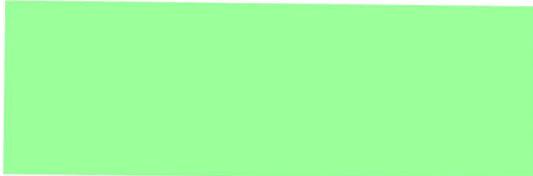


(b)(6)

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

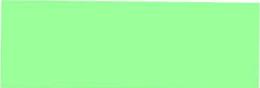


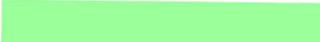
U.S. Citizenship
and Immigration
Services



DATE: **FEB 04 2014**

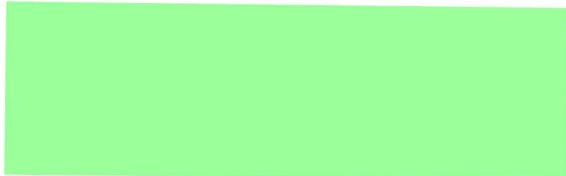
OFFICE: NEBRASKA SERVICE CENTER

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,

A handwritten signature in black ink that reads "Elizabeth McCormack".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as an information technology firm. It seeks to permanently employ the beneficiary in the United States as a mid-level programmer analyst. The petitioner requests classification of the beneficiary as a professional pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii).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 August 6, 2012. See 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess the minimum qualifications required to perform the offered position by the priority date.

The record shows that the appeal is properly filed 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 appeal.²

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).

¹ 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.

² 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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 Engineering, Science or Math.
- H.5. Training: None required.
- H.6. Experience in the job offered: 36 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: None accepted.
- H.14. Specific skills or other requirements: The job may require weekly travel or extended temporary relocation to client sites on project-related work. The Mid-Level Programmer Analysts will use technologies that have been developed by top tier software vendors from either of the platforms listed below: Java/J2EE Technology Platform: Java, J2EE, SOA, ESB, OOD, XML, UNIC, SQL, UML, MySQL, TOMCAT, WEBSPHERE, SVN, ETL, AJAX, CSS, SOAP, RET, WSDL, XSD, UML, PRD, UNIT TESTING. .Net/C# Technology Platform: .Net, Visual Studio 2008, MOSS, SharePoint Services, InfoPath, C#, XML, OOD, WCF, WPF, ADO.NET, SOA, ESB, MS SQL, MS BizTalk, ETL, AJAX, CSS, SOAP, REST, WSDL, XSD, UML, PRD, UNIT TESTING.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a programmer analyst from October 1, 2008 through June 3, 2009, July 1, 2009 through December 31, 2010, February 1, 2011 through September 30, 2011, October 1, 2011 through December 31, 2011, and January 1, 2012 through August 3, 2012 with the petitioner; as a programmer analyst with [REDACTED] from June 1, 2006 through September 30, 2008; as a software developer for [REDACTED] from July 1, 2005 through August 31, 2005; and as a systems developer for [REDACTED] from January 1, 2005 through June 30, 2005. No other experience is listed. 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 [REDACTED] of [REDACTED] stating that he worked with the beneficiary at [REDACTED] from January 10, 2005 to June 10, 2005 with the beneficiary serving as a workstation architect; a June 7, 2013 letter from [REDACTED] with [REDACTED] stating that the beneficiary worked for the company between June 12, 2006 and August 2, 2008; and a November 26, 2007 letter from [REDACTED] general counsel for [REDACTED] stating that the beneficiary worked for the company from June 12, 2006 through December 7, 2007 as a plant floor systems developer for [REDACTED] and that the beneficiary intended to return to that position on January 4, 2008. The record also contains a July 25, 2008 letter from [REDACTED] director for [REDACTED] offering the beneficiary a systems developer position along with documents filed with the DOL concerning the position for purposes of obtaining a labor certification. On appeal, the petitioner submitted a December 23, 2010 letter from [REDACTED] manager of the IT support center of [REDACTED] thanking the beneficiary for his 18 months service to the company.

The director's decision stated that the petitioner failed to demonstrate that the beneficiary had the 36 months of experience required for the proffered position. Specifically, the director noted that the letter from Mr. [REDACTED] did not state specific dates of employment and the letter from [REDACTED] demonstrates work experience of 24 months with [REDACTED] (considering the month on leave noted in Mr. [REDACTED] letter) and the letter from [REDACTED] established an additional five months of experience. The director did not accept the evidence submitted from [REDACTED] because it was an offer of employment instead of a letter verifying past dates of employment.

