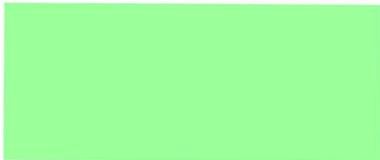




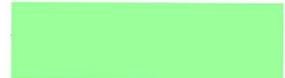
U.S. Citizenship  
and Immigration  
Services

(b)(6)



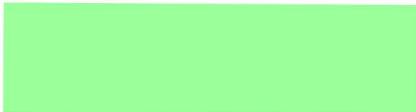
DATE: SEP 11 2013

OFFICE: NEBRASKA SERVICE CENTER FILE:



In re:

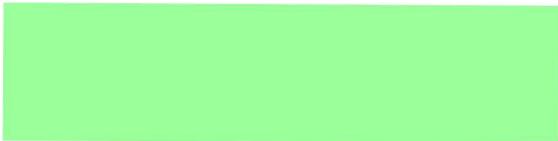
Petitioner:



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,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center (the director), and the Administrative Appeals Office (AAO) dismissed the subsequent appeal. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motion to reopen will be dismissed, the motion to reconsider will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner describes itself as a cable harness assembly business. It seeks to permanently employ the beneficiary in the United States as a manufacturing engineer. 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), 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 April 27, 2001. *See* 8 C.F.R. § 204.5(d). The director's decision denying the petition concluded 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.

On appeal, the AAO affirmed the director's finding that the petitioner failed to establish that the beneficiary has a U.S. bachelor's degree or foreign equivalent degree as required by the terms of the labor certification. The AAO also found that the evidence in the record did not establish that the beneficiary possesses the required experience for the offered position.

The record shows that the motion 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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon motion.<sup>1</sup> On motion, counsel submits a brief, a letter regarding job descriptions for a technician and engineer, two work experience declarations for the beneficiary, and copies of documentation already in the record.

8 C.F.R. § 103.5(a) provides, in pertinent part:

*(2) Requirements for motion to reopen.*

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . .

*(3) Requirements for motion to reconsider.*

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an

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<sup>1</sup> 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). While the petitioner did not comply with regulations governing motions, which require the submission of any documentation with the motion, the AAO will consider the documents newly submitted subsequent to motion.

incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The AAO finds that the petitioner has not filed a proper motion to reopen. The request was not accompanied by any new evidence or arguments based on precedent decisions. The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.<sup>2</sup> In this matter, the petitioner presented no facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen.

On motion, counsel contends that the petitioner met its burden of proof in showing that the beneficiary's education, coupled with his experience met the minimum requirements of the labor certification and submits evidence regarding the beneficiary's experience. The motion therefore meets the requirements for a motion to reconsider.

On motion, counsel continues to assert that the beneficiary's technical diploma combined with six (6) years of professional work experience as a Manufacturing Engineer is equivalent to a U.S. bachelor's degree and that an equivalency report prepared by [REDACTED] meets the burden of proof because [REDACTED] qualifications are very credible and have been recognized by U.S. Citizenship and Immigration Services (USCIS) for over twenty years.

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.

In the instant case, the labor certification states that the minimum requirements for the proffered position are four (4) years of college culminating in a Bachelor's degree in engineering or math, two (2) years of training as an electrical technician and two (2) years of experience in the proffered position or the related occupation of electrical technician or engineer. The position also requires special requirements of 2-3 years of experience operating a lathe; 2-3 years of experience with PC's; and 2-3 years of experience using UNIX.

The beneficiary claims to qualify for the proffered position based on a Certificate in Vocational Education issued by the [REDACTED] a Technical diploma in

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<sup>2</sup>The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . . ." *Webster's II New Riverside University Dictionary* 792 (1984)(emphasis in original).

Industrial Technology (Electrical Power Technology-Installation & Control) issued by [REDACTED] Certificates of Achievement for in-depth study and program completion in Electronic Technician Levels I and II issued by [REDACTED] in the U.S. and more than thirteen (13) years of experience.

As advised in the AAO's decision, according to the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), the beneficiary's Certificate in Vocational Education is comparable to "completion of a vocational or other specialized high school curriculum in the United States" and his Technical diploma from Thailand is comparable to "two years of university study in the United States."

