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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

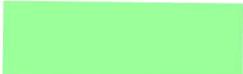


U.S. Citizenship
and Immigration
Services



DATE: **OCT 08 2013**

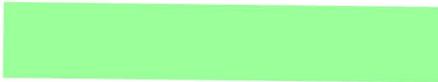
OFFICE: TEXAS SERVICE CENTER

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition, concluding that the petitioner had not demonstrated its ability to pay the proffered wage. The petitioner appealed the decision to the Administrative Appeals Office (AAO) with additional evidence not submitted to the director. The AAO remanded the matter to the director, indicating that based on the new evidence provided with the appeal, and additional evidence provided in response to the AAO's Request for Evidence (RFE), the petitioner had established its ability to pay the proffered wage, but concluded that the petitioner had not established the beneficiary was qualified for the instant petition. The director issued a Notice of Intent to Deny (NOID), dated September 5, 2012, regarding this issue. The petitioner responded to the NOID on October 4, 2012, and the director found the petitioner had not established that the beneficiary met the qualifications of the labor certification. On October 15, 2012, the director certified his decision for review to the AAO. Upon careful review, the AAO will affirm the director's decision and deny the petition.

Certifications by field office or service center directors may be made to the AAO "when the case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1). The regulations further state, in pertinent part, as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." 8 C.F.R. § 103.4(a)(4). "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5). The AAO conducts its review on a *de novo* basis, before issuing a decision. See *Soltane v. DOJ*, 361 F.3d 1143 (3d Cir. 2004).

The procedural history in this case is well documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner describes itself as a software company. It seeks to permanently employ the beneficiary in the United States as a Programmer 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).¹

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, which is the date the DOL accepted the labor certification for processing, is July 21, 2007. See 8 C.F.R. § 204.5(d).

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The director's decision as certified to the AAO concludes that the beneficiary did not possess the minimum experience required to perform the offered position as of the priority date.

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (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).

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.

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 / Engineering (any branch)."
- H.5. Training: None required.
- H.6. Experience in the job offered:² 24 months.
- 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: 24 months.

² The petitioner listed the job title on the labor certification in H.3 to be "Programmer Analyst" with the following job duties listed in H.11: "Analyze and design software applications using Oracle, VB, .Net, XML, SQL, C, C++, Pro C, etc [*sic*] under Windows; analyze requirements to recommend business solutions; create technical specification [*sic*] and design strategies; create and implement test plans; perform unit, system and integration testing; develop user manuals."

H.10-B. Acceptable alternate occupation: "Software Engineer / Analyst / Programmer / Developer / Similar."

H.14. Specific skills or other requirements:

"Note: Employer will accept any suitable combination of education, training or experience equivalent to the minimum requirements of this position and is not limited to titles listed in Item 10-B. Travel involved to unanticipated client locations within US."

The labor certification also states that the beneficiary qualifies for the offered position based on experience as: (1) a Senior Systems Analyst with [redacted] India, from November 2, 2005, until May 22, 2006; (2) a Programmer with [redacted] in [redacted] India, from March 1, 2005, until October 31, 2005; (3) a Software Developer with [redacted] India, from June 21, 2004, until February 28, 2005; (4) a Software Engineer with [redacted] India, from April 9, 2002, to June 19, 2004. The beneficiary also listed employment experience with the petitioner.³ The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

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.

The record contains experience letters from several employers regarding the beneficiary's prior employment experience, as shown in the following table.

Employer	Position	Dates	Job duties
[redacted]	Software Engineer	4/9/2002 to 06/19/2004 (26 months)	"[D]esign and develop applications using ASP.Net, ASP, Visual Basic, HTML, DHTML, CSS, Java Script, VBScript, ADO, Active X, Crystal Reports, Com, etc."
[redacted]	Software Developer	6/21/2004 to 2/28/2005 (8)	"Analysis, design, develop and maintain Software

³ When determining whether a beneficiary has the required minimum experience for a position, USCIS generally will not consider experience gained by the beneficiary with the petitioner in the offered position. See 20 C.F.R. § 656.17(i). In addition, the petitioner indicated in J.21 that the beneficiary did not gain any of the qualifying experience with the petitioner.

