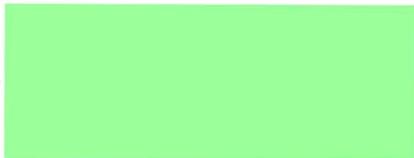


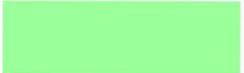
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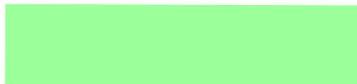
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: NOV 12 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

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,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center (the director), and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the petition remanded for a new decision.

The petitioner is a data collection, information processing and application software firm. It seeks to employ the beneficiary permanently in the United States as supervisor of software quality assurance as a skilled worker pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). Section 203(b)(3)(A)(i) of 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.

As required by statute, 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 is August 3, 2012, which is the date the labor certification was accepted for processing by the DOL. See 8 C.F.R. § 204.5(d). The director's decision concludes that the beneficiary does not have a U.S. bachelor's degree or foreign equivalent degree as required by the terms of the labor certification. The director also determined that the petitioner failed to demonstrate the beneficiary possessed the requisite experience for the equivalency. The director denied the petition on February 26, 2013.

The record shows that the appeal is properly filed, timely 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). On appeal, counsel submitted a brief, affidavits, credentials evaluations and copies of documentation already in the record.

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).

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: Bachelor's degree in Computer Science.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months.
- H.7. Alternate field of study: CIS, Software Engineering, Computer Engineering, Electrical Engineering, Electronics Engineering.
- H.8. Alternate combination of education and experience: "In lieu of a Bachelor's Degree or foreign equivalent degree we will accept, a combination of education and experience equivalent to a U.S. Bachelor's degree as determined by a qualified written evaluation prepared by a qualified evaluation service or in accordance with 8 CFR Section 212.2(h)(4)(iii)(D)" and 2-years of experience.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: Yes, 24 months as analyst or engineer.
- H.14. Specific skills or other requirements: Required experience must have been in a lead role managing testing activities for multiple applications/releases for software development or software quality; reviewing and analyzing and categorizing defects according to severity using Quality Center; performing SQL queries in QMT to extract data from databases for verification and validation; analysis and enhancement of mainframe JCLs; and use of File Aid, JAVA, SOAP, VB, AJAX, J2EE, In Sync, TSO/ISPF, WSDL, DB2, Windows XP, Oracle, and AS4000. Experience must include six months experience with gridding automation, packaging and distribution testing, scanning, scoring and reporting testing, QTP, ConvertorPro, Ultra Edit, WinSCP, IPSwitch, PRISMA, CAWA, and C# tools. Experience may be gained concurrently.

The labor certification states that the beneficiary qualifies for the offered position based on the beneficiary's highest level of education related to the offered position, which is a Bachelor's degree in Computer Science from [REDACTED] "(source of education equivalency evaluation)," [REDACTED] completed in 2006. The labor certification states that the beneficiary qualifies for the offered position based on his experience as a software engineer with [REDACTED] Florida, from February 28, 2007 until September 1, 2010 and in the proffered position with the petitioner from October 4, 2010, until August 3, 2012, the date on which the ETA Form 9089 was filed. 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 record of proceeding contains a copy of the beneficiary's degree and transcripts from the [REDACTED] India, awarded in 2001 in Computer Applications, and a copy of the beneficiary's one-year Post Graduate Diploma from [REDACTED] India awarded in Software Engineering. The record also contains six evaluations of the beneficiary's credentials.

The first evaluation of the beneficiary's credentials was prepared by Dr. [REDACTED] for Universal Evaluations on May 24, 2006. The evaluation concludes that the beneficiary's degree from the [REDACTED] in conjunction with his "3.2 years of employment" with [REDACTED], as a Software Developer, and [REDACTED] as a Software Engineer beginning in November 2003, and his "professional training in Computer Information Systems, and related areas," would be equivalent to a U.S. bachelor's degree in Computer Information Systems.

