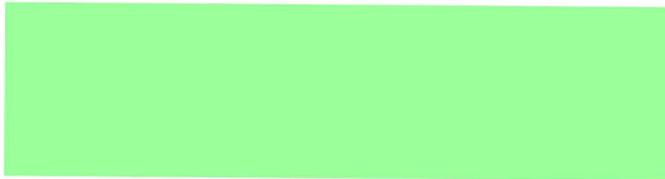


(b)(6)

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

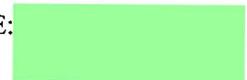


U.S. Citizenship
and Immigration
Services



DATE: OCT 03 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 (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,

Rachel Nitro
for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a manufacturer and fabricator of flat glass products. It seeks to permanently employ the beneficiary in the United States as a computer systems analyst. 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).

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL). The priority date of the petition, the date on which DOL accepted the labor certification for processing, is March 25, 2005. See 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess the four-year U.S. bachelor's degree or foreign equivalent required by the terms of the labor certification.

The record shows that the appeal is properly filed 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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

On appeal, counsel for the petitioner, referencing *Grace Korean United Methodist Church v. Chertoff*, 437 F.Supp. 2d 1174 (D.Or. 2005),² contends that United States Citizenship and Immigration Services (USCIS) lacks the authority to interpret the petitioner's job requirements on the Form ETA 750 as they are ambiguous and subject to more than one interpretation. She asserts that

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 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 In *Grace Korean United Methodist Church*, a federal district court held that USCIS lacked "the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." *Id.* At 1179. However, while the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. See *Matter of K-S-*, 20 I&N Dec. 715, 719 (BIA 1993). The AAO also notes that a judge in the same district subsequently held that the assertion that DOL certification precludes USCIS from considering whether the alien meets the educational requirements specified in the labor certification is wrong. *Snapnames.com, Inc. v. Chertoff*, 2006 WL 3491005 *5 (D.Or. Nov. 30, 2006).

USCIS has erred in focusing solely on the “4” entered in Part A.14. of the labor certification as proof that the petitioner’s minimum educational requirement for the offered position is a four-year U.S. bachelor’s degree and that it has failed to consider other factors that prove the 4 was a typographical error, including the petitioner’s explanation of the ambiguous phrase “bachelor or educational equivalent” found under “College Degree Required (specify)” in Part A.14. Such action on the part of USCIS, counsel asserts, jeopardizes the integrity of the labor certification process by minimizing and neglecting the roles of DOL and the petitioner in that process.

To demonstrate that the petitioner’s minimal educational requirements for the offered position were not limited to a U.S. bachelor’s degree, counsel points to the recruitment process for the position, which, she notes, was supervised by DOL. In that process, counsel contends, the petitioner consistently stated its minimal educational requirement as a bachelor’s degree, educational equivalent, or equivalent education and experience in information technology or a related field. She suggests that had DOL been concerned about any discrepancies between the educational requirement language used during recruitment and that indicated on the Form ETA 750, it would have raised these concerns with the petitioner at that time.

Counsel also references several decisions issued by DOL’s Bureau of Alien Labor Certification Appeals (BALCA), which, she asserts, stand for the proposition that a DOL certification officer should not deny a labor certification for harmless de minimis error. She contends that if BALCA has found that harmless error should not result in the denial of a labor certification, a USCIS adjudicator should not have the authority or justification to deny a Form I-140 petition on the basis of such an error.³ BALCA’s decisions, counsel states, demonstrate that USCIS’ denial of the instant petition is unreasonable and contrary to due process.

In support of her assertions, counsel submits copies of the petitioner’s advertisements for the offered position in the [REDACTED] for the period April 29 to May 1, 2007; a signed June 13, 2007 internal posting notice for the position; a copy of DOL Recruitment Report Instructions, dated May 17, 2007; and a copy of meeting notes from an April 30, 2008 meeting between representatives of the American Immigration Lawyers Association (AILA) and the Nebraska Service Center (NSC), evidence that she contends has been disregarded by USCIS.

