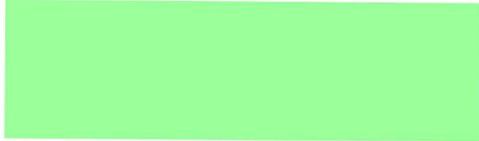


(b)(6)

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



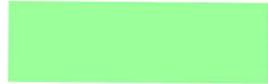
U.S. Citizenship
and Immigration
Services



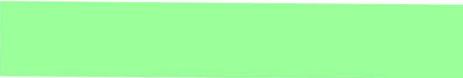
DATE: DEC 18 2013

OFFICE: TEXAS SERVICE CENTER

FILE:

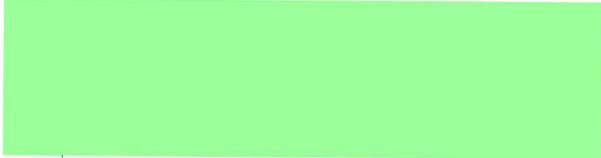


IN RE: Petitioner:
Beneficiary:



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. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

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,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Texas Service Center (the director) on January 16, 2007. In connection with the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485), the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR) on May 17, 2010. In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker on June 30, 2010. The matter was before the Administrative Appeals Office (AAO) on appeal, which was dismissed on April 17, 2013. The petitioner submitted a motion to reopen and reconsider to the AAO. The petitioner's motions will be granted. The AAO's and the director's decisions will be withdrawn. The petition will be remanded for a new decision.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner describes itself as a software consulting business. It seeks to permanently employ the beneficiary in the United States as a programmer analyst.¹ The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). The petition is accompanied by a labor certification approved by the U.S. Department of Labor (DOL).

The petitioner's ETA Form 9089 was filed with the DOL on November 21, 2006 and certified by the DOL on December 6, 2006. On May 17, 2010, the director issued a NOIR because the record was deficient regarding the beneficiary's employment. The NOIR states that the evidence in the record indicated that the beneficiary had been employed by the petitioner since February 2007 in Alpharetta, Georgia; however, an experience letter indicated that the beneficiary was a contractor with [REDACTED] since October 2003. Further, while the beneficiary indicated that he was a contractor for [REDACTED] through the petitioner, when contacted about the beneficiary [REDACTED] indicated that the beneficiary was provided to [REDACTED] through a contract with [REDACTED]. The director gave the petitioner 30 days to submit evidence that would overcome the reasons for revocation. In response to the NOIR, counsel submitted a letter from [REDACTED] indicating that the beneficiary is an employee of the petitioner who works on a consulting assignment for [REDACTED] paychecks from the petitioner for the beneficiary and Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, issued to the beneficiary from the petitioner. The director revoked the approval of the I-140 petition on June 30, 2010, determining that the petitioner had failed to establish that it would be the actual employer of the beneficiary and that, therefore, no *bona fide* job offer existed.

¹ The AAO notes that the petitioner listed the job title as engineer on the Form I-140 petitioner. However, USCIS must look to the terms of the labor certification. See *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 AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

On appeal, counsel submitted additional evidence that the beneficiary was to be employed by the petitioner and that, therefore, there is a *bona fide* job offer. Counsel submitted the following additional evidence to support a finding that the petitioner is to be the beneficiary's employer:

- Forms W-2 reflecting payment from the petitioner to the beneficiary in 2007 through 2009.
- A letter dated July 21, 2010, from [REDACTED] president, on the petitioner's letterhead, indicating that the beneficiary will be working exclusively for the petitioner as a programmer analyst. The letter states that the petitioner will have full control over the beneficiary's employment and is responsible for all incidents relating to such employment, including, hiring, termination, payment of wages, fringe benefits, discipline and promotion.
- Affidavits dated July 20, 2010, from [REDACTED] and the beneficiary confirming the petitioner's control over the beneficiary during his employment.
- A letter dated February 2, 2007, offering the beneficiary employment with the petitioner as a computer systems analyst.
- An agreement for third party consulting dated February 15, 2007, between [REDACTED] and the petitioner indicating that individuals contracted from the petitioner to [REDACTED] will remain under the employment and control of the petitioner.
- A purchase order dated February 16, 2007, reflecting the beneficiary's contracting of services as an employee of the petitioner to [REDACTED] as a QA analyst.

On January 31, 2013, the AAO issued a Notice of Intent to Deny and Derogatory Information (NOID/NODI) informing the petitioner that its location in New Hampshire, the location listed on the labor certification, was administratively dissolved or suspended on August 2, 2010.

In the response to the NOID/NODI, counsel informed the AAO that the petitioner closed its [REDACTED] New Hampshire location in 2009 and relocated its headquarters to [REDACTED] Connecticut. The petitioner provided evidence to demonstrate that it continues to operate the same business as its new headquarters address.

8 C.F.R. § 103.5(a) provides, in pertinent part:

(2) Requirements for motion to reopen.

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. . .

(3) Requirements for motion to reconsider.

A motion to reconsider must 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 Service policy. A motion to reconsider a decision on

an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

On motion, counsel contends that the AAO's previous decision was incorrect and that the Form I-140 immigrant petition is approvable. The AAO grants the petitioner's motions and finds that the grounds for revocation of the approved Form I-140 immigrant petition have been overcome; however, the petitioner has not otherwise established that the petition is approvable.

