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: JUN 17 2013 OFFICE: TEXAS SERVICE CENTER

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:

SELF REPRESENTED

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 immigrant visa petition. The petitioner filed a motion to reopen the director's decision, which was denied. The petitioner appealed the petition's denial to the Administrative Appeals Office (AAO), and, on April 23, 2012, the AAO dismissed the appeal. The petitioner filed a motion to reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted; however, the prior decision of the AAO dated April 23, 2012 will be affirmed, and the petition will remain denied.

The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner asserts that the director and the AAO made an erroneous decision through misapplication of law or policy. 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 describes itself as a software consulting company and development business. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the petition is accompanied by Form ETA 750, Application for Permanent Employment Certification (labor certification), certified by the Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is March 19, 2002. *See* 8 C.F.R. § 204.5(d). The director determined that the beneficiary did not possess a U.S. bachelor's degree or foreign equivalent as required by the terms of the labor certification.

The director denied the petition accordingly. Upon appeal, the AAO affirmed the director's findings that the beneficiary did not possess a U.S. bachelor's degree or foreign equivalent, and beyond the director's decision, the AAO also found that the petitioner did not demonstrate the ability to pay the proffered wage to the beneficiary in the instant petition from the priority date, and also did not demonstrate the ability to simultaneously pay the beneficiaries of its other petitions their proffered wages.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, 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 provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

Upon motion, the issue petitioner asks to be reconsidered is whether the AAO erred in its decision determining that the beneficiary did not possess a U.S. bachelor's degree or foreign equivalent pursuant to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A). The petitioner does not address the second ground for dismissal in the AAO's decision, wherein the AAO found that the petitioner had not demonstrated its ability to pay the proffered wage to the beneficiary.

In addition, the AAO previously found that the petitioner failed to establish its ability to pay the proffered wage from the priority date during its appeal. *See* 8 C.F.R. §204.5(g)(2).

According to USCIS records, the petitioner has filed I-140 petitions on behalf of two other beneficiaries

and I-129 petitions for six other beneficiaries. The petitioner would have to demonstrate its ability to pay the proffered wage to each I-140 beneficiary from the priority date until the beneficiary receives lawful permanent residence. *See* 8 C.F.R. §204.5(g)(2).

In the RFE from the AAO, the petitioner was requested to provide information regarding the other beneficiaries for which it had petitioned as well as documentation to establish its ability to pay the proffered wage to each of the I-140 beneficiaries.

In response, the petitioner named two beneficiaries for whom it had filed Form I-140 employment-based petitions and specified that one of the beneficiaries had obtained lawful permanent residence in June 2011. However, the petitioner failed to document the receipt number, priority date, exact dates of employment, proffered wage or wage paid to either of these beneficiaries. The petitioner's failure to submit these items cannot be excused.

The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). On motion, the petitioner again failed to submit any further information regarding its ability to pay the proffered wage of the instant beneficiary and for each of its I-140 beneficiaries. The petitioner has not demonstrated its ability to pay the proffered wage to the beneficiary. Therefore, the petitioner has not overcome this ground of the AAO's decision.

In addition, the AAO found that the beneficiary's academic credentials, a three-year Bachelor of Commerce from the did not meet the minimum requirements for the position offered as listed on the labor certification, including the requirements for a bachelor's degree or foreign equivalent.

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* 8 C.F.R. § 103.2(b)(1), (12). *See also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I& N Dec. 45, 49 (Reg. Comm. 1971).

In the instant case, the AAO determined that the petitioner failed to establish that the beneficiary possessed a U.S. baccalaureate or foreign equivalent.[1] The petitioner submitted various documents regarding the beneficiary's education into the record as described below.

- Bachelor of Commerce diploma and transcripts from the India.

[1] The AAO issued an RFE dated June 24, 2011 requesting additional evidence that the beneficiary possesses a U.S. bachelor's degree or foreign equivalent based on information received from the Electronic Database for Global Education (EDGE) notifying the petitioner that the beneficiary's three-year Bachelor of Commerce degree from India was not equivalent to a U.S. baccalaureate. The petitioner's counsel responded on July 29, 2011, indicating that since on Form ETA 750 Part 14, "Years of College" the petitioner replied "Y" for "Yes" for college instead of "4" for four years the petitioner expressly permitted an applicant with less than four years of college to be included in the pool of eligible, qualified workers.

- Transcripts for six courses completed at
- Diploma dated March 24, 1997, in completion of a PowerBuilder 5.0 advanced course from , India.
- Diploma dated September 1995 for completion of a Sybase PowerBuilder v.4 course from .
- Diploma in Computer Programming & Applications dated August 20, 1992 from

The record also contained two evaluations submitted regarding the beneficiary's credentials.

- submitted an evaluation dated December 3, 1999 concluding that the combination of beneficiary's three-year Bachelor of Commerce degree, his Diploma in Computer Programming and Applications from and his over six years of work experience were equivalent to a U.S. Bachelor of Science in management information systems.

- in an evaluation dated February 7, 2007, concluded that the beneficiary's three-year Bachelor of Commerce degree is equivalent to a U.S. Bachelor's degree in computer science.

In regard to the evaluation from the AAO noted that the evaluator did not claim the beneficiary possessed a bachelor's degree or foreign equivalent, but instead indicated that a combination of the beneficiary's education and work experience would constitute the equivalent of a U.S. bachelor's degree.

The evaluation from indicated that the beneficiary's three-year Bachelors of Commerce degree alone is equivalent to a U.S. Bachelor's degree in computer science, although the beneficiary's degree did not contain any computer courses according to his transcript in the record.

