



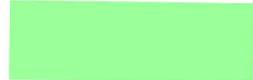
U.S. Citizenship
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Services

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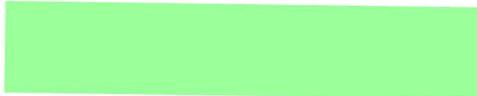


DATE: JUN 24 2013 OFFICE: TEXAS SERVICE CENTER

FILE:

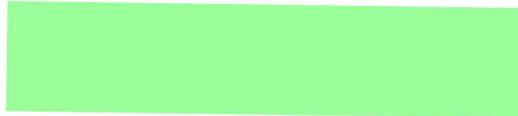


IN RE: Petitioner:
Beneficiary:



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. 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 employment-based preference visa petition was initially approved by the Director, Texas Service Center. The director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 research and development business. It seeks to permanently employ the beneficiary in the United States as a database programmer II. 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).¹

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is March 3, 2006. *See* 8 C.F.R. § 204.5(d).

The director’s decision revoking the approval of the petition concludes that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date and that the work location changed from Rockville, Maryland to Seattle, Washington. The director also noted that the record contained inconsistent evidence.

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. 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 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.²

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case

The beneficiary must 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).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (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).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *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]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering 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 a scientific field, math or computer science.
- H.5. Training: None required.
- H.6. Experience in the job offered: Twenty-four (24) months.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: Twenty-four (24) months in the alternate occupation of SAS or PL/SQL programming.
- H.14. Specific skills or other requirements: Two years of experience should include some experience with clinical trials or in a research environment. Employer will accept any suitable combination of education, training, or experience.

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).

The labor certification also states that the beneficiary qualifies for the offered position based on experience as an SAS programmer intern with [REDACTED] Maryland from June 18, 2001 until September 10, 2001, as an Oracle Database Administrator with [REDACTED] China from July 1, 1998 to October 31, 1999, and as a clinical research associate with [REDACTED] China from July 1, 1996 to June 30, 1998. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

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

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 from [REDACTED] Associate Director, Human Resources, on [REDACTED] letterhead stating that the company employed the beneficiary full-time as a programming intern from June 18, 2001 until September 10, 2001. Ms. [REDACTED] states that the beneficiary was responsible for SAS and Visual Basic programming and that in carrying out her duties, the beneficiary obtained a thorough understanding of basic SAS programming.

The record also contains additional evidence of the beneficiary's work for [REDACTED] including a letter from [REDACTED] the beneficiary's co-worker at [REDACTED] a 2001 Internal Revenue Service (IRS) Form 1099-MISC for the beneficiary listing [REDACTED] as the payer, and; an independent contractor agreement between [REDACTED] and the beneficiary signed by the beneficiary on June 7, 2001 for a term commencing on June 18, 2001 and expiring on September 10, 2001. The AAO accepts that it is more likely than not that the beneficiary gained relevant work experience with [REDACTED]. However, the beneficiary only worked three months for [REDACTED] and not 24 months as required by the labor certification.

The record contains an experience letter from [REDACTED] Chairman & CEO, [REDACTED] on [REDACTED] letterhead stating that he was the general manager of [REDACTED] Beijing Office from January 1, 1995 to December 31, 2001. Mr. [REDACTED] states that [REDACTED] employed the beneficiary full-time as a database administrator from July 1, 1998 until October 31, 1999. Mr. [REDACTED] states that the beneficiary's duties included creating, configuring and maintaining Oracle database for pharmaceutical marketing research, using SQL*Loader, Export/Import utility to perform database migration and data loading on CB collected data and secondary data, conducting data cleaning to ensure the data accuracy and performing data manipulation for analysis.

Although the beneficiary's position as a database administrator for [REDACTED] Beijing Office includes using SQL*Loader as one of the beneficiary's work duties,

the evidence does not demonstrate that this employment meets the requirements as stated in the ETA Form 9089. The ETA Form 9089 states that the offered position requires 24 months of experience in the offered position of database programmer II, or 24 months of experience in SAS or PL/SQL programming. Using SQL*Loader is only one of several job duties listed for the position of database administrator and there is no evidence to show that this employment was as a database programmer II or the alternate occupation of SAS or PL/SQL programming, as required by the ETA Form 9089.