Counsel further states that an AAO decision issued on January 20, 2004⁴ offers proof that USCIS has already acknowledged that beneficiaries holding the equivalent of a bachelor’s degree may qualify for classification as a skilled worker under section 203(b)(3) of the Act. She also asserts that the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D) provides the formula for such equivalency determinations,

³ Although counsel asserts that these BALCA decisions should influence USCIS adjudication of Form I-140 petitions, the AAO notes that BALCA decisions are not binding on USCIS.

⁴ The January 20, 2004 decision referenced by counsel is unpublished. While 8 C.F.R. § 103.3(c) provides that USCIS precedent decisions are binding on all employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

allowing three years of professional experience to substitute for one year of college-level training. The petitioner, counsel contends, has provided a credible evaluation of the beneficiary's education and experience that has used this formula to find the beneficiary's work experience, when combined with his education, to be the equivalent of a U.S. bachelor's degree. She states that USCIS has unfairly challenged the submitted evaluation in its denial of the visa petition, failing to provide the petitioner with an opportunity to respond to its concerns.

Roles of DOL and USCIS

At the outset, the AAO will respond to counsel's assertions regarding the role of USCIS versus that of DOL in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The 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.

It is significant that none of the above inquiries assigned to DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).⁵ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

. . .

⁵ Based on revisions to the Act, the current citation is section 212(a)(5)(A).

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

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).

Therefore, 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 USCIS 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.

Classification under Section 203(b) of the Act

In the instant case, the petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A).⁶ Section 203(b)(3)(A)(i) of the Act provides for the granting of 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. *See also* 8 C.F.R. § 204.5(1)(2).

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(B) 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. Relevant post-secondary education may be considered as training. *See* 8 C.F.R. § 204.5(1)(2).

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 that the beneficiary meets all of the requirements of the offered position set forth on the labor certification as of the priority date, which in the present case is March 25, 2005.

⁶ 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 did not have separate boxes for the professional and skilled worker classifications. However, while the petitioner selected Part 2, Box e of Form I-140 for a professional or skilled worker, the letter accompanying the Form I-140 petition indicates that the petition should be considered under the skilled worker classification.

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 *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).

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

EDUCATION

Grade School: 8 years.

High School: 4 years.

College: 4 years.

College Degree Required: Bachelor or Educational Equivalent.

Major Field of Study: Information Technology or related field.

TRAINING: None Required.

EXPERIENCE: One year in the job offered or in the related occupations of Computer Systems Analyst, Systems Analyst, Programmer or combination.

OTHER SPECIAL

REQUIREMENTS: One year of experience must include work with Clipper programming language.

The beneficiary possesses a Diploma for a Title of Higher Technician from the [redacted] in Venezuela awarded in 1993, which is equivalent to three years of university study in the United States rather than the four years required by Part A.14. of the labor certification. He also claims more than seven years and six months of work experience in information technology and related areas.

The plain language of the labor certification in this case does not permit a lesser degree, a combination of lesser degrees, and/or a quantifiable amount of work experience, such as that possessed by the beneficiary.⁷ Nonetheless, on May 1, 2013, the AAO issued a Request for Evidence (RFE), providing

⁷ The DOL has provided the following field guidance: “When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the [labor certification] as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative

the petitioner an opportunity to submit evidence that it had intended the labor certification to allow for an alternative to a U.S. bachelor's degree or a single foreign equivalent degree, as that intent was expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.⁸ Specifically, the AAO asked the petitioner to provide copies of the documentation prepared in accordance with prior DOL labor certification regulations at 20 C.F.R. § 656, including a signed recruitment report for the offered position, the prevailing wage determination for the position, all online and print recruitment conducted for the position, the posted notice of the filing of the labor certification and all resumes received in response to its recruitment efforts. The petitioner was also asked to submit copies of any communications with DOL that might be probative of its intent.

In response, counsel has reiterated her assertions on appeal, contending that the "4" entered in Part A.14. of the labor certification is the result of typographical error and that at no time during the recruitment process supervised by DOL did the petitioner state or imply that only a candidate with a four-year bachelor's degree could satisfy its requirements for the offered position. Instead, counsel contends, the petitioner specifically articulated various educational options, including equivalent education and experience.