The two evaluations provided by the petitioner are inconsistent and come to conflicting conclusions. 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). The petitioner was asked to respond to the findings of EDGE, which were inconsistent with the evaluations submitted upon appeal. Counsel asserted in response that the credential evaluations provided by the petitioner should carry more evidentiary weight than EDGE because they provide an "individualized analysis of the beneficiary's educational history." However, the AAO determined that counsel failed to address the conflicts between the evaluations submitted by the petitioner. Therefore, in response to the AAO's RFE the petitioner provided no evidence to overcome the inconsistencies in the record.

In the current motion the petitioner again asks the AAO to consider the beneficiary's education in light of a letter previously submitted into the record and addressed by the director in a Motion to

Reconsider, and by the AAO, from indicating:

> the named individual [the beneficiary] is enrolled in the Master's of Science degree program in Organization Leadership at
>
> The college accepted the beneficiary's Bachelor's of Commerce degree from the University of as fulfilling the undergraduate degree requirements for admission into the program.

The petitioner therefore indicates that based on this fact alone, the AAO should also accept the beneficiary's Bachelor of Commerce degree as equivalent to a U.S. bachelor's degree. The director noted that no evidence was submitted detailing the criteria for admission to the Master of Science in the Organization Leadership Program at or whether the beneficiary must correct any deficiencies due to his three years of study in commerce in order to complete this program.

The petitioner did not address these deficiencies indicated in the decision of the director or the AAO in the instant motion to reconsider. The petitioner states instead that the beneficiary's acceptance into the indicated program at alone adequately demonstrates that he possesses a U.S. bachelor's degree equivalent. However, the AAO does not find the letter sufficient to address all of the deficiencies stated in the record which indicate that the beneficiary does not possess one degree which would be considered a foreign degree equivalent of a U.S. baccalaureate. Therefore, it is determined that the evidence submitted is insufficient to demonstrate that solely based on the beneficiary's admittance into the Master of Science in the Organization Leadership Program at , he would possess the U.S. baccalaureate or foreign equivalent degree required to meet the requirements of the labor certification.

Without documentary evidence to support the claim, the statements of petitioner will not satisfy the petitioner's burden of proof. The statements of petitioner alone do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The beneficiary does not possess a 4-year U.S. bachelor's degree, or a foreign equivalent degree. The labor certification does not permit a lesser degree, a combination of lesser degrees, and/or a quantifiable amount of work experience, such as that possessed by the beneficiary.[2] Nonetheless,

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[2] The DOL has provided the following field guidance: "When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the [labor certification] as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job." *See* Memo. From Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). The DOL's certification of job requirements stating that a "certain amount and kind of experience is equivalent of a college degree does in no way bind [USCIS] to accept the employer's definition." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training

the AAO RFE permitted the petitioner to submit any evidence that it intended the labor certification to require an alternative to a U.S. bachelor's degree, or a single foreign equivalent degree, as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified workers.[3] Specifically, the AAO requested that the petitioner provide a copy of the signed recruitment report required by 20 C.F.R. § 656, together with copies of the prevailing wage determination, all recruitment conducted for the position, the posted notice of the filing of the labor certification, and all resumes received in response to the recruitment efforts. The AAO's prior decision discussed the single advertisement provided by the petitioner, and noted that the failure to provide the requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. §103.2(b)(14). On motion, the petitioner has failed to provide any of the required evidence, or to address this finding.

In the instant case the AAO afforded the petitioner the opportunity to establish its intent regarding the term "or equivalent" on the labor certification and the minimum educational requirements of the labor certification. The petitioner failed to establish that "or equivalent" was intended to mean that the required education could be met with an alternative to a four-year U.S. bachelor's degree or foreign equivalent. The petitioner also failed to address the issue of intent regarding the term "or equivalent" on the labor certification in its current motion to reconsider. As discussed in the AAO's prior decision, competent, objective evidence is required to document what equivalent degree the petitioner considered equivalent. The evidence in the record is not sufficient to establish that the petitioner would accept less than the four-year U.S. bachelors or foreign equivalent degree.

Consequently, the petitioner has failed to establish that the beneficiary possessed a U.S. bachelor's degree or equivalent. The petitioner has also failed to demonstrate that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification under section 203(b)(3)(A)(i) of the Act or its related regulations, as a skilled worker, or under section 203 (b)(3)(A)(ii), as a professional.

Administration, to Lynda Won-Chung, Esq., Jackson & Hertogs (March 9, 1993). The DOL has also stated that "[w]hen the term equivalent is use in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

[3] In limited circumstances, USCIS may consider a petitioner's intent to determine the meaning of an unclear or ambiguous term in the labor certification. However, an employer's subjective intent may not be dispositive of the meaning of the actual minimum requirements of the offered position. *See Maramjaya v. USCIS,* Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008). The best evidence of the petitioner's intent concerning the actual minimum educational requirements of the offered position is evidence of how it expressed those requirements to the DOL during the labor certification process and not afterwards to USCIS. The timing of such evidence ensures that the stated requirements of the offered position as set forth on the labor certification are not incorrectly expanded in an effort to fit the beneficiary's credentials. Such a result would undermine Congress' intent to limit the issuance of immigrant visas in the professional and skilled worker classifications to when there are no qualified U.S. workers available to perform the offered position. *See Id.* at 14.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion to reconsider the previous decision of the AAO is granted. The previous decision of the AAO, dated April 23, 2012, will not be disturbed. The petition remains denied.