a Diploma of Associate of Engineer on May 24, 1984. Another document from the same board indicated that the beneficiary had successfully completed his "Commercial Refrigeration and Air Conditioning" course for the 1981-1983 session in second division. The petitioner failed to submit a copy of the beneficiary's Bachelor's degree in engineering obtained in 1984 from [REDACTED] as indicated on the ETA Form 9089.¹ The petitioner also submitted a transcript from the [REDACTED] indicating that the beneficiary had successfully passed the first annual examination for "B.A." that was held in May/June 1985. The transcript lists Islamic studies, history, economics, and English as the subjects in which the beneficiary was tested. The submitted transcript indicated that "[a]n entry appearing in it does not in itself confer any right or privilege independently to the grant of proper Certificate/Degree which will be issued under the Regulations in due course." The record does not contain evidence of a proper certificate or degree that was granted to the beneficiary by the [REDACTED]. Further, the beneficiary's purported degree from the [REDACTED] was not listed on the labor certification, and as a Bachelor of Arts² would not be in the required field of engineering.

¹ The record contains a "Diploma of Associate of Engineer" from the [REDACTED]

² We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, www.aacrao.org, 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." <http://www.aacrao.org/About-AACRAO.aspx> (accessed August 27, 2013). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." <http://edge.aacrao.org/info.php> (accessed August 27, 2013). Authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a

The record contains copies of the beneficiary's intermediate and secondary education transcripts, certificates of several continuing education courses in maintenance related topics that the beneficiary completed in 2003, 2005 and 2008; and certificates of two training courses that the beneficiary completed in 2009 through the petitioner.

The record does not contain a copy of a bachelor's degree with a major field of study in engineering as required by the labor certification.

Additionally, the petitioner submitted two experiential evaluations to establish that the beneficiary has the equivalent of a bachelor's degree with engineering as the major field of study. In an evaluation dated November 29, 2011, [REDACTED] concluded that the beneficiary's 28 years of work experience in the field of engineering was equivalent to a Bachelor of Science degree in Engineering. In a November 29, 2011 evaluation, [REDACTED] an Associate Professor with the [REDACTED] concluded that using the equivalency ratio of three years of work experience for one year of college training, the beneficiary's work experience of more than 28 years equals a least a Bachelor of Science degree in Engineering from an accredited institution of higher education in the United States.

The AAO does not agree with the conclusions of the above noted evaluations. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988). See also *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).

The evaluations in the record used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H-1B petitions, not to immigrant petitions. See 8 CFR § 214.2(h)(4)(iii)(D)(5). The beneficiary was required to have a bachelor's degree on the ETA Form 9089 and based on the professional category selected. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in part:

reliable, peer-reviewed source of information about foreign credentials equivalencies. EDGE states that a Bachelor of Arts degree in Pakistan is awarded upon completion of two to three years of tertiary study beyond the Higher Secondary Certificate. If the Bachelor's degree is two years of duration, then it is noted as a Pass degree and if it is a three year's degree it is noted as an Honors degree. Regardless of whether the degree, if issued and the record does not establish that it was issued, was a Pass degree or an Honors degree, it is not equivalent to a U.S. Bachelor's degree, and, based on the one page in the record it is in a field of study which is unrelated to the field required by the labor certification.

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 of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.

Therefore, a petition for a professional must establish that the occupation of the offered position is listed as a profession at section 101(a)(32) of the Act or requires a bachelor's degree as a minimum for entry; the beneficiary possesses at least a U.S. bachelor's degree or a foreign equivalent degree from a college or university; and the job offer portion of the labor certification requires at least a bachelor's degree or a foreign equivalent degree.

The beneficiary must also meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

As is noted above, in order to be classified as a professional, the beneficiary must possess at least a U.S. bachelor's degree or a foreign equivalent degree from a college or university. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) uses a singular description of the degree required for classification as a professional. In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now USCIS or the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991) (emphasis added).

It is significant that both section 203(b)(3)(A)(ii) of the Act and the relevant regulations use the word "degree" in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5th Cir. 1987). It can be presumed that Congress' requirement of a single "degree" for members of the professions is deliberate.

The regulation also requires the submission of "an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study." 8 C.F.R. § 204.5(l)(3)(ii)(C) (emphasis added). In another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning." Section 203(b)(2)(C) of the Act (relating to aliens of exceptional

ability). However, for the professional category, it is clear that the degree must be from a college or university.

In *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the court held that, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, USCIS properly concluded that a single foreign degree or its equivalent is required. See also *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008)(for professional classification, USCIS regulations require the beneficiary to possess a single four-year U.S. bachelor's degree or foreign equivalent degree).

Thus, the plain meaning of the Act and the regulations is that the beneficiary of a petition for a professional must possess a degree from a college or university that is at least a U.S. baccalaureate degree or a foreign equivalent degree. In summary, the petitioner has failed to establish that the beneficiary possessed a U.S. bachelor's degree or a foreign equivalent degree from a college or university. The petitioner also failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act. The director's decision to deny the petition must be affirmed. The AAO cannot alter the education requirements of the labor certification.