In support of these claims, counsel again submits copies of the signed and dated internal posting notice for the offered position; the [redacted] advertisements for the offered position; the DOL Recruitment Report Instructions, dated May 17, 2007; and the notes from the April 30, 2008 meeting between AILA

in order to qualify for the job." See Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). The DOL's certification of job requirements stating that "a certain amount and kind of experience is the equivalent of a college degree does in no way bind [USCIS] to accept the employer's definition." See Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Lynda Won-Chung, Esq., Jackson & Hertogs (March 9, 1993). The DOL has also stated that "[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree." See Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

⁸ In limited circumstances, USCIS may consider a petitioner's intent to determine the meaning of an unclear or ambiguous term in the labor certification. However, an employer's subjective intent may not be dispositive of the meaning of the actual minimum requirements of the offered position. See *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008). The best evidence of the petitioner's intent concerning the actual minimum educational requirements of the offered position is evidence of how it expressed those requirements to the DOL during the labor certification process and not afterwards to USCIS. The timing of such evidence ensures that the stated requirements of the offered position as set forth on the labor certification are not incorrectly expanded in an effort to fit the beneficiary's credentials. Such a result would undermine Congress' intent to limit the issuance of immigrant visas in the professional and skilled worker classifications to when there are no qualified U.S. workers available to perform the offered position. See *Id.* at 14.

and NSC representatives. She has additionally provided a copy of DOL Recruitment Instructions, dated May 17, 2007. The petitioner has not, however, submitted its signed recruitment report for the offered position, the prevailing wage determination or any resumes received in response to its recruitment efforts,⁹ and counsel does not indicate that such documentation was unavailable. Neither has the petitioner provided evidence of its online recruitment efforts nor indicated that the *Fresno Bee* advertisements it has submitted represent the only times the offered position was advertised in print.

The AAO acknowledges that the petitioner's posting notice and the job advertisements from the *Fresno Bee* indicate that the offered position was open to job candidates with a bachelor's degree, its educational equivalent or equivalent education and experience in information technology or a related field. However, in the absence of the petitioner's recruitment report, the prevailing wage determination for the offered position, documentation of the petitioner's online recruitment for the position or any resumes received in response to its efforts in fill the position, the posting notice and newspaper advertisements are insufficient to establish that the petitioner expressed an explicit, specific intent to both DOL and potentially qualified U.S. workers of its willingness to accept an alternative to a U.S. bachelor's degree or single foreign equivalent degree.

"[F]ailure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition." See 8 C.F.R. § 103.2(b)(14). Here, the petitioner has failed to submit evidence requested by the AAO, evidence with a direct bearing on its intent regarding the minimal educational requirements for the offered position, and has offered no explanation as to why it was unable to do so. Accordingly, the AAO finds the petitioner's failure to submit this evidence to have precluded a material line of inquiry and will dismiss the appeal pursuant to the regulation at 8 C.F.R. § 103.2(b)(14). Moreover, in the absence of the requested evidence, the petitioner has failed to establish that the terms of the labor certification are ambiguous and that it intended the labor certification to require less than a four-year U.S. bachelor's or foreign equivalent degree, as that intent was expressed during the labor certification process to DOL and potentially qualified U.S. workers.

It is, therefore, concluded that the terms of the labor certification require a four-year U.S. bachelor's degree in information technology or a related field, or a foreign equivalent degree. The beneficiary does not possess such a degree and, as a result, was not qualified for the offered position as of the priority date. Accordingly, the AAO finds that the beneficiary does not qualify for classification as a skilled worker pursuant to section 203(b)(3) of the Act.

The appeal will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, it is the petitioner's burden to establish

⁹ The AAO notes the copy of the May 17, 2007 DOL Recruitment Report Instructions submitted for the record, which reflects that no qualified applicants expressed interest in the offered position to DOL, resulting in the transmission of no resumes to the petitioner. It does not find this document to also establish that the petitioner did not receive resumes directly from potential job applicants, which could have been submitted in response to the May 1, 2013 RFE.

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NON-PRECEDENT DECISION

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eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.