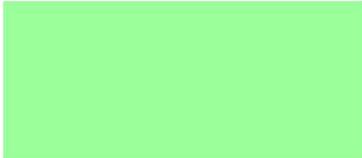


U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

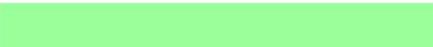
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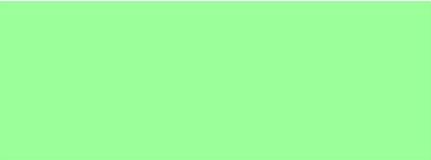
OFFICE: TEXAS SERVICE CENTER

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 Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO withdrew the director's decision and remanded the matter for further consideration. The director denied the petition a second time and certified the decision to the AAO. The director's decision will be affirmed, and the appeal will be dismissed.

The petitioner describes itself as a wool processing business. It seeks to permanently employ the beneficiary in the United States as a PLC Technician. 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).<sup>1</sup>

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 June 11, 2007. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concluded that the petition could not be approved in the skilled worker classification because the offered position did not require at least two months of training or experience.

On appeal, the AAO concluded that the director failed to consider the required postsecondary education on the labor certification, and withdrew the decision denying the petition.<sup>2</sup> The AAO also remanded the decision to the director to determine whether the beneficiary possessed the minimum education required by the terms of the labor certification, and whether the petitioner possessed the continuing ability to pay the proffered wage from the priority date.

The director issued a request for evidence (RFE), and, after receiving a response from the petitioner, denied the petition a second time and certified the decision to the AAO pursuant to 8 C.F.R. § 103.4(a)(1). The decision concluded that the petitioner established its ability to pay the proffered wage, but that the evidence in the record was not sufficient to conclude that the beneficiary possessed the minimum education required by the terms of the labor certification.

Therefore, at issue on certification is whether or not the beneficiary possessed the minimum education required to perform the offered position as set forth on the labor certification.

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<sup>1</sup> 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.

<sup>2</sup> For classification as a skilled worker, relevant postsecondary education may be considered as training. *See* 8 C.F.R. §204.5(1)(2).

The 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 (1<sup>st</sup> 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.

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: Associate's Degree.
- H.4B: Major field of study: EE or equivalent.
- H.5. Training: None required.
- H.6. Experience in the job offered: 6 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: 6 months in industrial wool PLC systems.
- H.14. Specific skills or other requirements: Will accept any suitable combination of education, experience or training.<sup>3</sup>

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<sup>3</sup> The regulation at 20 C.F.R. § 656.17(h)(4)(ii) states:

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

Part J of the labor certification states that the beneficiary's highest level of education related to the offered position is an Associate's Degree in Electrical Engineering from the [REDACTED] Uruguay, completed in 1997. The record before the AAO on appeal did not contain a copy of the diploma or transcripts for this degree. Instead, the record of proceeding contained a copy of the following certificates issued to the beneficiary:

- Certificate for attending a course at the Institute of Electrical Engineers and Electronics for the [REDACTED] August 19-22, 1997 ;
- Certificate for attending a three-hour Module on Risk Prevention in Pressure Appliances, sponsored by the [REDACTED] October 27-28, 2003;
- Certificate for attending a 20 hour continuing professional education course at the

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unless the application states that any suitable combination of education, training, or experience is acceptable.

This regulation was intended to incorporate the Board of Alien Labor Certification Appeals (BALCA) ruling in *Francis Kellogg*, 1994-INA-465 and 544, 1995-INA 68 (Feb. 2, 1998) (en banc), that “where the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer’s alternative requirements are unlawfully tailored to the alien’s qualifications . . . unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable.” The statement that an employer will accept applicants with “any suitable combination of education, training or experience” is commonly referred to as “*Kellogg* language.”

At the time the labor certification was filed, the DOL was denying labor certification applications containing alternative requirements if Part H. 14 of the application did not contain the *Kellogg* language.

However, two BALCA decisions have significantly weakened this requirement. In *Federal Insurance Co.*, 2008-PER-00037 (Feb. 20, 2009), BALCA held that the ETA Form 9089 failed to provide a reasonable means for an employer to include the *Kellogg* language on the labor certification. Therefore, BALCA concluded that the denial of the labor certification for failure to write the *Kellogg* language on the labor certification application violated due process. Also, in *Matter of Agma Systems LLC*, 2009-PER-00132 (BALCA Aug. 6, 2009), BALCA held that the requirement to include *Kellogg* language did not apply when the alternative requirements were “substantially equivalent” to the primary requirements.

Given the history of the *Kellogg* language requirement at 20 C.F.R. § 656.17(h)(4)(ii), the AAO does not interpret this phrase to mean that the employer would accept lesser qualifications than the stated primary and alternative requirements on the labor certification. To do so would make the actual minimum requirements of the offered position impossible to discern, and it would render largely meaningless the stated primary and alternative requirements of the offered position on the labor certification.

