

(b)(6)

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

DATE: MAY 31 2013

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Professional Pursuant to Section 203(b)(3)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(ii)

ON BEHALF OF PETITIONER:
[REDACTED]

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 employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a direct seller and manufacturer of skin care. It seeks to employ the beneficiary permanently in the United States as a senior configuration management analyst. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification. The director also found that the proffered position listed by the petitioner on the labor certification and Form I-140 was inconsistent.

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.¹

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

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 Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on December 11, 2008.² The Immigrant Petition for Alien Worker (Form I-140) was filed on November 29, 2011.

The proffered position's requirements are found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. The instructions for the ETA Form 9089, Part H, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months

¹ 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).

² If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

On the ETA Form 9089, the “job offer” position description for a senior supply chain analyst provides:

Implement product data maintenance and analysis for all Enterprise Resource Planning (ERP) in supply chain system. Work closely with various departments in U.S. and China (sometimes other Asia Pacific countries) to obtain accurate information in order to interpret into system. Develop and optimize standard process to facilitate managerial functions. Define business and ERP technical requirements and create data configuration rules. Perform data collection and validation. Evaluate problems and recommend solutions such as optimizing the standard process. Collaborate with others in the organization to ensure the successful implementation of chosen problem solutions or process. Mentor and cross-train Associate Supply Chain Analysts in data analysis procedures and practices.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the labor certification reflects the following requirements:

- H.4. Education: Master’s.
- H.4-B. Major field of study: Supply Chain Management
- H.5. Training: None required.
- H.6. Experience in the job offered: None required.
- 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: Accepted.
- H.10-A. Number of months experience in alternate occupation required: 12 months.
- H.10-B. Identify the job title of the acceptable alternate occupation: Configuration Management Analyst, Supply Risk Management Consultant.
- H.13. Is knowledge of a foreign language required to perform the job duties: Yes.
- H.14. Specific skills or other requirements: Master’s degree in Supply Chain Management and one year experience using MS Access and major ERP system. i.e. SAP, Oracle or JD Edwards. Experience using logical (such as if-else) and lookup (such as vlookup) functions in Excel. Ability to read, write and speak fluent Mandarin.

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary’s qualifications, 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).

As set forth above, the proffered position requires a Master's degree in Supply Chain Management and 12 months experience in the alternate occupation of configuration management analyst or supply risk management consultant. No alternate field of study is accepted.

On the ETA Form 9089, signed by the beneficiary, the beneficiary represented that the highest level of achieved education related to the requested occupation was "Master's." She listed the institution of study where that education was obtained as [REDACTED] and the year completed as 2005.

In support of the beneficiary's educational qualifications, the petitioner submitted a copy of the beneficiary's diploma and transcripts from [REDACTED]. It indicates that the beneficiary was awarded a Master of Business Administration (MBA) on May 14, 2005. The petitioner additionally submitted a credentials evaluation, dated January 6, 2012, from [REDACTED] Ph.D, Assistant Professor, [REDACTED] School of Business, [REDACTED] University. The evaluation describes the beneficiary's MBA from [REDACTED] as a Master of Business Administration with a concentration in Supply Chain Management. Dr. [REDACTED] further states that "Supply Chain Management is a sub-discipline of Business Administration, qualifying her MBA degree as, more specifically, a master's degree in Supply Chain Management."

The director denied the petition on January 24, 2012. He determined that the beneficiary's MBA transcripts did not reflect that neither her degree nor the transcripts reflected that she had a concentration in Supply Chain Management. The director further stated that the ETA Form 9089 did not allow for a concentration in Supply Chain Management to qualify for the position, but specifically required a Master's degree in Supply Chain Management. Finally, the director stated that the petitioner did not submit evidence that this concentrated area of study is possible at [REDACTED]

On appeal, with regard to the beneficiary's qualifying academic credentials, counsel submitted a letter from [REDACTED]. The letter on [REDACTED] letterhead signed by [REDACTED] Assistant Director, MBA Program, states that the beneficiary graduated from [REDACTED] Ms. [REDACTED] further states that the beneficiary's "MBA field of study (concentration) is in Supply Chain Management," a field of study within the university's graduate program.

As noted in Dr. [REDACTED] evaluation, the beneficiary's [REDACTED] transcripts indicate that she passed graduate level Supply Chain Management courses including: Supply Chain Practicum, Supply Chain Logistics, and Planning and Control Systems. The university's website at [http://\[REDACTED\]](http://[REDACTED]) (accessed on May 21, 2013) indicates that the university provides an

MBA with a concentration in Supply Chain Management. The website lists the Supply Chain Management curricula and notes the required courses for an MBA with a concentration in Supply Chain Management. The beneficiary's transcripts indicate that she meets the requirements for the [REDACTED] MBA with a concentration in Supply Chain Management. Therefore, the AAO concludes that the beneficiary does possess a Master of Business Administration degree with a concentration in Supply Chain Management.

