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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



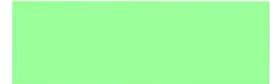
U.S. Citizenship  
and Immigration  
Services



DATE: JUN 04 2013

OFFICE: TEXAS SERVICE CENTER

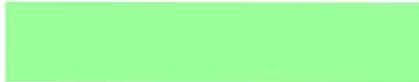
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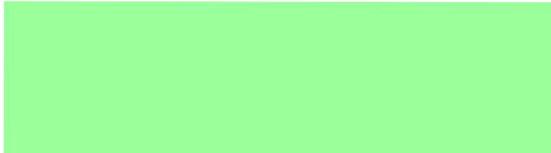
Petitioner:

Beneficiary:



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

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,

  
Ron Rosenberg

Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition on September 27, 2011. The petitioner filed a motion to reopen the decision. On January 24, 2012, the director withdrew the decision of September 27, 2011 and again denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an information technology and systems application development business. It seeks to employ the beneficiary permanently in the United States as a developer. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the Department of Labor (DOL), accompanied the petition.<sup>1</sup> Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated 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.<sup>2</sup>

Section 203(b)(3)(A)(ii) of the 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 ETA Form 9089 was accepted for processing on November 18, 2010.<sup>3</sup> The Immigrant Petition for Alien Worker (Form I-140) was filed on February 4, 2011.

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<sup>1</sup> On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA Form 9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

<sup>2</sup> 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).

<sup>3</sup> If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

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 developer provides:

Responsible for supporting [REDACTED] and supporting applications that are written in Powerbuilder and Forte. Develop, unit test, and deploy enhancement requests and bug fixes for the [REDACTED]. Provide assistance with data patches, client and server application installations, and database purging/archiving. Participate in converting the Forte based server application into Java with Spring framework. Includes development, unit testing and deploying application functions. As part of the development process, Design Specification and Unit Test Case documents must be created. Qualified candidates should exhibit strong analytical skills to be able to effectively support trouble requests. Candidates should also possess knowledge of languages such as Powerbuilder, Forte, Java, XML, SQL and PL/SQL. Experience with or knowledge of Java Technologies (Spring and Hibernate), IDE & Tools (MyEclipse, Rational ClearCase), Databases (Oracle 8i/9i/10g, SQL Server), and Platforms (Windows, Unix, Linux) are also required.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the labor certification reflects the following requirements:

- H.4. Education: Minimum level required: Bachelor's degree.
- 4-B. Major Field Study: Electronic Engineering or related.
- 6. Is experience in the job offered required for the job?  
The petitioner checked "yes" to this question.
- 6-A. If Yes, number of months experience required: 36 months.
- 7. Is there an alternate field of study that is acceptable?  
The petitioner checked "yes" to this question.
- 7-A. If Yes, specify the major field of study: MIS, CIS, or related.
- 8. Is there an alternate combination of education and experience that is acceptable?  
The petitioner checked "no" to this question.
- 9. Is a foreign educational equivalent acceptable?  
The petitioner listed "yes" that a foreign educational equivalent would be accepted.

10. Is experience in an alternate occupation acceptable?  
The petitioner checked "yes" to this question.
- 10-A. If Yes, number of months experience in alternate occupation required: 36 months.
- 10-B. Identify the job title of the acceptable alternate occupation: software development field and support.
14. Specific skills or other requirements: Successful candidate will have Bachelor's degree (or equivalent) in Electronic Engineering or related and three (3) years of experience in software development field and support. Experience may have been gained concurrently. Any suitable combination of education and experience acceptable.

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 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *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 of Electronic Engineering, MIS, CIS or related or foreign equivalent degree, and three years of experience in the job offered of developer or in the alternate field of software development field and support.

On the ETA Form 9089, signed by the beneficiary, the beneficiary represented that the highest level of achieved education related to the requested occupation was a bachelor's degree in Management Information Systems and Business Administration. He listed the institution of study where that education was obtained as the [REDACTED] India, and the year completed as 1995.

In support of the beneficiary's educational qualifications, the petitioner submitted a copy of the beneficiary's diploma from the [REDACTED]. It indicates that the beneficiary was awarded a Bachelor of Commerce in April 1995. The record also contains a copy of the beneficiary's master of business administration diploma from the [REDACTED] awarded in April 2000. The petitioner additionally submitted several credentials evaluations. The evaluations describe the beneficiary's master's diploma from the [REDACTED] as a Bachelor's degree in business administration, with a major in management information systems, and conclude that it is equivalent to a bachelor's degree in the United States.

