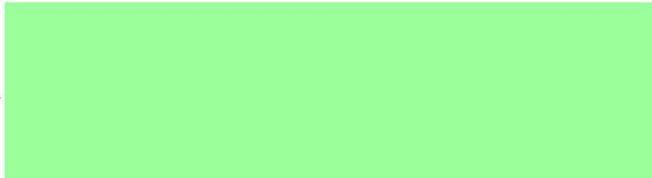




U.S. Citizenship
and Immigration
Services

(b)(6)

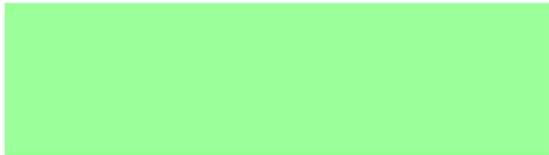


DATE: JUN 28 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: 

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.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO will withdraw the director's decision and remand the matter to the director for further consideration and the issuance of a new decision.

The petitioner is a hotel. It seeks to permanently employ the beneficiary as a systems engineer. 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 As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).

The director's decision denying the petition concluded that the beneficiary did not possess the minimum education required to perform the offered position as set forth on the labor certification.

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

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).

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), also 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 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).

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: An Associate's Degree in Electronics or Computer Science.
- H.5. Training: None required.
- H.6. Experience in the job offered: 48 months experience in the job offered.
- 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: None accepted.
- H.14. Specific skills or other requirements: None required.

The record contains copies of the diploma and transcripts for the beneficiary's Diploma in Industrial Electronics from [REDACTED] in Maharashtra State, India. On appeal, the petitioner submitted new evidence establishing that the beneficiary's postsecondary diploma was a three-year program of study at an institution of higher education in India that required a Higher Secondary Certificate for admission.

Upon review of the entire record, including additional evidence submitted on appeal and in response to a request for evidence issued by the AAO, it is concluded that the petitioner has established by a preponderance of the evidence that the beneficiary possessed the foreign equivalent of at least a U.S. Associate's Degree. Accordingly, the director's decision on this issue is withdrawn.

However, beyond the decision of the director,³ the petitioner failed to establish that the beneficiary possessed the minimum experience required to perform the offered position as set forth on the labor certification. Specifically, as is explained in detail below, there are multiple unresolved inconsistencies in the record of proceeding pertaining to the beneficiary's qualifying employment experience.

Part J of the labor certification states that the beneficiary possessed the following experience prior to working for the petitioner:

- Support Executive for [REDACTED] from October 1, 1996 until October 1, 2000, supervised by [REDACTED]⁴

³ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

⁴ The record also contains a Form G-325A, Biographic Information, submitted with the beneficiary's application for adjustment of status. In the section for listing the beneficiary's last employment abroad, the beneficiary stated that he was employed as a Support Executive by [REDACTED] from October 1996 until October 2000.

- Senior Customer Engineer for [REDACTED] from January 1, 1993 until October 31, 1996, supervised by [REDACTED]
- "Sr. Prod. Engineer R & D" for [REDACTED] from April 25, 1989 until December 11, 1992, supervised by [REDACTED]

At the outset, it is noted that the beneficiary's claimed employment with [REDACTED] and [REDACTED] overlap by one month.

As evidence of the beneficiary's qualifying experience, the record contains the following documents:

- The beneficiary's resume, which states that he was a System Engineer for [REDACTED] from October 1996 until October 2000, a Senior Hardware Engineer for [REDACTED] from January 1, 1993 until September 1996, and an Electronics Engineer R&D Department with the [REDACTED] from June 1988 until December 1992. The names of the employers and the beneficiary's titles are different than what is stated on the labor certification. In addition, the beneficiary's dates of employment with [REDACTED] and [REDACTED] are not consistent between the resume and the labor certification.
- September 15, 1993 letter by an illegible author of [REDACTED], stating that the beneficiary worked as a Senior Production Engineer from April 25, 1989 until December 31, 1992. The stated dates of employment are inconsistent with both the resume and the labor certification.
- October 31, 1996 letter of [REDACTED] stating that the beneficiary worked as a Senior Customer Engineer from January 1993 until October 31, 1996, where he represented the company "in IBM TRAINING PROGRAMME organised by [REDACTED] (BOMBAY)." The stated dates of employment are inconsistent with the beneficiary's resume, and the stated duties are inconsistent with the labor certification and the resume.
- Undated letter of [REDACTED] stating that the beneficiary worked as a Support Executive for [REDACTED] from October 1996 until October 2000.
- A second undated letter of [REDACTED] stating that the beneficiary worked for [REDACTED] for "three and a half years." The difference between [REDACTED] and [REDACTED], if any, is not explained. Further, the beneficiary's resume states that he worked for [REDACTED] from October 1996 until October 2000, a period of four years. Therefore, this letter is inconsistent with the beneficiary's resume as well as other evidence in the record of proceeding.
- April 3, 1998 letter of [REDACTED] of [REDACTED] stating that the beneficiary provided "Hardware Maintenance Services" as part of a maintenance contract with [REDACTED] for the last "1 ½ year," where he diagnosed and resolved hardware problems. The beneficiary's stated title is inconsistent with what is stated on the labor certification and resume during this period, and there is no explanation of the beneficiary's employment with an entity named [REDACTED]
- Undated letter by an illegible author for [REDACTED] stating that stating that the beneficiary was a Support Executive for [REDACTED] providing "Hardware Maintenance Services" as part of a maintenance contract with [REDACTED] since 1997.

- February 20, 2009 letter of [REDACTED] stating that the beneficiary was employed by [REDACTED] as a “Sr. Production Engineer R & D Dept” from April 25, 1989 until December 31, 1992 (which included an initial month of employment as an “Engineer Quality Control Electronic”) and that the author was his supervisor. However, the labor certification lists the beneficiary’s supervisor as [REDACTED], and states a different employment end date.
- February 24, 2009 letter of [REDACTED] stating that the beneficiary was employed by [REDACTED] as a Senior Customer Engineer from January 1993 until October 31, 1996.
- Undated letter of [REDACTED] of [REDACTED] stating that the beneficiary was employed by the company as a “Support Executive (System engineer)” from October 1, 1996 until October 1, 2000. The letter states that the beneficiary worked part-time for the first month of employment.

It is incumbent upon the petitioner to resolve the 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issues 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.

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 met that burden.

ORDER: The director’s decision is withdrawn; however, the petition is currently not approvable 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.