- [REDACTED] Montevideo, Uruguay, August 6-30, 1996;
- Diploma for attending a one-day seminar on "New Ideas in Illumination," sponsored by [REDACTED] July 1999;
  - Certificate for attending a one-day course on "Electrical Risk," sponsored by the [REDACTED] November 21, 2003; and
  - Certificate for attending a 20-hour marketing course sponsored by [REDACTED] January 1999.

The petition also contained a one-page evaluation of the beneficiary's credentials prepared by [REDACTED] for [REDACTED] on May 3, 2004.<sup>4</sup> The evaluation concluded that the combination of the beneficiary's diplomas from the [REDACTED] in Montevideo, Uruguay and the [REDACTED] a six-year International Baccalaureate diploma (which the author claims is equivalent to a secondary school diploma and two years of advance placement towards an Bachelor of Science in Engineering); and several post-graduate courses and training is equivalent to a Bachelor of Science in Electrical Engineering.

The evaluation did not mention any Associate's Degree in Electrical Engineering from the [REDACTED] as stated on the labor certification. The record also did not contain any diplomas for the schools mentioned in the evaluation. Accordingly, the AAO concluded that the evidence in the record did not establish that the beneficiary possessed the required education to perform the offered position, and remanded the appeal to the director for further consideration.

On August 22, 2012, the director issued a request for evidence (RFE) instructing the petitioner to submit copies of the diploma and transcripts for his secondary and postsecondary education, and to provide information about the educational institutions the beneficiary claimed to attend, including evidence of their admission requirements. The director also instructed the petitioner to submit a new credentials evaluation that only (a) considered the beneficiary's education, (b) provided a detailed analysis of the beneficiary's credentials, and (c) set forth the evaluator's qualifications and experience. The director also asked the petitioner to explain why the labor certification states that the beneficiary's highest level of education relating to the offered position is an Associate's Degree, while on appeal the petitioner claimed that the beneficiary possessed a bachelor's degree.

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<sup>4</sup> USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. See *Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. See *id.* at 795. USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. See also *Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)); *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).

The RFE response contained an evaluation from [REDACTED] from [REDACTED], dated November 2, 2012. The evaluation states that the beneficiary completed his high school education from 1985 to 1988.<sup>5</sup> Thereafter, he attended '[REDACTED]' in Salto, Uruguay from 1989 until 1994, where he studied "Electronic and Electro Technology."<sup>6</sup> The evaluation concludes that the beneficiary's studies are equivalent to a bachelor's degree in engineering with a specialization in electronics. This evaluation is approximately one page in length and does not contain a detailed analysis of the beneficiary's credentials or the evaluator's methodology.

The RFE response also contains translated transcripts for the beneficiary from [REDACTED] [REDACTED]. Elsewhere the transcripts mention [REDACTED]. The RFE response did not contain any diplomas, and the translated transcripts do not appear to definitively state that the beneficiary graduated from the program.<sup>7</sup>

In summary, the RFE response did not contain the requested diplomas or the requested information about the educational institutions the beneficiary claimed to have attended.<sup>8</sup> The record does not contain evidence establishing that the beneficiary received a degree from a postsecondary educational institution. The labor certification, the evaluation of [REDACTED] and the evaluation of [REDACTED] contain multiple inconsistencies about the beneficiary's education.<sup>9</sup> Further, the evaluations do not provide detailed support for their conclusions or methodology.

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<sup>5</sup> According to the petition, the beneficiary was born on September 27, 1972. Therefore, in 1988, the beneficiary would have turned 16 years old. Therefore, the evaluation states that the beneficiary completed his secondary education and entered university at the age of 16.

<sup>6</sup> [REDACTED] stands for [REDACTED] which is a public institution for training technicians and skilled workers in Uruguay. See [REDACTED]

<sup>7</sup> Even if the evidence in the record established that the beneficiary had graduated from a four-year [REDACTED] program, the degree would not be the foreign equivalent of an Associate's Degree. According to the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), a technical graduate (*Bachiller Técnico-Diversificado*) issued after completion of a four-year technical course of study at [REDACTED] is comparable to a vocational or other specialized high school curriculum in the United States. See <http://edge.aacrao.org>.

<sup>8</sup> Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Going on record without supporting documentary evidence is not sufficient for purposes 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)).

<sup>9</sup> 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). Doubt cast on any aspect of the petitioner's proof may, of

For these reasons, 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. The evidence in the record does not establish that the beneficiary possessed the foreign equivalent of a U.S. Associate's Degree by the priority date of the petition. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) 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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course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.