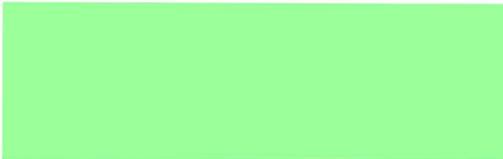


(b)(6)

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: **NOV 14 2013** OFFICE: TEXAS SERVICE CENTER FILE: [REDACTED]

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

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:
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) 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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the appeal. The matter is now before the AAO on the petitioner's motion to reopen and motion to reconsider. The motions will be approved. The AAO's dismissal of the appeal will be affirmed.

The petitioner describes itself as a business consulting firm. It seeks to permanently employ the beneficiary in the United States as a Clarity Functional/Technical Specialist. The petitioner requests classification of the beneficiary 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).

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment 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 November 30, 2009. See 8 C.F.R. § 204.5(d).

The director's decision denying the petition concluded that the beneficiary did not possess a U.S. bachelor's degree or foreign equivalent as required by the terms of the labor certification. The AAO affirmed this decision and dismissed the appeal on August 30, 2013.

Counsel has filed a motion to reopen and a motion to reconsider, asserting that the beneficiary's qualifications meet the terms of the labor certification and the skilled worker visa classification. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or CIS policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. The AAO will accept counsel's motion as a motion to reopen and to reconsider, but for the reasons set forth below, will affirm its prior decision, dismissing the appeal.

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 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.

It is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of the United States Citizenship and Immigration Services (USCIS) not DOL to determine if the beneficiary qualifies for the offered

position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.¹

In this proceeding, the petitioner has requested classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i).²

¹The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d 1006, 1008 (9th Cir. 1983), stated:

The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

² Employment-based immigrant visa petitions are filed on Form I-140, Immigrant Petition for Alien Worker. The petitioner indicates the requested classification by checking a box on the Form I-140. The Form I-140 version in effect when this petition was filed has separate boxes for the professional and skilled worker classifications. In the instant case, the petitioner selected Part 2, Box f of Form I-140 for a skilled worker. The beneficiary was previously sponsored under the EB 2, advanced degree professional category, but denied. Based on the advanced degree and experience requirements, as well as salary, it is not clear that the appropriate category should be as a skilled worker.

In the instant case, the ETA Form 9089 labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Bachelor's.
- H.4B Major field of study: Computer Science.
- H.5. Training: None required.
- H.6. Experience in the job offered: 84 months.
- H.7. Alternate field of study: Computer Engineering.
- 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.10A Number of months of experience in alternate occupation required: 84
- H.10B Identify the job title of the acceptable alternate occupation: Clarity Specialist
- H.14. Specific skills or other requirements: Specific skills or other requirements: The 7 years of experience noted above must include: (a) five years working with relational databases (e.g., Microsoft SQL Server/Oracle) including stored procedure and function development; (b) three years of JAVA development and Clarity studio, including custom object configuration, NSQL, GEL script, and portlet development; (c) two years conducting business systems analysis, experience with Clarity integration with other enterprise software, Clarity XOG interface, XML and JavaScript, developing use cases, and user training, and (d) 1 year experience in Clarity's Financial Module and working with HTML.

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).

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(B), governing the skilled worker visa category, states:

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the [labor certification]. The minimum requirements for this classification are at least two years of training or experience.

The determination of whether a petition may be approved for a skilled worker is based on the requirements of the job offered as set forth on the labor certification. *See* 8 C.F.R. § 204.5(1)(4). The labor certification must require at least two years of training and/or experience. Accordingly, a petition for a skilled worker must establish that the job offer portion of the labor certification requires at least two years of training and/or experience, and the beneficiary meets all of the requirements of the offered position set forth on the labor certification.

In evaluating 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 *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).

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.

Contrary to counsel’s suggestion, the AAO finds nothing on the ETA Form 9089 to establish that the bachelor’s degree required by the ETA Form 9089 may be acceptable as some kind of unspecified formula substituting experience for education instead of only undergraduate university or college academic study culminating in a bachelor’s degree as representative of an educational equivalent. The ETA Form 9089 further provided that an alternative combination of education and experience would not be acceptable. As stated in the AAO’s previous decision, the beneficiary’s Indian degree was a 3-year course of study, and was comparable to the U.S. equivalent of three years of undergraduate study, not the U.S. equivalent of a bachelor’s degree. A United States bachelor’s degree generally requires four years of education. See *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). See also *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008)(upholding USCIS interpretation that the term “bachelor’s or equivalent” on the labor certification necessitated a single four-year degree). Further, as used by the two credentials evaluations submitted by the petitioner, the formula to equate three years of experience for one year of education does not apply to immigrant petitions. That equivalence applies to non-immigrant H-1B petitions, not to immigrant petitions. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

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). 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. As expressed in the AAO’s previous decision, the AAO does not find the determination of the credentials evaluations probative in this matter.

