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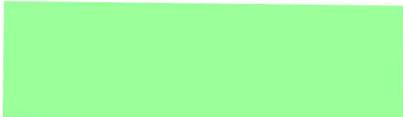
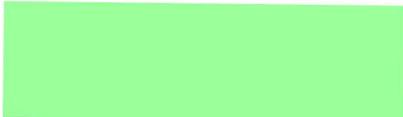
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: **APR 08 2014** 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 Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition and the Administrative Appeals Office (AAO) dismissed the appeal. The AAO dismissed a motion to reopen, granted a motion to reconsider and affirmed the AAO's previous decision. The matter is again before the AAO on a motion to reopen. The motion 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.

On August 6, 2012, the petitioner filed a motion to reopen and a motion to reconsider claiming 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 submitted evidence regarding the beneficiary's experience. On motion, the AAO determined 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 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. On motion, counsel submits a brief, a declaration from the beneficiary, letters to the petitioner's previous counsel, copy of a State Bar of California Attorney Complaint Form, new credentials evaluations and affidavits of experience.

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. . .

Counsel bases the motion to reopen on ineffective assistance of counsel. Any appeal or motion based upon a claim of ineffective assistance of counsel requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

In support of this assertion, counsel submits a declaration from the beneficiary stating that the petitioner's previous counsel, [REDACTED] had failed to request detailed experience letters for the beneficiary even though counsel was aware that the beneficiary had worked with [REDACTED] and [REDACTED]. He states that Mr. [REDACTED] also did not request an evaluation stating that the beneficiary's education and experience was equivalent to a U.S. bachelor's degree. He states that the petitioner's previous counsel, [REDACTED] also did not inform the petitioner that evaluations of the beneficiary's education and experience or additional experience letters were required. He states that Mr. [REDACTED] did not sufficiently explain the previously filed motions and never gave the petitioner and beneficiary the opportunity to file an ineffective assistance of counsel claim. Counsel submits October 1, 2013 letters to Mr. [REDACTED] and Mr. [REDACTED], informing them of the beneficiary's ineffective assistance of counsel claims; and a copy of a State Bar of California Attorney Complaint Form against Mr. [REDACTED] and Mr. [REDACTED]. The AAO notes that the petitioner's ineffective assistance of counsel claim is deficient in that there is no evidence that counsel received the two letters or that the complaint form has been filed. Further, there has been insufficient time to permit Mr. [REDACTED] and Mr. [REDACTED] a response to the petitioner's claims of ineffective assistance of counsel. Despite the deficiencies in the petitioner's claim of ineffective assistance of counsel, the motion includes new facts and the motion to reopen is granted.

In the instant case, the petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A).¹

¹ 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. In the instant case, the petitioner selected Part 2, Box e of Form I-140 for a professional or skilled worker. The petitioner did not specify elsewhere in the record of proceeding whether the petition should be considered under the skilled worker or professional classification. After reviewing the minimum requirements of the offered position set forth on the labor certification and the standard requirements of the occupational classification

On motion, counsel contends that the new evidence submitted with the motion establishes that the beneficiary's education is the equivalent of a U.S. bachelor's degree.

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 United States Citizenship & Immigration Services (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 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.

The AAO previously considered an evaluation of the beneficiary's credentials prepared by [REDACTED] on April 21, 2009.² The evaluation stated that the beneficiary's Certificate of Vocational Education in Electrical Power from the [REDACTED] is equivalent to completion of the U.S. vocational high school diploma. The evaluation concluded that the beneficiary's Technical Diploma from [REDACTED] in Thailand is equivalent to two years of undergraduate study in Electrical Engineering Technology in the United States and, when combined with six (6) years of his professional work experience as a Manufacturing Engineer for [REDACTED] is equivalent to a Bachelor of Science in Manufacturing Engineering Technology in the United States.

On motion, counsel submits an October 8, 2013 evaluation of the beneficiary's credentials prepared

assigned to the offered position by the DOL, the AAO considered the petition under both the professional and skilled worker categories.

² USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). *See also Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

by Dr. [REDACTED]. The evaluation concludes that the beneficiary's transcripts and resume detailing his extensive engineering experience is equivalent to a bachelor's degree in engineering from a U.S. college. Counsel also submits an October 8, 2013 evaluation of the beneficiary's credentials prepared by [REDACTED] for [REDACTED]. The evaluation states that the beneficiary's Certificate of Vocational Education in Electrical Power from the [REDACTED] is equivalent to two years of undergraduate study in a technical degree in the United States and, when combined with the beneficiary's Technical Diploma from [REDACTED] the degree is equivalent to a four year degree in industrial technology in the United States.

The letter from Dr. [REDACTED] does not include a curriculum vitae or other evidence of Dr. [REDACTED] qualifications to evaluate the equivalency of the beneficiary's education. Further, the evaluation from Dr. [REDACTED] is inconsistent with the [REDACTED] evaluation regarding the equivalency of the beneficiary's Certificate of Vocational Education in Electrical Power from the [REDACTED]. [REDACTED] evaluation reflects that the credential is equivalent to a U.S. vocational high school diploma, whereas Dr. [REDACTED] states that it is equivalent to two years of undergraduate study in a technical degree program in the United States. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As advised in the AAO's February 5, 2013 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." The new evaluations do not address or overcome the conclusions of EDGE.³

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

³ In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

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); *Snapshot.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.⁴ 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.⁵ 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. 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.⁶

⁴ In counsel's brief on motion and in the beneficiary's declaration, it is claimed that previous counsel failed to obtain evaluations of the beneficiary's education from peers or an engineering professor. While two evaluations from engineering professors Dr. [REDACTED] and Dr. [REDACTED] are provided on motion, neither evaluation addresses the conclusions of EDGE. Further, as noted above, the evaluations are contradictory, in that Dr. [REDACTED] uses the beneficiary's education and experience to find the equivalent of a U.S. bachelor's degree, while Dr. [REDACTED] uses the beneficiary's education alone to reach this conclusion.

⁵ 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.

⁶ 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

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 "Tool Design Engineer," is not related to the instant labor certification and was placed on October 23, 2001.⁷ 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. *Snappnames.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). Nothing in the record defines what the petitioner will accept as the equivalent of a U.S. bachelor's degree. Further, nothing in the record demonstrates that U.S. workers were put on notice of the petitioner's willingness to accept less than a four-year bachelor's 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 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 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.

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.

⁷ 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.

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.⁸ 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, the AAO considered a March 5, 2013 declaration 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 estimates/configuration, softball and prototype development. . . designed and built various fixtures to speed up production and reduce manufacturing costs." The AAO also considered 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." However, as advised in the AAO's September 11, 2013 decision, such evidence only accounts for two (2) years of relevant training or experience.

On motion, counsel submits two more affidavits from [REDACTED] and [REDACTED] attesting to the beneficiary two years of employment with [REDACTED]. Again, as advised in the AAO's September 11, 2013 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

⁸ 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.

(2) years of experience in the offered position or in the related occupation of electrical tech or engineer.⁹

As discussed in the AAO's February 5, 2013 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 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.¹⁰ 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 in the proffered position 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 appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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 is granted. Upon reopening, the AAO's previous decisions, dated February 5, 2013 and September 11, 2013, are affirmed. The petition will remain denied.

⁹ On motion, the petitioner fails to provide any evidence of the beneficiary's employment or training by an employer other than [REDACTED]

¹⁰ 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.