The director's original decision dated September 27, 2011 concluded that the petitioner had not demonstrated that the beneficiary met the minimum requirements as listed on the labor certification, as the beneficiary's degree in business administration is not related to the field of electrical engineering, MIS, or CIS. In his decision dated January 24, 2012, the director withdrew his previous decision and stated that, although the beneficiary has the equivalent of a U.S. bachelor's degree in

business administration, the petitioner had not established how the evaluators determined that the beneficiary's five computer-related courses were sufficient to meet the requirements of labor certification of a major in electrical engineering, management information systems, CIS or a related field.

On appeal, with regard to the beneficiary's qualifying academic credentials, counsel submitted additional evaluations of the beneficiary's credentials discussing the beneficiary's bachelor's and master's degree coursework.

The record contains an evaluation of the beneficiary's credentials prepared by [REDACTED] for [REDACTED] on October 21, 2011. The evaluation concludes that the beneficiary's bachelor's degree in commerce from the [REDACTED] is equivalent to three-years of university-level credit in business and accounting from an accredited university in the United States. Mr. [REDACTED] evaluation also stated that the beneficiary's two-year master's degree in business administration was at least the equivalent of a bachelor's degree in business administration with a major in management information systems from an accredited university in the United States.

The record contains an evaluation of the beneficiary's credentials prepared by Prof. [REDACTED] Ph.D. of [REDACTED] on October 21, 2011. The evaluation concludes that the beneficiary's three-year bachelor's degree in commerce and two-year master's degree in business administration totals five years of progressive post-secondary education. Prof. [REDACTED] states that the beneficiary attained the equivalent of at least a four-year bachelor of business administration degree, with a major in management information systems, from an accredited U.S. college of university based upon the beneficiary's single-source two-year master of business administration. Prof. [REDACTED] further stated that his findings were in accordance with the American Association of Collegiate Registrars and Admissions Officer's (AACRAO) Electronic Database for Global Education (EDGE) database.

The record contains an evaluation of the beneficiary's credentials prepared by Prof. [REDACTED] of [REDACTED] New York on October 21, 2011. The evaluation concludes that the beneficiary's two-year master's degree in business administration is equivalent to a single source U.S. bachelor's degree in business administration, with a major in management information systems. Prof. [REDACTED] further stated that his findings were in accordance with the AACRAO EDGE database.

The record contains an evaluation of the beneficiary's credentials prepared by [REDACTED] B.A., J.D., M.B.A for [REDACTED] on February 16, 2012. The evaluation concludes that the beneficiary's two-year master's degree in business administration is equivalent to a single source four-year bachelor's degree in business administration, with a major in management information systems, from an accredited U.S. college or university.

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

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

At the outset, it is noted that section 212(a)(5)(A)(i) of the Act and the scope of the regulation at 20 C.F.R. § 656.1(a) describe the role of the DOL in the labor certification process as follows:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is left to USCIS to determine whether the proffered position and alien qualify for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).<sup>4</sup> *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

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Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the

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<sup>4</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of “matching” them with those of corresponding United States workers so that it will then be “in a position to meet the requirement of the law,” namely the section 212(a)(14) determinations.

*Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).<sup>5</sup>

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*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate that the beneficiary has to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification application form].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

The AAO is in agreement with the director and concludes that the beneficiary’s Master of Business Administration degree from the [REDACTED] is equivalent to a bachelor’s degree in the

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<sup>5</sup> The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

The Department of Labor (“DOL”) must certify that insufficient domestic workers are available to perform the job and that the alien’s performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien’s entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

*Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9<sup>th</sup> Cir. 1984).

United States. However, the AAO does not agree with the petitioner's assertions that the beneficiary's master's degree is in a field listed on the ETA Form 9089.

The AAO notes that the beneficiary's transcripts indicate that the beneficiary took very few IT courses in comparison to business courses. Further, the job description for the proffered position focuses only on IT skills. The AAO notes that the beneficiary's transcripts also reflect several failed courses, including those in the management information systems field. 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, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 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). Based on the few management information systems courses listed on the transcripts, and the beneficiary's failure to pass some courses, the AAO cannot conclude that the beneficiary meets the requirements of the labor certification.<sup>6</sup>

The beneficiary does not have a United States baccalaureate degree or a foreign equivalent degree in Electronic Engineering, MIS, CIS or a related field, and, thus, does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act.

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.

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<sup>6</sup> The record includes a copy of the beneficiary's Bachelor of Commerce degree issued by the [REDACTED] on April 1, 1995. The AAO notes that the beneficiary's Master of Business Administration degree, also issued by the [REDACTED] varies significantly from the Bachelor of Commerce degree in the heading and typeface. This inconsistency must be addressed in any further filings.