The record contains an experience letter from [REDACTED] Director, the CEO office, [REDACTED] on [REDACTED] letterhead stating that the beneficiary was employed by [REDACTED] a [REDACTED] holding subsidiary that merged into [REDACTED] in 2000, as a clinical research associate from July 1, 1996 until June 30, 1998. Mr. [REDACTED] states that he worked for [REDACTED] since 1995 and he can confirm that [REDACTED] did not keep employment records from [REDACTED] after the merger.

The record also contains a letter from [REDACTED] CEO, [REDACTED] on [REDACTED] letterhead. Mr. [REDACTED] states that the beneficiary was employed full-time by [REDACTED] as a clinical research associate from July 1, 1996 to June 30, 1998. Mr. [REDACTED] states that the beneficiary's duties included clinical research coordination, data collection, SAS programming for data analysis, conducting feasibility analysis on new product candidates and providing regulatory affairs assistance. Mr. [REDACTED] states that he was the General Manager of [REDACTED] from 1994 to 1999 and the Vice President of [REDACTED] from 1994 to 1999. Mr. [REDACTED] states that he worked directly and closely with the beneficiary.

Although the beneficiary's position as a clinical research associate for [REDACTED] included SAS programming, the evidence does not demonstrate that this employment meets the requirements as stated in the ETA Form 9089. SAS programming is only one of several job duties listed for the position of clinical research associate and there is no evidence to show that this employment was as a database programmer II or in the alternate occupation of SAS or PL/SQL programming as required by the ETA Form 9089.

In the revocation, the director noted a discrepancy between the beneficiary's Form G-325A and the labor certification with regard to when the beneficiary's employment for the petitioner began. On appeal, counsel states that she filled out the Form G-325A and included the previous five years of employment as requested by the form. However, no independent and objective evidence was submitted to support counsel's assertions. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO affirms the director's decision that the petitioner failed to establish 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 as a professional or skilled worker under section 203(b)(3)(A) of the Act.

A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the ETA Form 9089. 20 C.F.R. § 656.30(C)(2). The director noted that the petitioner intends to employ the beneficiary as a database programmer II in [REDACTED] Washington instead of in [REDACTED] Maryland, outside the terms of the ETA Form 9089. See *Sunoco Energy Development Company*, 17 I&N Dec. 283 (Reg'l Comm'r 1979).

On appeal, counsel asserts that the beneficiary moved to Washington in 2008 for personal reasons and that she continues to work remotely for the petitioner in the same position. Although counsel states that the beneficiary is willing to move back to Maryland to work in the same position, there is no evidence in the record of proceeding that the beneficiary intends to move to Maryland and work for the petitioner in [REDACTED] Maryland. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel asserts on appeal that the petition is still "approvable" due to the terms of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). The AAO does not agree that the terms of AC21 make it so that the instant *immigrant petition* can be approved despite the fact that the petitioner has not demonstrated its eligibility. As noted above, AC21 allows an *application for adjustment of status*³ to be approved despite the fact that the initial job offer is no longer valid. The language of AC21 states that the I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status

³ The AAO notes that after the enactment of AC21, USCIS altered its regulations to provide for the concurrent filing of immigrant visa petitions and applications for adjustment of status. This created a possible scenario wherein after an alien's adjustment application had been pending for 180 days, the alien could receive and accept a job offer from a new employer, potentially rendering him or her eligible for AC21 portability, prior to the adjudication of his or her underlying visa petition. A USCIS memorandum signed by William Yates, May 12, 2005, provides that if the initial petition is determined "approvable", then the adjustment application may be adjudicated under the terms of AC21. See *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)* at 3. This memorandum was superseded by *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010), which determined that the petition must have been valid to begin with if it is to remain valid with respect to a new job.

based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer the new employer must be for a "same or similar" job. A plain reading of the phrase "will remain valid" suggests that the petition must be valid *prior* to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar. In other words, it is not possible for a petition to remain valid if it is not valid currently. The AAO would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petition for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, USCIS regulations required that the underlying I-140 was approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term "remains valid" was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer. *See Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010).

Counsel submitted a copy of a memorandum written by Michael Aytes, Acting Director of Domestic Operations, and dated December 27, 2005. Question 11 of the memorandum asks "When is an I-140 no longer valid for porting purposes?" Answer B. states that a Form I-140 is no longer valid for porting purposes when an "I-140 is denied or revoked at any time except when it is revoked based on a withdrawal that was submitted after an I-485 has been pending for 180 days." It is emphasized that USCIS internal memoranda and manuals do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely"). The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). However, in the instant case, the memo cited by counsel confirms that the revoked petition is no longer valid for porting purposes.

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.