On appeal, the petitioner submitted evidence that its former name is [REDACTED] so that the letter submitted concerned the beneficiary's work with the petitioner. Representations made on the certified Form ETA 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the petitioner or experience in an alternate occupation cannot be used to qualify the beneficiary for the certified position.³

³ 20 C.F.R. § 656.17 states:

(h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation

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

(i) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

(ii) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

(i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or

(ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

(i) The term "employer" means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.

(ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position

Specifically, the petitioner indicates that questions J.19 and J.20, which ask about experience in an alternate occupation, are not applicable. In response to question J.21, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?," the petitioner answered "no." The petitioner specifically indicates in response to question H.6 that 36 months of experience in the job offered is required and in response to question H.10 that experience in an alternate occupation is not acceptable. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable⁴ and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.1. that his position with the petitioner was as a programmer analyst and the job duties are the same duties as the position offered.⁵ Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as he was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. Additionally, as the terms of the labor certification supporting the instant Form I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary's experience with the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position.

descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

⁴ A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

5) For purposes of this paragraph (i):

...
(ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

⁵ The job duties stated in question H.11 are: "The Mid-Level Programmer Analyst will be required to write computer code in accordance with [the petitioner's] design specifications to solve business problems or enhance existing business processes." In addition, as noted above, question H.14 lists a number of different programs with which the mid-level programmer analyst must be familiar and use. Section K lists the beneficiary's job duties on different projects with the petitioner, including "creating new, modifying, and supporting existing software applications that are moderately complex with full competency . . . code, test, debug, document, and implement software applications . . . provide expert level programming and abilities in database design, development, and enhancement within MS SQL, Server DBMS." Section K also lists the use of some of the same programs listed in H.14.

Thus, based on the terms of the labor certification application, the beneficiary does not possess the requisite 36 months of experience in the job offered.

On appeal, counsel states that the petitioner, at the time known as [REDACTED], assigned the beneficiary to a series of projects with [REDACTED] as a systems developer for 19 months under the terms of a 2008 H-1B visa. Counsel states that the positions of "systems developer" and "programmer analyst," the proffered position, are not substantially comparable and that more than 50% of the duties of a systems developer differ from the duties of a programmer analyst, thus qualifying the experience under the instant petition. As stated above, the petitioner stated in question H.10 that experience in an alternate occupation would not qualify the beneficiary for the proffered position. As a result, the experience described by counsel as a systems developer does not qualify the beneficiary for the proffered position of programmer analyst.

Additionally, beyond the decision of the director, the letters submitted to verify the beneficiary's experience with [REDACTED] and [REDACTED] are insufficient to establish the beneficiary's experience in the proffered position. The letter from [REDACTED] indicates that he worked with the beneficiary at [REDACTED] as a workstation architect. Pursuant to 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A), any letters to verify experience must be authored by the employer. The letter from Mr. [REDACTED] indicates that he was the beneficiary's co-worker and not his employer. In addition, the letter states that the beneficiary was employed as a workstation architect and not in the proffered position as programmer analyst. As a result, this letter may not be accepted to demonstrate the beneficiary's qualifying experience under the terms of the labor certification. Similarly, the letter submitted from Mr. [REDACTED] states that the beneficiary was employed as a plant floor systems developer and not in the proffered position as a programmer analyst. Because the petitioner indicated in question H.10 that experience in an alternate occupation would not qualify the beneficiary for the proffered position, this letter is also insufficient to demonstrate qualifying experience under the terms of the labor certification.

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.

Beyond the decision of the director, the petitioner has also failed to establish its continuing ability to pay the proffered wage as of the priority date. See 8 C.F.R. § 204.5(g)(2). According to USCIS records, the petitioner has filed five I-140 petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or

whether any of the other beneficiaries have obtained lawful permanent residence.⁶ In addition, the 2012 Internal Revenue Service Form W-2 in the record indicates that the petitioner paid the beneficiary \$64,776.28, which is less than the proffered wage of \$91,400.00 and no additional evidence allowed by the regulation was submitted to demonstrate the ability to pay the difference between the actual wage paid and the proffered wage.⁷ Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 appeal is dismissed.

⁶ The petitioner submitted an H1-B Employees Wage Compliance Report dated March 29, 2012 containing wages paid to six employees in the third and fourth quarter of 2011; however, the statement concerns wages paid prior to the priority date and contains wages paid for only three of the additional five sponsored workers for whom the petitioner has filed a Form I-140. In addition, it does not contain priority dates or proffered wage amounts for the three sponsored workers listed.

⁷ The petitioner submitted a 2012 profit and loss statement stating net income of \$54,975.63, however, the profit and loss statement did not indicate that it was subject to an accountant's audit. Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." 8 C.F.R. § 204.5(g)(2). As the 2012 statement was not audited, the AAO will not accept the evidence to establish the petitioner's ability to pay the proffered wage.