		months)	applications using Asp.Net, C#, VB.Net, ADO.Net, XML, SXML, HTML, DHTML, Java Script, UML, Oracle, Crystal Reports, Visual Studio, etc.”
	Programmer	3/1/2005 to 10/31/2005 (8 months)	“Analysis, design, develop and maintain Software applications using Asp.Net, C#, VB.Net, ADO.Net, XML, SXML, HTML, DHTML, Java Script, UML, Oracle, Crystal Reports, Visual Studio, etc.”
	Senior Systems Analyst	11/2/2005 to 05/22/2006 (6 months)	“White box testing of DTD, XML, XSL, SXML, S-Path, X-Query, XML DOM, Test Requirement analysis, Test Design, Test scripting, Defect tracking on windows, etc.”

Part H.6 of the labor certification requires 24 months of experience in the job offered, Programmer Analyst, and Part H.11 states the following duties of the job offered:

Analyze and design software applications using Oracle, VB, .Net, XML, SQL, C, C++, Pro C, etc [sic] under Windows; analyze requirements to recommend business solutions; create technical specification [sic] and design strategies; create and implement test plans; perform unit, system and integration testing; develop user manuals.

Part 10.B of the labor certification states that the petitioner will alternately require 24 months of experience in an alternate occupation as a “Software Engineer / Analyst / Programmer / Developer / Similar.” The regulation at 20 C.F.R. § 656.17(h)(4)(i) states the following:

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

At issue in this matter is whether the alternative experience the beneficiary may possess as a “Software Engineer / Analyst / Programmer / Developer / Similar” is “substantially equivalent” to the primary requirements of the job offered.

The record contains a notarized letter, dated September 24, 2012, from the Vice President of [REDACTED], stating that the beneficiary was employed full-time from April 9, 2002, to June 19, 2004, as a “Software Engineer” (quotes in original). As stated above, the labor certification requires 24 months of experience in the position offered with the following duties:

Analyze and design software applications using Oracle, VB, .Net, XML, SQL, C, C++, Pro C, etc [sic] under Windows; analyze requirements to recommend business solutions; create technical specification [sic] and design strategies; create and implement test plans; perform unit, system and integration testing; develop user manuals.

As stated above, the labor certification states that the beneficiary gained the following experience at [REDACTED] (which is similarly stated in the experience letter from this employer):

[D]esign and develop applications using ASP.Net, ASP, Visual Basic, HTML, DHTML, CSS, Java Script, VBScript, ADO, Active X, Crystal Reports, Com, etc; involve [sic] in designing the architecture of the project; design and develop user interface reports; create reports; test software.”

The description provided is vague and provides little detail regarding the beneficiary’s claimed experience with designing or developing applications, project architecture, user interface reports; and testing software. This demonstrates that the only job duties that appear to be the same between the job duties of the beneficiary’s position at [REDACTED] and the instant position are developing applications using Visual Basic. The petitioner has not demonstrated how the beneficiary’s other job duties at [REDACTED] were “substantially equivalent” to the requirements of the instant position. See 20 C.F.R. § 656.17(h)(4)(i). This experience letter also does not indicate that the beneficiary has any experience with creating or implementing test plans. It is unclear from this experience letter if the beneficiary has any experience in analyzing requirements in order to recommend business solutions, in developing user manuals,⁴ or in creating technical specifications or design strategies. Therefore, the petitioner has

⁴ The AAO notes that the development of a user manual is normally performed by employees in a different occupational classification, that of a technical writer. See Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2012-13 Edition*, <http://www.bls.gov/ooh/media-and-communication/technical-writers.htm> (accessed August 26, 2013) (technical writers produce instruction manuals and other supporting documents to communicate complex, technical information more easily). None of the beneficiary’s experience letters document any experience in this occupation, or a similar occupation. Additionally, the record contains a later-filed labor certification, filed on October 22, 2012, which includes a description of the beneficiary’s job duties with the petitioner. While the labor certification in the instant matter indicates that the beneficiary developed user manuals, the later filed labor certification does not document any experience in this occupation. This casts doubt on the terms of the job opportunity as

not established that the beneficiary's employment experience with [REDACTED] meets the requirements of the labor certification.