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 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: Bachelor's degree in any field of study.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: Accepted: combination of education/exp. acceptable to meet bachelor's requirement. 3 years of experience acceptable for H.8.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: 24 months as an engineer, programmer, developer or analyst.
- H.14. Specific skills or other requirements: Experience in one, some or most of: kernel/embedded systems programming using C/C++, assembly language, cisco systems engineers, database/systems administrators, ERP/CRM/supply chain; Oracle application. Travel out of state 75%. Will accept combination of education and experience to meet bachelor's requirement. Any suitable combination of training, education and experience is acceptable.

Part J of the labor certification states that the beneficiary's highest level of education related to the offered position is a Bachelor's degree in commerce from [REDACTED], completed in 1989.

The record of proceeding contains a copy of the beneficiary's Bachelor of Commerce diploma and transcripts from [REDACTED] completed in 1986.

Part K of the labor certification states that the beneficiary qualifies for the offered position based on experience as a senior engineer with [REDACTED], [REDACTED] New Jersey, from January 1, 2004, until November 21, 2006, the date on which the labor certification was submitted to the DOL. No other experience is listed.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record contains an experience letter dated April 18, 1998, from [REDACTED] managing director, on [REDACTED] (Inset) letterhead stating that the company employed the beneficiary as a director of customer service from October 1989 to December 1997. However, the letter does not sufficiently describe the beneficiary's duties in detail or specify the dates of employment. Further, this experience is not listed on the labor certification. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. Additionally, the title of the beneficiary's position with this employer does not appear to meet the duties of the proffered position or the alternate occupations acceptable on the labor certification.

The record contains an experience letter dated November 23, 2003 from [REDACTED] chief financial officer, on [REDACTED] letterhead stating that the company employed the beneficiary from September 2000 to November 2003, managing IT projects. However, the letter does not state the title of the beneficiary's position, sufficiently describe the duties in detail or specify the dates of employment. Further, this experience is not listed on the labor certification. *Matter of Leung*, 16 I&N Dec. at 2530. Additionally, this experience was utilized by the petitioner to qualify the beneficiary under the educational requirements of the labor certification and may not be used to meet the experience requirements of the labor certification.

The record contains an experience letter dated November 12, 2004 from [REDACTED] president, on Infinite letterhead stating that the company employed the beneficiary as a programmer/analyst from January 2004 to September 2004. However, the letter does not sufficiently describe the duties in detail or specify the dates of employment. Further, this experience is not listed on the labor certification. *Matter of Leung*, 16 I&N Dec. at 2530. Additionally, based on the evaluations of the beneficiary's education and experience in the record, this experience was utilized by the petitioner to qualify the beneficiary under the educational requirements of the labor certification and may not be used to meet the experience requirements of the labor certification.

The record contains an experience letter dated December 15, 2006, from [REDACTED] general counsel, on [REDACTED] letterhead stating that the company employed the beneficiary as a programmer/analyst from October 1, 2004 until December 15, 2006, the date on which the letter was signed. However, the letter does not describe the beneficiary's duties in detail.

The record contains an experience letter dated December 15, 2006, from [REDACTED] manager-business analysis team stating that the beneficiary is a contractor at [REDACTED] and has worked as a business quality assurance analyst since October 2003. However, the letter does not provide the name and address of the beneficiary's actual employer, describe the beneficiary's duties in detail or sufficiently specify the dates of employment.

The record contains an experience letter dated June 17, 2010, from [REDACTED] CEO, on [REDACTED] letterhead stating that the company employed the beneficiary on a consulting assignment for the petitioner. However, the letter does not state the title of the beneficiary's position, describe the duties in detail or specify the dates of employment.

Representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the petitioner cannot be used to qualify the beneficiary for the certified position.² In response to question

² 20 C.F.R. § 656.17 states:

(h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation

.....

(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

(i) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

(ii) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

J.21, which asks, “Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?,” the petitioner answered “no.” The petitioner specifically indicates in response to question H.6 that 24 months of experience in the job offered is required. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable³ and the terms of the ETA Form 9089 at H.10 provide that applicants can

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer’s actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

- (i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
- (ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer’s actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer’s expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

- (i) The term “employer” means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.
- (ii) A “substantially comparable” job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

³ A definition of “substantially comparable” is found at 20 C.F.R. § 656.17:

5) For purposes of this paragraph (i):

- ...
(ii) A “substantially comparable” job or position means a job or position requiring performance of the same job duties more than 50 percent of the

qualify through an alternate occupation. Here, the record indicates that the beneficiary has been employed by the petitioner only in the proffered position and the job duties are substantially similar duties as the position offered. Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as he was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position.

Therefore, the evidence in the record is not sufficient to establish that the beneficiary possessed the 24 months of experience in the proffered position or the alternate occupations of engineer, programmer, developer or analyst by the priority date as required by the terms of the labor certification. Additionally, the letters do not provide evidence that the beneficiary has the special requirements listed in section H.14. of the labor certification.

As always in visa petition proceedings, the burden of proof rests entirely with the petitioner. See section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

In view of the foregoing, the previous decisions of the AAO and the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. 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 AAO's and the director's decisions are withdrawn; however, the petition is currently unapprovable 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.

time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.