The second evaluation is from [REDACTED] PhD, an Associate Professor at [REDACTED] Department of Computer Information Systems for [REDACTED] dated March 7, 2013. The evaluator indicates that the beneficiary's three-year bachelor's degree is equivalent to three-years of undergraduate study at a regionally accredited institution of higher education in the United States. The evaluator notes that the beneficiary's Post Graduate Diploma from [REDACTED] is not from an accredited institution, but "can be equated to a one-year period of work experience." This evaluation concludes that based on the requirements for the [REDACTED] of Business Administration, Computer Information Systems degree program, and combining the beneficiary's three-year Bachelor's degree in Computer Applications, one-year post graduate diploma in Software Engineering from [REDACTED] employment with [REDACTED] from November 17, 2003 to August 4, 2006, and with [REDACTED] from February 2007 to September 2010, the beneficiary's credentials would be equivalent to a U.S. bachelor's degree with a major in Computer Information Systems.

The third evaluation is from [REDACTED] and [REDACTED] for [REDACTED] dated March 20, 2013. This evaluation concludes that the beneficiary's three-year Bachelor's degree from the [REDACTED] would be equivalent to three-years of study in the field of Computer Information Systems in the U.S. Further, the evaluators indicate that because the beneficiary did not submit a transcript including grades and credits or hours of instruction from [REDACTED] and it is not an accredited institution, they were unable to provide an academic equivalency for this portion of study. The evaluators do not indicate that the beneficiary obtained any degree equivalent to a U.S. bachelor's degree.

The fourth evaluation is from [REDACTED] Dean of Studies at [REDACTED] dated January 8, 2013. This evaluation concludes that through the beneficiary's education, specialized training and employment experience, the beneficiary has attained "the training and education that an individual would acquire by completing a U.S. Bachelor's degree in Computer Science." The evaluator relies on the beneficiary's Bachelor's degree, Post Graduate degree, and employment with [REDACTED] to reach her assessment.

The fifth evaluation is also from [REDACTED] Dean of Studies at [REDACTED]

dated February 13, 2013. This evaluation reaffirmed the conclusion of the evaluator that the beneficiary had attained the equivalent of a bachelor's degree in Computer Science at a regionally accredited college in the United States as of August 2006 through his training and education, as indicated above.

The sixth evaluation is from [REDACTED] President [REDACTED], dated February 22, 2011. This evaluation concludes that the beneficiary's three-year degree from the [REDACTED] in conjunction with his diploma from [REDACTED] which would constitute a year of specialized training in applied computing and software engineering, would be equivalent to three-years of undergraduate studies in Computer Science at a regionally accredited University in the U.S., plus one-year of advanced specialized training in applied computing and software engineering. The evaluator does not indicate any foreign degree equivalency in his evaluation.

On appeal, a review of the six evaluations submitted indicated that none of the evaluators determined that the beneficiary's three-year bachelor's degree in Computer Applications alone would be equivalent to a U.S. baccalaureate. Each one used varying combinations of the beneficiary's education and/or employment experience to arrive at their assessments. However, all of the evaluators concluded that the beneficiary did not possess a single source U.S. bachelor's degree equivalent. Moreover, the evaluations from [REDACTED] and [REDACTED] specifically rely on experience the beneficiary indicates he received from [REDACTED] from November 17, 2003 to August 4, 2006 to make their determinations that the beneficiary possesses the requisite combination of education and experience equivalent to a U.S. Bachelor's degree. This experience was not listed on the labor certification at the time of its filing. While counsel indicated that the petitioner received no notice of this issue prior to the director's decision dated February 26, 2013, the director did in fact address this issue in his request for evidence (RFE) dated January 25, 2013. Therefore, the credential evaluation information in the record was insufficient to demonstrate that the beneficiary has the foreign degree equivalent of a U.S. bachelor's degree as required under the terms of the labor certification.