The AAO's decision of August 30, 2013 acknowledged counsel's reference to the dissolution of The National Council on the Evaluation of Foreign Educational Credentials. However, the AAO believes there are ample grounds for its reliance upon the opinion of the American Association of Collegiate Registrars and Admissions Officers (AACRAO) and its Electronic Database for Global Education (EDGE) in the evaluation of foreign academic credentials. "With the dissolution of the National Council on the Evaluation of Foreign Educational Credentials (The Council) the placement recommendations in EDGE are the only standards reviewed and approved by a higher education organization that is non-profit, voluntary, and broadly representative of American higher education. AACRAO was the charter member of The Council and is comprised of over 10,000 registration and admission professionals who represent approximately 2500 institutions in more than 30 countries."³ It is noted that the petitioner's two credentials evaluations did not find that the beneficiary had the U.S. equivalent of a bachelor's degree based on academic studies alone, but rather the equivalent of three years of undergraduate study at an accredited U.S. institution of higher learning. Only after substituting experience for university study did the evaluations determine that the beneficiary had the U.S. equivalent of a Bachelor's degree. As this analysis is not supported by the language of the labor certification or the advertisement documentation submitted, the AAO does not find the determination of the credentials evaluations probative in this matter.

Neither the ETA Form 9089 nor the recruitment documentation submitted established that an equation of accepting experience in lieu of education was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers. It did not define any equivalency to allow for any combination of education and experience that would have informed U.S. workers without a Bachelor's degree that they were eligible to apply for the position.

On motion, counsel also submits copies of two letters, dated January 7, 2003 and July 23, 2003, respectively, signed by [REDACTED] of the INS Office of Adjudications to counsel in other cases, expressing his opinion about the possible means to satisfy the requirement of a foreign equivalent of a U.S. advanced degree for purposes of 8 C.F.R. 204.5(k)(2). Within the July 2003 letter, Mr. [REDACTED] states that he believes that the combination of a post-graduate diploma and a three-year baccalaureate degree may be considered to be the equivalent of a U.S. bachelor's degree.

Private discussions and correspondence solicited to obtain advice from USCIS are not binding on the

³<http://www.foreitncredentials.org/about-fcsa/the-edge-standard-of-evaluation> (accessed October 30, 2013). "In addition to AACRAO being the premier publisher of references on foreign educational systems since the mid-1950's with the World Education Series, the Projects for International Education Research (PIER), the AACRAO Country Studies, and the recent web based [EDGE], AACRAO has been evaluating foreign credentials since 1965. From 1965 until 1991, AACRAO was responsible for evaluating foreign education for the US Agency for International Development (USAID), Office of International Training, Academic Advisory Service. In 1991, with the end of USAID's scholarship program for developing nations, AACRAO created International Education Services to provide evaluations for AACRAO member institutions as well as the general public." <http://ies.aacrao.org/about/> (accessed October 30, 2013).

AAO or other USCIS adjudicators and do not have the force of law. *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); *see also*, Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).

Additionally, although 8 C.F.R. § 204.5(k)(2), (for an advanced degree visa category) as referenced by counsel and in Mr. [REDACTED] correspondence, permits a certain combination of progressive work experience and a bachelor's degree to be considered the equivalent of an advanced degree, there is no comparable regulatory provision to substitute work experience for undergraduate university course work in the skilled worker visa category, except possibly where the experience is explicitly and specifically permitted as an educational substitute on the labor certification and in the recruitment advertisements, which is not the case here. (See footnote 5 of AAO decision of August 30, 2013).

The evidence in the record fails to show that the beneficiary meets the educational requirements of the labor certification of the required Bachelor's in Computer Science. The evidence in the record failed to demonstrate that the terms of the labor certification permitted applicants without a U.S. bachelor's degree but with an unspecified educational equivalency based on a combination of education and experience to qualify for the offered job, as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.

The petitioner failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification by the priority date. Therefore, the beneficiary does not qualify for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. Based on the foregoing, the petitioner's motion does not qualify as a motion to reopen or reconsider and will be dismissed.

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 motion to reopen and motion to reconsider is approved. The AAO's decision of August 30, 2013 is affirmed. The petition remains denied.