Additionally, the similarity of the language on the labor certification and the language of the employment letter from [REDACTED] casts further doubt on this employment letter. On the labor certification, the beneficiary claimed that her more than two years of employment experience with [REDACTED] included: "[D]esign and develop applications ... involve [sic] in designing the architecture of the project; design and develop user interface reports; create reports; test software." However, the employer's letter also only provides a brief, vague description of the beneficiary's experience, which lasted more than two years. The employer's letter indicates that the beneficiary's duties included: "design and develop applications ... [s]he was also involved in designing architecture of the project, designing and develop user interface reports, creating reports and testing software." The job duties described in this letter mirror those claimed by the beneficiary on the labor certification, are stated in nearly identical terms as those on the labor certification, and are listed in an identical order. This casts doubt on the experience letter, suggesting it was not prepared based on the employer's direct knowledge of the beneficiary's employment and suggesting it was a replication of the terms of the labor certification. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* The employer's experience letter was written on September 24, 2012, after the labor certification was certified. The record does not contain any documentation that demonstrates where the language of these job duties as stated on the labor certification originated. Therefore, the petitioner has not demonstrated that the beneficiary's experience with [REDACTED] is "substantially equivalent" to the primary requirements of the instant position, as stated above, the petitioner has not demonstrated that the beneficiary's experience with [REDACTED] is qualified for the instant position.

As stated above, the position requires 24 months of experience in the position offered, or in the alternative, 24 months of experience as a "Software Engineer / Analyst / Programmer / Developer / Similar." The beneficiary's remaining employment experience with [REDACTED] viewed together, constitutes a total of 22 months of experience, which would not be sufficient to meet the terms of the labor certification, and therefore does not qualify the beneficiary for the instant position. The AAO also notes that the petitioner has not established that the beneficiary's experience with

stated on the labor certification. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.*

these employers is “substantially equivalent” to the primary requirements of the position offered. As noted above, while the letters list various technologies utilized by the beneficiary in the course of employment, the letters do not sufficiently describe the employment experience or establish the beneficiary gained experience in substantial portions of the position offered, such as analyzing requirements to recommend business solutions or in developing user manuals. The record contains an experience letter from [REDACTED] dated September 21, 2012, which does not indicate whether the beneficiary’s employment was full-time or part-time. Therefore, the AAO cannot determine the extent of the beneficiary’s experience with [REDACTED].

The record contains a notarized experience letter, dated September 12, 2012, from the “Manager – HR” of [REDACTED] stating that the beneficiary was employed full-time as a Programmer, and listing her duties. Of these duties, the only ones that correlate with the duties of the instant position stated in Part H.11. of the labor certification are in the analysis, design, and development of software applications using Visual Basic and Oracle. This experience letter also does not demonstrate that the beneficiary gained experience in recommending business solutions or in developing user manuals. Therefore, the petitioner has not established that the beneficiary’s experience with [REDACTED] is substantially equivalent to the requirements of the position offered as stated on the labor certification.

The record also contains a notarized letter, dated September 28, 2012, from the “Group Manager – HRD” at [REDACTED] stating that the beneficiary was a full-time employee working 40 hours per week as a Senior Systems Analyst from November 2, 2005 to May 22, 2006. The writer indicates that the beneficiary’s duties included “[w]hite box testing ... Test Requirement analysis, Test Design, Test scripting, Defect tracking ... [s]he was also involved in performing Functional Unit and Integration testing of program change requests.” These job duties are inconsistent with the job duties the beneficiary claimed on the labor certification, which included “analysis, design, development, maintenance and support of software applications ... perform unit and integration testing; implement program change request.” Additionally, the record contains an earlier experience letter, dated May 22, 2006, from an “Associate Vice President – HRD” on [REDACTED] letterhead stating that the company employed the beneficiary from November 2, 2005 to May 22, 2006. However, the letter states that the beneficiary’s “last assignment” was in the “role” of Senior Systems Analyst. The letter does not indicate what role(s) the beneficiary held previously, or for what duration each role was held by the beneficiary. The subsequent letter, dated September 28, 2012, indicates that the beneficiary only held one position at [REDACTED]. Doubt cast on any aspect of the petitioner’s evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* Therefore, the petitioner has not established that the beneficiary’s experience with [REDACTED] qualifies the beneficiary for the instant position.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

In visa petition proceedings, it is the petitioner's burden to establish 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 director's decision to deny the petition is affirmed.