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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: **SEP 26 2013**

Office: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner:
 Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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, denied the immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal (June 25, 2013). The matter is again before the AAO on a motion to reconsider. The motion to reconsider will be denied. The petition remains denied. The AAO affirms its decision of June 25, 2013.

The petitioner describes itself as a software consulting company. It seeks to permanently employ the beneficiary in the United States as a software engineer. The petitioner requests classification of the beneficiary as 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). As required by statute, the petition is accompanied by an ETA Form 9089 (labor certification), Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is May 30, 2011. *See* 8 C.F.R. § 204.5(d). The director's September 29, 2011 decision denying the petition concludes that the beneficiary did not possess a U.S. bachelor's degree or foreign equivalent as required by the terms of the labor certification. On appeal, the AAO (in its decision of June 25, 2013) dismissed the appeal stating as follows:

In summary, the petitioner has failed to establish that the beneficiary possessed a U.S. bachelor's degree or a foreign equivalent degree from a college or university as of the priority date. The petitioner also failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification as of the priority date. The petitioner failed to establish that the beneficiary meets the job experience requirements of the labor certification. Therefore, the beneficiary does not qualify for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act.

Beyond the decision of the director, the petitioner has also not established that the beneficiary has the experience for the position offered.

The record shows that the motion to reconsider is properly filed. 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.

A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [USCIS] policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The motion to reconsider must be denied because the motion does not state reasons for reconsideration which are supported by pertinent precedent decisions to establish the decision was based on an incorrect application of law or [USCIS] policy and which establishes that the AAO's June 25, 2013 decision was incorrect based on the evidence of record at the time the AAO's decision was rendered.

In support of its motion to reconsider the petitioner asserts as follows:

The beneficiary qualifies for the position under the alternate education and experience requirements the petitioner gave in H-14 of the ETA Form 9089 as certified by the DOL. The AAO made an error of law in determining that the petitioner failed to establish its intent of the actual alternate requirements and an error of fact in determining that the evaluator applied all eight years of the beneficiary's experience to the knowledge equivalency determination.

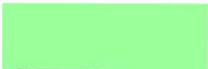
The petitioner asserts in its motion to reconsider that the beneficiary qualifies for the offered position under the alternate education and experience requirements set forth in part H-14 of the labor certification:

Applicant may submit evaluation that she/he has the knowledge equivalent to a person with a bachelor's degree to satisfy the educational requirement listed in H-4. Each three years of progressively responsible work experience will be considered equivalent to one year of college education.

Any suitable combination of equivalent education, degree/s, training or experience will be acceptable.

As noted by the AAO in its June 25, 2013 decision, '[i]n the AAO's RFE (November 29, 2012) the petitioner was instructed that if it claimed that its organization intended the terms of the labor certification to require an alternative to a U.S. bachelor's degree or a single foreign equivalent degree, then it should submit evidence of the petitioner's claimed intent. Such evidence would be of the petitioner's intent concerning the actual minimum requirements of the position as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.' Specifically, "the AAO requested that the petitioner provide a copy of the documentation prepared in accordance with the DOL labor certifications regulations at 20 C.F.R. § 656 (2011), including a signed recruitment report, the prevailing wage determination, 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 the recruitment efforts. The petitioner was asked to also include any other communications with the DOL that may be probative of its intent, such as correspondences or documents generated in response to an audit." The petitioner did not provide this documentation in response to the AAO's RFE, nor was the documentation provided with the petitioner's original appeal or in support of its motion to reconsider.

The AAO stated in its prior decision: "In regard to the AAO's request for documentation of the petitioner's intent concerning the actual minimum requirements of the position 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 stated that it, 'drafted the labor certification application with the beneficiary in mind, knowing that he did not have a U.S. Bachelor's or single source foreign equivalent degree, [is] evidence that the petitioner intended to accept alternate qualifications that allowed for filing in the skilled worker category.'" The AAO did not accept the



petitioner's assertion in this regard and stated that "[e]vidence of such intent would be proof that the petitioner advertised the position to all U.S. workers stating alternatives to a U.S. bachelor's degree were acceptable for the position.¹ The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. The petitioner may not seek a labor certification with one particular worker in mind and not provide all qualified American workers with a meaningful opportunity to apply for the position by not informing those who may be interested of all qualifying factors for the position."²

On motion, the petitioner asserts that the fact that the DOL certified the position, based on the information provided in the petitioner's Application for Permanent Employment Certification, is evidence of the petitioner's intent that was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers. The petitioner states that USCIS may not second-guess the decision of the DOL after DOL certified the labor certification. In this instance, the petitioner has failed to provide documentation requested by the AAO (in an RFE, or in support of the petitioner's appeal or motion to reconsider) regarding its recruitment efforts so that it could be determined whether or not U.S. workers were clearly informed of the alternative education set forth in section H-14 of the ETA Form 9089, and thus that the petitioner was willing to accept all qualified workers who complied with the alternative education stated in H-14 and who did not possess a Bachelor's Degree as required by section H-4 of the labor certification. The petitioner was asked to provide documentation of the petitioner's recruitment efforts. The petitioner did not provide the documentation nor did it state that any such documentation did not exist or was otherwise unavailable. The purpose of a request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The

¹ 20 C.F.R. § 656.17(f) *Advertising requirements* [must] . . .