Therefore, based on the conclusions of EDGE, the evidence in the record on appeal was not sufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree in engineering or math. As advised in the AAO's decision, it was concluded that the petitioner failed to establish that the beneficiary qualified for consideration as a professional because he does not have a U.S. baccalaureate degree or a foreign equivalent degree from a college or university. See 8 C.F.R. §§ 204.5(l)(3)(i) and 204.5(l)(3)(ii)(C); *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5th Cir. 1987); *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006); and *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008)(for professional classification, USCIS regulations require the beneficiary to possess a single four-year U.S. bachelor's degree or foreign equivalent degree); and *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). On motion, counsel does not argue and does not provide reliable, peer-reviewed information to overcome the conclusions of EDGE. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act.

As discussed in the AAO's decision, the labor certification 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.<sup>3</sup> Nonetheless, the AAO issued a request for evidence (RFE) permitting the petitioner to submit any evidence that it intended the labor certification to require an alternative to a U.S.

<sup>3</sup> 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 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.

bachelor's degree or a single foreign equivalent degree, as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.<sup>4</sup> As discussed in the AAO's decision, while counsel contended that a tear sheet from the [REDACTED] showed that the employer advertised by stating the minimum requirement as "BS or equivalent," the advertisement counsel submitted was for a [REDACTED] is not related to the instant labor certification and was placed on October 23, 2001.<sup>5</sup> The AAO advised in its decision that, even if it were to accept this as evidence that the petitioner's intent included a "BS or equivalent" for the instant labor certification, the term "or equivalent" in recruitment is insufficient notice of the petitioner's intent to DOL and potentially qualified U.S. workers. *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). *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).

As discussed in the AAO's decision, the petitioner failed to establish that the terms of the labor certification are ambiguous and that the petitioner 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 the DOL and potentially qualified U.S. workers. On motion, the petitioner again fails to establish that the terms of the labor certification are ambiguous and that the petitioner 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 the DOL and potentially qualified U.S. workers. On motion, counsel fails to address at all the inconsistencies noted by the AAO in the recruitment evidence submitted in response to the RFE.

Therefore it is concluded that the terms of the labor certification require a four-year U.S. bachelor's degree in engineering/math or a foreign equivalent degree. The beneficiary does not possess such a degree. 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. Even if the petition were to qualify for skilled worker consideration, the beneficiary does not meet the terms of the labor certification, and the petitioner could thus not establish eligibility under the skilled worker category. See 8 C.F.R. § 204.5(1)(3)(ii)(B) (requiring evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification). The

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<sup>4</sup> 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.

<sup>5</sup> Counsel also submitted copies of other advertisements for the position of "Tool Design Engineer" that are unrelated to the instant labor certification and were placed by the petitioner in 2001.

beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act or as a skilled worker under section 203(b)(3)(A)(i) of the Act.

Beyond the decision of the director, the AAO found that the evidence in the record did not establish that the beneficiary possesses the required experience for the offered position. Part B, Item 15 of the labor certification states that the beneficiary qualifies for the offered position based on experience as an Engineering Assistant (Technician) with [REDACTED] in California from February 1992 to May 1994; as an Electronics Engineer with [REDACTED] in California from May 1994 to May 1999; and as a Design Engineer with the petitioner from June 1999 until December 12, 2005, the date on which the labor certification was executed. No other experience is listed.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

In its RFE, the AAO informed the petitioner of deficiencies in the evidence regarding the beneficiary's training and experience.<sup>6</sup> As advised in the AAO's decision, the experience letter submitted in response to the RFE, did not meet the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A). On motion, counsel contends that the AAO erred in requiring that the petitioner submit two affidavits rather than the employment letter because the RFE only requested an employment letter; however, as stated in the RFE and in the AAO's decision, 8 C.F.R. § 204.5(l)(3)(ii)(A) requires that any experience must be supported by letters from the company who trained or employed the beneficiary. The AAO did not err in failing to accept the letter submitted in response to the RFE because the letter was not provided by the beneficiary's employer, but was a personal letter from an individual who also used to be employed by the beneficiary's employer. 8 C.F.R. § 103.2(b)(2) provides that when primary evidence is not available, such as when an employer is no longer in business, evidence must be submitted to establish the need for secondary evidence with any documentary evidence of the qualifying employer's closing, and affidavits from two persons must be submitted to establish the fact of the beneficiary's employment.