On appeal, counsel indicated that the director erred in applying *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971) to the instant case because the experience received from Triangle Solutions occurred many years prior to the labor certification, and would therefore not be analogous to *Katigbak*. Counsel asserts that the experience in *Katigbak* would be considered "new facts" because the beneficiary's qualifying experience in that case actually occurred after the petition was filed, but, in the instant petition the qualifying employment would not be "new facts" because it occurred prior to the labor certification's filing. As the information was not submitted at the time the labor certification was filed, this lessens the credibility of this late asserted qualifying experience. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. While the experience referenced in the education evaluations does not appear on the labor certification,

the AAO is not inclined to follow *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), as the experience is not inconsistent with the information contained on the labor certification, the Form I-140 immigrant petition or the beneficiary's resume.

The evaluations from [REDACTED] although concluding that the beneficiary's educational and employment experience are equivalent to a U.S. bachelor's degree, do not offer specific details as to how this conclusion was drawn. They merely assert this information as fact without sufficiently describing the objective criteria used to make this determination. The director discussed this deficiency in his decision and also indicated that, although it was stated on the labor certification that the beneficiary attended the same university at which [REDACTED] serves, no further evidence was submitted in the record to demonstrate this assertion. On appeal, the petitioner did not address this issue or submit any further evidence of the beneficiary's attendance at [REDACTED] or more specific explanations from [REDACTED] as to her determinations.

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.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. 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).

As the petitioner's credential evaluations differed in their conclusions, the AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." See <http://www.aacrao.org/About-AACRAO.aspx>. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." <http://edge.aacrao.org/info.php>. Authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.¹ If placement recommendations are included, the Council Liaison works with the

¹ See *An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNA_TIONAL_PUBLICATIONS_1.sflb.ashx.

author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.²

According to EDGE, a three-year Bachelor of Science degree from India is comparable to “three years of university study in the United States.”

EDGE further discusses postgraduate diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate degree. EDGE states that a postgraduate diploma following a two-year bachelor’s degree may represent attainment of a level of education comparable to one year of university study in the United States. EDGE also states that a postgraduate diploma following a three-year bachelor’s degree may represent attainment of a level of education comparable to a bachelor’s degree in the United States. However, the “Advice to Author Notes” section states:

Postgraduate Diplomas should be issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE). Some students complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor’s degree.

In the instant case, the record does not contain any evidence establishing that the beneficiary’s postgraduate diploma was issued by an accredited university or institution approved by AICTE, or that a two- or three-year bachelor’s degree was required for admission into the program of study. In fact, the record contains no evidence that this entity is a college or university, or that the program is accredited by AICTE. Further, the evaluations from [REDACTED] PhD, and [REDACTED] and [REDACTED] for [REDACTED] indicate that [REDACTED] is not an accredited institution.

² In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien’s three-year foreign “baccalaureate” and foreign “Master’s” degree were only comparable to a U.S. bachelor’s degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien’s three-year bachelor’s degree was not a foreign equivalent degree to a U.S. bachelor’s degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

On July 30, 2013, the AAO issued an RFE to permit the petitioner the opportunity to submit further evidence that the beneficiary possessed the equivalent of a U.S. Bachelor's degree.

On the labor certification application, the petitioner indicated that the proffered job requires an applicant with a bachelor's degree or the following education:

In lieu of a Bachelor's degree or, foreign equivalent degree, will accept a combination of education and experience equivalent to a U.S. bachelor's degree as determined by a written educational equivalency evaluation prepared by qualified evaluation service or in accordance with 8 CFR § 214.2(h)(4)(iii)(D).

This regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D) states:

(D) Equivalence to completion of a college degree. For purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree in the specialty, three

years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty. If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

8 C.F.R. § 214.2(h)(4)(iii)(D)(I) is applicable in the instant case regarding an evaluation written by [REDACTED] is "an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience." Specifically, in response to the AAO's RFE, counsel submitted a letter from [REDACTED] Vice President for Academic Affairs and Academic Dean for [REDACTED] stating that Ms. [REDACTED] is the person responsible for reviewing and approving academic credit for non-academic experience, such as employment, which would then be calculated among the credits required to obtain a bachelor's degree at [REDACTED]

The petitioner claimed that it intended the terms of the labor certification to permit an alternative to a U.S. bachelor's degree or a single foreign equivalent degree. In response to the AAO's RFE, counsel submitted copies of the prevailing wage determination, all online, print and additional recruitment conducted for the position, the job order, the posted notice of the filing of the labor certification, and all resumes received in response to the recruitment efforts, which reflect that the

petitioner's intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.

Thus, the petitioner has overcome the ground for denial in the director's decision regarding the beneficiary possessing the equivalent of a Bachelor's degree in Computer Science. Accordingly, the director's decision will be withdrawn.

However, the director made no findings in his decision as to whether the beneficiary satisfied the 24 months of experience required by the labor certification, and whether the petitioner has established its continuing ability to pay the proffered wage.

The record contains an experience letter dated, August 6, 2006, from an individual who indicates his title as HR manager, on [REDACTED] letterhead, stating that the company employed the beneficiary as a [REDACTED] from November 17, 2003 until August 4, 2006. The letter does not list any duties of the beneficiary, nor does it provide a description of the beneficiary's experience. The letter also does not indicate if the position was full-time, or part-time status. The petitioner submitted two additional letters from [REDACTED] dated, May 11, 2003, and November 3, 2003 respectively, regarding the beneficiary's work experience with that entity, which also did not meet the requirements under the regulations. One of these letters was for an offer of employment therefore, it cannot confirm the beneficiary's employment as it predates the actual period of work. The other letter is an acceptance of the beneficiary's resignation, but does not indicate dates of employment or duties of the position he held with the company.

The petitioner also submitted two affidavits allegedly from former colleagues from [REDACTED]. One of the affidavits from [REDACTED] notarized December 13, 2012, indicates that the beneficiary was employed with [REDACTED] from November 17, 2001 to August 4, 2006, contradicting the dates indicated in the employer's letter of employment of the beneficiary from November 17, 2003 to August 4, 2006, which casted doubt on the beneficiary's claimed employment experience. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). However, in response to a request for evidence (RFE) issued by the AAO on July 30, 2013, counsel submitted a second affidavit from [REDACTED] notarized August 27, 2013, indicating that the dates of employment in the previous affidavit were a result of typographical error and that the beneficiary was indeed employed with [REDACTED] from November 17, 2003 to August 4, 2006.

It is noted that representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, indicate that the beneficiary's 24 months of qualifying experience is met by his experience as a software engineer with [REDACTED] Florida, from February 28, 2007 until September 1, 2010. This experience was corroborated by a photocopy of an experience letter dated December 2, 2011 from [REDACTED] human resources, on [REDACTED] letterhead stating that the company employed the beneficiary as a software engineer from February 2007 to September 2010. However, in response to the AAO's RFE, counsel submitted the original experience letter dated December 2, 2011, from [REDACTED] human resources, on [REDACTED]

letterhead. However, this second copy stated that the company employed the beneficiary as a software engineer from February 26, 2008 until October 1, 2010. The type-face and spacing of the dates of employment in the first photocopy do not match the later submitted color photocopy. No explanation is made as to why there are two letters dated the same day and appearing almost identical with the exception of the dates of employment. 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).

Therefore, the petition will be remanded to the director for the consideration of these issues, and any other issue the director deems appropriate. The director may request additional evidence from the petitioner, if needed, and the petitioner may submit additional evidence within a reasonable time period to be set by the director. The director will then issue a new decision.

As always in visa petition proceedings, the burden of proof rests entirely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

ORDER: The director's decision dated February 26, 2013 is withdrawn. The petition is remanded to the director for the issuance of a new decision.