. . . .
(3) Provide a description of the vacancy specific enough to apprise the U.S. workers of the job opportunity for which certification is sought . . .

. . . .
(6) Not contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089.

² The regulation at 20 C.F.R. § 656.10(c) states in pertinent part that:

(c) *Attestations.* The employer must certify to the conditions of employment listed below on the *Application for Permanent Employment Certification* under penalty of perjury under 18 U.S.C. 1621 (2). Failure to attest to any of the conditions listed below results in a denial of the application.

. . . .
(8) The job opportunity has been and is clearly open to any U.S. worker;
(9) The U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons.

petitioner did not provide the requested evidence with its motion to reconsider nor did the petitioner address the request in its brief filed in support of the motion to reconsider.

While counsel for the petitioner has discussed various cases in his brief filed in support of the motion to reconsider, the petitioner has not established that the AAO's prior decision in this regard was based on an incorrect application of law or USCIS policy. Nor has the petitioner established that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The petitioner further asserts in its motion to reconsider that "[t]he beneficiary meets the alternative requirements for the position and the AAO made an error of fact concerning the experiential evaluation submitted by the petitioner." As discussed in the AAO's prior decision, the labor certification stated in part H.8 that the petitioner will not accept an alternate combination of education and experience. Further, J.19 of the labor certification asks whether "the alien possess[es] the alternate combination of education and experience," to which the petitioner responded "no." Therefore, the petitioner's statement that alternate requirements are acceptable, as described in part H.14 of the labor certification, appears to conflict with the petitioner's statement in H.8 that there was no acceptable alternate combination of education and experience. Further, as discussed above, while the AAO has requested that the petitioner provide independent evidence that it would accept an alternative to the stated minimum requirements, including, the petitioner's recruitment efforts, the petitioner has failed to provide this requested evidence in response to the RFE or on motion. The petitioner refers to an experiential evaluation it submitted in response to the AAO's RFE. That evaluation, from [REDACTED] (dated January 4, 2013), states that in the evaluator's judgment the beneficiary's three-year Bachelor of Commerce degree from the [REDACTED] in India plus the beneficiary's "eight years of progressively more responsible full[-]time professional work experience in software engineering are equivalent to the completion in knowledge of the four-year, Bachelor of Science in Business Administration with a second major in Computer Science, for employment purposes, from an accredited college or university in the United States." The petitioner asserts that:

[T]he evaluator "was not saying that the petitioner's entire eight years of experience with [REDACTED] was necessary to the degree equivalency determination. This can be seen when the evaluator refers to the petitioner's criteria of three years of experience for each year of education. . . Thus, in this case six years are what was necessary to establish that [the beneficiary] had the equivalent in knowledge of someone with a Bachelor's in Business Administration and a second major in Computer Science when combined with his three years of college education. Consequently, there were still two years remaining which applied to the two-year experience requirement for the position.

The AAO does not agree with this assertion. The evaluator clearly stated that the beneficiary's three-year Bachelor of Commerce degree plus the beneficiary's "eight years of progressively more responsible full[-]time professional work experience in software engineering are equivalent to the

completion in knowledge of the four-year, Bachelor of Science in Business Administration with a second major in Computer Science, for employment purposes, from an accredited college or university in the United States.” The petitioner asks the AAO to assume that the evaluator only considered six years of experience as opposed to the eight years that the evaluator clearly stated in the evaluation. The AAO does not have before it all information reviewed by the evaluator making his evaluation, whether that information included information obtained from the beneficiary in personal interviews or other information detailing specifically what duties the beneficiary performed in those eight years. As stated by the AAO in its prior decision, the eight years of experience considered by the credentials evaluator in determining the beneficiary’s education equivalency may not again be considered as the two years of experience required in the labor certification. The two years of experience required is in addition to the education required by the labor certification. Again, the petitioner has not established that the AAO’s prior decision in this regard was based on an incorrect application of law or USCIS policy. “The record of proceeding does not contain any documentation to overcome the conflict between the terms of the labor certification that the petitioner gave notice of the purported alternative acceptable minimums for the position offered to qualified U.S. workers. Nor has the petitioner established that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Having considered the petitioner’s motion in its entirety, the motion shall be denied. The AAO’s decision of June 25, 2013 shall be affirmed. The petition shall remain denied.

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 motion to reconsider is denied. The AAO’s decision of June 25, 2013 is affirmed. The petition remains denied.