On motion, counsel submits a declaration, dated March 5, 2013, from [REDACTED] in which she states that [REDACTED] no longer exists and that she was employed by [REDACTED] and can verify that the beneficiary was employed full-time "reviewing and evaluating work packs to release production, verifying tooling and equipment availability to include adding manufacturing instructions, product development process including sourcing, cost

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<sup>6</sup> The experience letter on [REDACTED] letterhead did not describe the beneficiary's duties in sufficient detail or state whether the beneficiary was employed on a full time basis.

estimates/configuration, softball and prototype development. . . designed and built various fixtures to speed up production and reduce manufacturing costs.” Counsel also submits a declaration, dated March 5, 2013, from [REDACTED] in which he states that [REDACTED] no longer exists and that he was employed by [REDACTED] and can verify that the beneficiary was employed full-time “reviewing and evaluating work packs to release production, verifying tooling and equipment availability to include adding manufacturing instructions, product development process including sourcing, cost estimates/configuration, softball and prototype development. . . designed and built various fixtures to speed up production and reduce manufacturing costs.”

The declarations that have been provided on motion are not affidavits as they were not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). However, they do contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. However, as advised in the AAO's decision, such evidence only accounts for two (2) years of relevant training or experience. On motion the petitioner has failed to provide evidence that the beneficiary meets both of the requirements in regard to training/experience: two (2) years of training in electrical tech **and** two (2) years of experience in the offered position or in the related occupation of electrical tech or engineer.<sup>7</sup>

Counsel contends that the AAO erred in failing to accept the beneficiary's experience with the petitioner because the petitioner did not show the dissimilarity of the experience gained with the petitioner. It is noted that counsel has failed to submit any evidence of the petitioner's employment with the petitioner. Even if the petitioner had submitted an experience letter to establish the beneficiary's employment with the petitioner, as advised in the AAO's decision, when determining whether a beneficiary has the required minimum experience for a position, experience gained by the beneficiary with the petitioner in the offered position cannot be considered. *See* 20 C.F.R. § 656.21(b)(5) [2004]. While counsel contends that the AAO cannot rely upon *Delitizer Corp. of Newton*, 88-INA-482, May 9, 1990 (BALCA) because it is a decision by the Board of Alien Labor Certification Appeals (BALCA), it is 20 C.F.R. § 656.21(b)(6) which clearly requires that employers establish “the ‘dissimilarity’ of the position offered for certification from the position in which the alien gained the required experience.” Moreover, while the AAO is not bound by BALCA decisions, it may still choose to utilize the reasoning set forth in any BALCA case.

As discussed in the AAO's decision, in the instant case, representations made on the certified Form ETA 750 clearly indicated that the actual minimum experience/training requirement for the offered position is two (2) years of training in electrical tech **and** two (2) years of experience in the offered

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<sup>7</sup> On motion, the petitioner fails to provide any evidence of the beneficiary's employment or training by an employer other than [REDACTED]. As advised in the AAO's decision, even if the petitioner had provided an experience letter for the beneficiary's experience with [REDACTED] because counsel contends that it is this experience with [REDACTED] when combined with the beneficiary's education which meets the requirement of the bachelor's degree, this experience cannot also be utilized to meet the separate and additional experience or training requirement on the labor certification.

position or in the related occupation of electrical tech or engineer. In the instant case, the beneficiary did not represent on Form ETA 750, Part B that he had been employed with the petitioner in any position other than the proffered position.<sup>8</sup> As discussed in the AAO's decision, in order to utilize the experience gained with the employer, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. *Delitizer Corp. of Newton*, 88-INA-482, May 9, 1990 (BALCA). The petitioner failed to establish the dissimilarity between the position the beneficiary previously held with the employer and the permanent position offered. Therefore, the AAO cannot consider the beneficiary's experience gained with the petitioner as qualifying experience to meet the requirements of the labor certification by the priority date.

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

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

**ORDER:** The motion to reconsider is granted. Upon reconsideration, the AAO's decision, dated February 5, 2013, is affirmed. The petition will remain denied.

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<sup>8</sup> Counsel submits a statement from the petitioner in which it explains the differences between the job descriptions for an engineer and a technician; however, these job descriptions are not relevant to the instant case because the petitioner indicated on the ETA Form 750 that he had only been employed by the petitioner in the proffered position of design engineer.