For this reason, the petitioner's motion to reopen/motion to reconsider must be denied and the AAO's prior decision denying the petition and appeal affirmed.

- In support of its motion to reopen and motion to reconsider, the petitioner states that *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988) holds that a combination of education and experience may be considered equivalent to a professional degree and that, therefore, the AAO's prior decision not considering the beneficiary's work experience as being equivalent to a Bachelor's degree in Engineering must be reversed.

Counsel's assertion is incorrect. Without discussing the specifics of *Matter of Caron* with reference to counsel's assertion as the case's holding, the present case, and the educational requirements relative thereto, are controlled by the certified labor certification which requires a Bachelor's Degree with a major in Engineering, and specifically precludes an alternate combination of education and experience to the bachelor's degree requirement. Additionally, as noted above, the petitioner filed for the beneficiary as a professional, which does not allow for a combination of education and experience.

- Counsel states that in an unrelated filing to the present petition, the petitioner "previously obtained a labor certificate on behalf of the beneficiary as [a] maintenance worker. . . . An I-140 visa petition was filed on behalf of the beneficiary.

Although this application was at first approved, the approval was later revoked by DHS. The basis of the revocation was that the beneficiary was in fact a maintenance engineer and not a maintenance worker. ([See] [REDACTED])

Since DHS recognized the beneficiary a[s] a maintenance engineer in an earlier petition it is an error to deny [him] the same status in this petition.”

Counsel is incorrect in this assertion and has mischaracterized what occurred in the referenced proceeding. In that proceeding, which is unrelated to the present proceeding and has no precedential authority, the petitioner submitted a Form I-140 for a professional or skilled worker under 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3).³ In support of that petition, the petitioner submitted an ETA Form 9089 which was certified by the DOL for a maintenance worker requiring no education and two years of experience. In response to a request for evidence, both the petitioner and beneficiary acknowledged that the beneficiary’s employment was actually in the position of a maintenance engineer. The petition’s approval was therefore revoked based upon information provided by the petitioner and beneficiary. USCIS made no independent determination that the previous position or beneficiary qualified as a maintenance engineer, or that the evidence in the previous petition is identical to the evidence in the present case. Counsel’s assertion is without merit.

- Counsel asserts that the AAO erred in stating that the petitioner had failed to establish its ability to pay the proffered wage of the present beneficiary and other sponsored workers. In support of that assertion, counsel submitted the beneficiary’s W-2 Forms for 2010 (showing wages paid of \$64,785.45), 2011 (showing wages paid of \$73,252.17) and 2012 (showing wages paid of \$76,979.45). These wages exceed the proffered wage of \$52,707.20 and could establish the petitioner’s ability to pay the proffered wage of the present beneficiary in those years. The petitioner did not provide proof of wages paid to the beneficiary in any other year despite the ability to pay issue being raised by the AAO in its prior dismissal. The 2008 and 2009 tax returns of the petitioner would show sufficient net income to pay the present beneficiary’s proffered wage. Without information about the wages of other sponsored workers, however, as detailed in the AAO’s decision of April 16, 2013, the petitioner’s ability to pay the required wages of all sponsored workers cannot be determined in 2008 or 2009. This issue was not adequately addressed by counsel’s motion despite the specific statements of the AAO relative to these issues in its prior decision. For this reason the petition must be denied.
- Finally, counsel states on motion that the beneficiary was not required to have a Bachelor’s degree in Engineering, but only a Bachelor’s degree with a major in Engineering. Assuming that counsel’s assertions in this regard are correct, and the AAO does not accept those assertions, for reasons previously addressed herein and in the AAO’s decision of April 16, 2013, the petitioner has not established that the beneficiary possesses the foreign equivalent of a U.S. Bachelor’s degree in any field, or in the field of Engineering as required by the labor certification. For this reason the petition must be denied.

³ A prior Form I-140 version allowed for consideration as both a professional or skilled worker in the same filing. The Form I-140 has now been changed and requires the selection of either a professional or skilled worker.

Finally, the AAO, in its decision of April 16, 2013, found that the petitioner failed to establish that the beneficiary had the 24 months of experience specified on the labor certification. The AAO specifically noted that experience letters submitted by the petitioner were inconsistent and that those inconsistencies must be resolved in order for the petitioner to establish that the beneficiary had the necessary qualifying experience (the referenced inconsistent experience letters were provided by [REDACTED]). The AAO further noted that employers who provided additional experience letters were not listed on the labor certification and as such, their credibility was in question. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976). Counsel's motion did not address the experience issue as related to the above. For this additional reason, the petition must be denied.

It is further noted that the petitioner's motions to reopen and reconsider shall be dismissed for failing to meet an applicable requirement. The regulation at 8 C.F.R. § 103.5(a)(1)(iii) lists the filing requirements for motions to reopen. Section 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, the motion must also be dismissed because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C),

In visa petition proceedings, the burden of proving eligibility remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion to reopen and motion to reconsider are granted. The AAO's decision of April 16, 2013 is affirmed. Upon reconsideration, the petition remains denied.