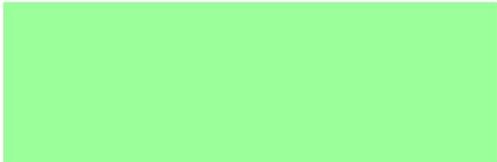


U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

(b)(6)

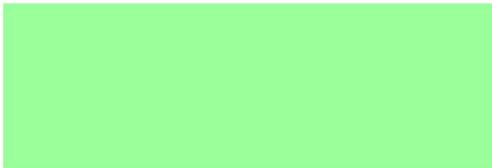


Date: **MAY 30 2013** Office: NEBRASKA SERVICE CENTER File: 

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must 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 preference visa petition was denied by the Director, Nebraska Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is a computer consulting firm. It seeks to employ the beneficiary permanently in the United States as a network administrator. As required by statute, the petition is accompanied by Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition or that the beneficiary possessed the requisite two years of experience as of the priority date. The director denied the petition accordingly.

On March 14, 2012, the AAO dismissed the subsequent appeal, affirming the director's denial. The petitioner then filed a motion to reopen the AAO decision. The record shows that the motion is properly filed and timely and includes additional evidence. Here, we will accept the motion to reopen the matter based on the new information submitted. Thus, the instant motion is granted. 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.

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.

With regard to the beneficiary's experience, as stated in the prior AAO decision, 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, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also 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).

In the instant case, the labor certification states that the offered position requires two years of experience in the job offered as a network administrator.

The prior AAO decision noted that discrepancies existed in the evidence submitted to document the beneficiary's experience including that the beneficiary claimed to have worked for [REDACTED]

[REDACTED] in Berkshire, United Kingdom and for the company in the Philippines at the same time. The AAO also noted that the explanation provided was that the United Kingdom address was for the company's headquarters, but that explanation was contradicted by the company's website which indicated that its headquarters was located in Switzerland.

With the motion, the petitioner provided a copy of [REDACTED] website indicating that it has locations globally. The petitioner also submitted a letter dated April 9, 2012 from [REDACTED] Manager for [REDACTED], stating that he was the beneficiary's supervisor at the Philippines location from January 2000 to February 2002. [REDACTED] stated that the headquarters for [REDACTED] was located in the United Kingdom until 2009 or 2010 when the headquarters moved to Switzerland, as currently appears on the website. He also stated that he worked at the offices in the United Kingdom and Philippines during the time that he supervised the beneficiary, doing so remotely when required.

The petitioner also submitted an affidavit from the beneficiary with its motion stating that he worked at the [REDACTED] location in the Philippines from January 2000 to February 2002. During that time, his supervisors were located in the United Kingdom and that all of his training "came from UK." He states that those reasons led him to list the United Kingdom office on the Form ETA 750B; he stated that if the Form ETA 750B had stated the "worksite or location" of the former employment, he would have listed the Philippines office.

As stated in the previous AAO decision, the website does not list an office in Batangas City in the Philippines; the only location in the Philippines is located in Makati City. The printout provided on motion of the [REDACTED] global locations does not include a location in Batangas City. The evidence submitted on motion is insufficient to resolve the discrepancies in the information the beneficiary provided and the evidence initially submitted. As stated in the previous AAO decision, 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 submitted no pay stubs, tax returns, or other employment records to resolve the inconsistencies and to demonstrate that the beneficiary has the experience claimed with [REDACTED]. As a result, the petitioner has not established that the beneficiary is qualified as a network administrator as of the priority date.

The AAO's previous decision stated in its discussion of whether the petitioner had the ability to pay the proffered wage that, from the record, it is unclear why the petitioner paid the beneficiary on Form 1099 as "nonemployee compensation." The Form I-140 petition requires that the petitioner pay the employee the full proffered wage at the time of adjustment and that the petitioner will be the employee's actual employer. The AAO's decision stated that in any further filings, the petitioner must establish that it will be the beneficiary's actual employer. The petitioner submitted no evidence to demonstrate that it would be the beneficiary's actual employer with its motion, so the petition will remain denied on this basis as well.

The previous AAO decision also questioned the position in which the beneficiary would be working for the petitioner. The beneficiary is currently employed in an H-1B position of Computer Support Specialist with a certified wage higher than the proffered wage in this case and which requires a Bachelor's degree in Computer Engineering. The previous decision stated that discrepancies in the requirements of the position and the wage call into doubt the veracity of the position requirements, the required minimum education, and the *bona fides* of the position. *Id.*

The only evidence submitted in response by the petitioner was the beneficiary's affidavit which stated that he would accept the lower salary and position with the petitioner because it would mean less travel and more time with his family as well as his wife being able to acquire a job. In addition, he stated that he would not want to have to find another job in today's economy and potentially move.

As stated in the previous AAO decision, no evidence was submitted to demonstrate the petitioner's intent to change the parameters of the beneficiary's employment or the business needs for such a change. No evidence was submitted with the motion to address this concern. As a result, the AAO's decision will not be disturbed.

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 reopen is granted and the decision of the AAO dated March 14, 2012 is affirmed. The petition remains denied.