Notwithstanding the beneficiary's actual degree, the AAO finds that Dr. [REDACTED] assertion that "Supply Chain Management is a sub-discipline of Business Administration" is without merit. The AAO notes that there are universities in the United States that offer graduate degree programs in Supply Chain Management outside of Business Administration. For example, the University of San Diego offers a Master of Science degree in Supply Chain Management, http://www.sandiego.edu/business/centers/supply_chain_management/MS-SCM/ (accessed May 22, 2013).

Therefore, as the beneficiary does not possess a Master's degree in Supply Chain Management, the beneficiary cannot be considered to have met the requirements for the offered position as stated on the labor certification. The director's decision that the petitioner has not demonstrated that the beneficiary possesses the degree in the required field is affirmed.

As noted in the director's decision, the position listed in the labor certification and Form I-140 have two different job titles. The job title listed on the ETA Form 9089 as certified by the DOL is "Sr. Supply Chain Analyst," with the following job duties:

Implement product data maintenance and analysis for all Enterprise Resource Planning (ERP) in supply chain system. Work closely with various departments in U.S. and China (sometimes other Asia Pacific countries) to obtain accurate information in order to interpret into system. Develop and optimize standard process to facilitate managerial functions. Define business and ERP technical requirements and create data configuration rules. Perform data collection and validation. Evaluate problems and recommend solutions such as optimizing the standard process. Collaborate with others in the organization to ensure the successful implementation of chosen problem solutions or process. Mentor and cross-train Associate Supply Chain Analysts in data analysis procedures and practices.

The job title listed on the Form I-140 is "Senior Configuration Management Analyst," with the following non-technical description of the job:

Training international subsidiary staff members in the basics of ERP data requirements, analyzing data submitted by international subsidiary for ERP conversion, design of process changes needed by international subsidiary for ERP implementation, analyzing data converted by international subsidiary for ERP conversion (mock/practice conversions and final conversions), and on-going post-implementation support of

international subsidiary for ERP implementation. She will also mentor and cross-train Configuration Management Analysts and Configuration Specialists in standard, successful procedures and practices as well as serve as a liaison between international subsidiary technical resources (IST and Supply Chain Operations) and US counterparts.

In response to the director's notice of intent to deny (NOID), the petitioner asserted that the positions were "extremely similar" and that the new position of Senior Configuration Management Analyst involved only two new duties. The first change expanded training from U.S. and China operations to other international relations. The petitioner asserts that this accounts for only a five percent difference in the job duties. The second change expanded training Supply Chain Analysts to training higher level analysts, including Configuration Management Analysts and Configuration Specialists. The petitioner asserts that this accounts for only a five to ten percent change in the job duties. Finally, the petitioner asserts that the overall job duties of Senior Configuration Management Analyst are 85 to 90 percent the same as the overall job duties of Senior Supply Chain Analyst, and that the main difference in the two positions is for whom the training is provided.

On appeal, the petitioner provides an analysis and comparison of the Senior Supply Chain Analyst and Senior Configuration Management Analyst position descriptions, dated February 23, 2012 and completed by [REDACTED] Ph.D., Professor of Operational Management & Management Science, [REDACTED] of Maryland. Dr. [REDACTED] concludes that "the difference between the two [positions] is largely in terminology rather than substance," and that the positions are "largely the same, and should be considered equivalent within this company's industry."

Although Dr. [REDACTED] states his qualifications in the analysis and comparison, as well as provides his Curriculum Vitae, Dr. [REDACTED] does not claim to be an employee of the petitioner. Although Dr. [REDACTED] states that the positions are the same within the industry, Dr. [REDACTED] does not state that he is an expert in the petitioner's industry. Rather, Dr. [REDACTED] asserts that he is familiar with the two positions "for various companies." USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). *See also 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).

