



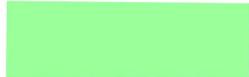
U.S. Citizenship
and Immigration
Services

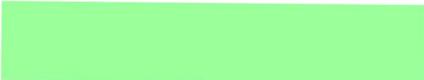
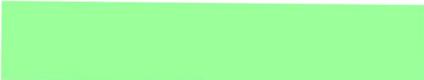
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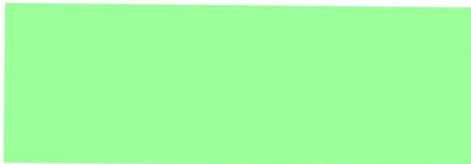
OFFICE: TEXAS SERVICE CENTER

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 preference visa petition was denied by the Director, Texas Service Center. The subsequent appeal and motion to reconsider were dismissed by the Administrative Appeals Office (AAO). The matter is now before us on a second motion to reconsider. The motion will be granted, our previous decision will be affirmed, and the petition will remain denied.

The petitioner describes itself as an IT consulting business. It seeks to permanently employ the beneficiary in the United States as a “Programmer Analyst.” The petitioner requests classification of the beneficiary as a 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).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 director’s decision denying the petition concludes that the beneficiary does not meet the educational requirements of the labor certification. We affirmed the director’s decision on appeal.

The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner’s counsel asserts that the director and the AAO made an erroneous decision through misapplication of law or policy.

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 determination of whether a petition may be approved for a skilled worker is based on the requirements of the job offered as set forth on the labor certification. *See* 8 C.F.R. § 204.5(l)(4). The labor certification must require at least two years of training and/or experience. Relevant post-secondary education may be considered as training. *See* 8 C.F.R. § 204.5(l)(2).

Accordingly, a petition for a skilled worker must establish that the job offer portion of the labor certification requires at least two years of training and/or experience, and the beneficiary meets all of the requirements of the offered position set forth on the labor certification.

In evaluating the beneficiary’s qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate that the beneficiary has to be found qualified for the position. *Madany*, 696 F.2d at 1015. USCIS interprets the meaning of terms used to describe the requirements of a job in a labor certification by “examin[ing] 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

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, 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.

requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification]” even if the employer may have intended different requirements than those stated on the form. *Id.* at 834 (emphasis added).

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 be contrary to 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.

On motion to reconsider, the petitioner through counsel claims that the beneficiary meets the requirements as outlined on the labor certification, and that USCIS has imposed a requirement not listed on the labor certification. Counsel further asserts that we applied an incorrect regulatory standard to the instant petition; and ignored or dismissed evidence that the beneficiary qualifies for the benefit sought.

In the instant case, the labor certification states that the primary requirements of the offered position of Programmer Analyst are a bachelor’s degree in computer science, mathematics, engineering, computer application or related and 24 months of experience in the job offered, or in the alternate occupation of software engineer or related. The labor certification states that the petitioner will accept an alternate combination of “3 years bachelor’s + master’s or post graduate diploma” in lieu of the primary requirements. The labor certification further states that the petitioner will accept a foreign educational equivalent and will accept “a combination of degrees if deemed equivalent to a U.S. bachelor’s degree by a credentials evaluator.”

Counsel maintains that the beneficiary qualifies for the job opportunity based on the secondary requirements listed on the labor certification of a three-year bachelor’s degree plus a master’s degree or post-graduate diploma.

In our March 4, 2014 request for evidence (RFE), we requested evidence from the petitioner to establish that it intended to allow for an alternative to a U.S. bachelor’s degree. The petitioner’s response to our RFE included the recruitment report prepared in support of the labor certification, as well as its response to the DOL’s audit notification. In our decision of July 3, 2014 dismissing the appeal, we determined that the recruitment for the proffered position did not support the petitioner’s claimed intent to accept a degree or combination of degrees that equate to less than a U.S. bachelor’s degree. We affirmed this decision in our September 19, 2014 dismissal of the motion to reconsider.

Counsel asserts that, on its face, the labor certification does not require a combination of degrees to

be equivalent to a U.S. bachelor's degree, and that USCIS exceeded its scope of authority in examining the petitioner's intent in the way that it advertised the position to potentially qualified U.S. applicants.

As noted in our dismissal of the appeal, 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.[emphasis added]" 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.

On motion, counsel distinguishes *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008) and asks that we apply *Grace Korean United Methodist Church v. Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005). In *Grace Korean*, a federal district court held that USCIS "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." *Id.* at 1179. Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. See *Matter of K-S-*, 20 I&N Dec. 715, 719 (BIA 1993). A judge in the same district, however, subsequently held that the assertion that DOL certification precludes USCIS from considering whether the alien meets the educational requirements specified in the labor certification is wrong. *Snapnames.com, Inc. v. Chertoff*, 2006 WL 3491005 *5 (D. Or. Nov. 30, 2006).

At issue is whether the beneficiary's Master's diploma in Programming and Computer Applications from [REDACTED] represents a master's degree or a post-graduate diploma. The evidence in the record on appeal did not establish that the beneficiary's postgraduate diploma was issued by an accredited university or institution approved by [REDACTED], or that a two- or three-year bachelor's degree is required for admission into the program of study.

Therefore, upon review of the record at hand and in considering the motion to reconsider, we find that 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. Therefore, the beneficiary does not qualify for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act.

Counsel argues that we misapplied the findings in *Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). Counsel argues that *Matter of Caron International* does not allow us to refuse

to consider credentials evaluations. However, in our two previous decisions we offered our explanation for not accepting the submitted education evaluations which were considered and discussed.

Counsel argues that we have unilaterally imposed a requirement that is not found in the labor certification in requiring that the beneficiary's combination of degrees must be equivalent to a U.S. bachelor's degree as listed in the EDGE database. Although counsel claims that this requirement is not listed on the labor certification, we disagree. The petitioner required the following alternate education: 3 years bachelor's + master's or post-graduate diploma. The labor certification also indicates in Part H.9 that the petitioner will accept a foreign educational equivalent. As noted above, the beneficiary does not possess a master's or post-graduate diploma that, when combined with his three-year bachelor's degree, is the equivalent of a U.S. bachelor's degree.

Therefore, upon review of the record at hand and in considering the motion to reconsider, we find that 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. Therefore, the beneficiary does not qualify for classification as a skilled worker under section 203(b)(3)(A)(i) 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: Upon consideration of the motion, we affirm our decisions dated July 3, 2014 and September 19, 2014. The petition remains denied.