Further, the AAO notes that the beneficiary listed her prior work experience on the ETA Form 9089, Section K. The beneficiary stated on the Form 9089 that she was employed by the petitioner in the position of Senior Supply Chain Analyst from February 27, 2008 to the present. The beneficiary also listed experience with the petitioner in the position of Configuration Management Analyst from February 27, 2006 to February 26, 2008. Section K.9 lists the job details of the position of Configuration Management Analyst as:

Used MS Access and a major ERP system, i.e. SAP, Oracle or JD Edwards. Used logical (such as if-else) and lookup (such as vlookup) functions in Excel. Utilized Mandarin to carry out business. Successfully achieved JDE product data conversion from legacy systems by coordinating business and ERP technical requirements. Created product data configuration rules and developed product data maintenance process by understanding business processes in terms of product development, packaging, regulatory and production planning. Analyzed projects and created plans to manage the scope of change to the product data, and followed up to ensure changes are made in a coordinated and timely manner. Mentored and cross-trained associated supply chain analysts.

The job description for a Configuration Management Analyst with the petitioner is inconsistent with the petitioner's job descriptions for both the position of Senior Configuration Management Analyst and Senior Supply Chain Analyst. Further, the separation of the two positions in the beneficiary's work experience listed in Section K of the Form 9089 evidences that the petitioner intended the position of Senior Supply Chain Analyst to be different than the position of Configuration Management Analyst.

Further evidence that the petitioner intended to distinguish between the two positions can also be seen in Section K of the Form 9089. The ETA Form 9089 lists only one other position held by the beneficiary in the related occupation of Configuration Management Analyst or Supply Risk Management Consultant. Section K.c states that the beneficiary was employed by Boston Scientific in the position of Supply Risk Management Consultant from May 30, 2005 to February 17, 2006, a total of eight months and 18 days. The Form 9089 also lists the beneficiary's experience as a Financial Analyst, Software Developer, Product Development Supervisor, Merchandiser, and Import-Export Specialist/Team Leader. None of these positions are listed in Section H.10-B as acceptable alternate occupations for the required 12 months of experience.

There is no regulatory-prescribed evidence in the record of proceeding demonstrating that the beneficiary is qualified to perform the duties of the proffered position. The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) Other documentation—

(A) General. 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.

Representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the petitioner or experience in an alternate occupation cannot be used to qualify the beneficiary for the

certified position.³ Specifically, the petitioner indicates that questions J.19 and J.20, which ask about experience in an alternate occupation, are not applicable. In response to question J.21, which asks, “Did

³ 20 C.F.R. § 656.17 states:

(h) *Job duties and requirements.* (1) The job opportunity’s requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation

.....

(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

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

(ii) *Actual minimum requirements.* DOL will evaluate the employer’s actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer’s actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer’s actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

(i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or

(ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer’s actual minimum requirements, DOL will not consider any education or training obtained by

the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?," the petitioner answered "no." The petitioner specifically indicates in response to question H.6 that no experience in the job offered is required and in response to question H.10 that 12 months experience in an alternate occupation is acceptable. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable⁴ and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation.

As detailed above the petitioner's letter submitted in response to the director's NOID states that the position of Senior Supply Chain Analyst constitutes 85 to 90 percent of the duties for the position of Senior Configuration Management Analyst. As the duties of a Senior Supply Chain Analyst are substantially comparable to the duties listed for the beneficiary's position as a Configuration Management Analyst, as confirmed by the petitioner in its letter dated January 11, 2012, the experience gained with the petitioner was in the position offered and is substantially comparable as she was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position.

the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

(i) The term "employer" means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.

(ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

⁴ A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

5) For purposes of this paragraph (i):

...
(ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

As the petitioner presents no evidence that the beneficiary possessed the required 12 months of experience in the required position of Configuration Management Analyst or Supply Risk Management Consultant outside of experience gained with the petitioner, it is apparent that the petitioner intended to rely on the beneficiary's two years of experience as a Configuration Management Analyst gained with it. As the experience gained with the petitioner must be in a position that is at least 50 percent different, this is inconsistent with the petitioner's assertions on appeal that the positions are actually substantially comparable.

Beyond the decision of the director,⁵ the petitioner has also not established that the beneficiary is qualified for the offered position. 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'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In the instant case, as noted above, the labor certification states that the offered position requires 12 months of experience as a Configuration Management Analyst or Supply Risk Management Consultant. On the labor certification, the beneficiary claims to qualify for the offered position based on two years of experience as a Configuration Management Analyst for the petitioner, and eight months and 18 days of experience as a Supply Risk Management Consultant with [REDACTED]. As noted above, the position of Senior Supply Chain Analyst and Configuration Management Analyst with the petitioner are substantially comparable, and pursuant to 20 C.F.R. § 656.17, cannot be relied upon as experience for the beneficiary to qualify for the proffered position.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). There is no regulatory-prescribed evidence in the record of proceeding demonstrating that the beneficiary is qualified to perform the duties of the proffered position.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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.

⁵ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center 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); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

ORDER: The appeal is dismissed.