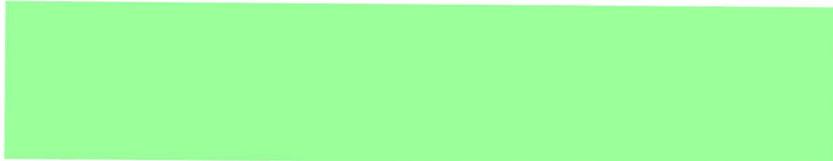


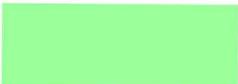
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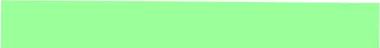
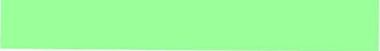
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



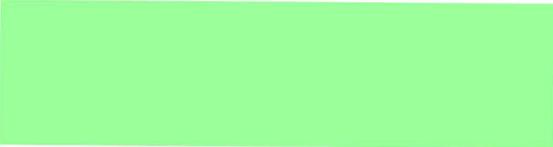
U.S. Citizenship
and Immigration
Services



DATE: **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,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and the AAO dismissed the appeal on June 5, 2013. The petitioner filed a motion to reopen and reconsider the AAO's decision, and the AAO affirmed its prior decision on August 29, 2013. The matter is again before the AAO on a motion to reopen and reconsider. The prior decision of the AAO, dated August 29, 2013, will be reopened, a new decision will be entered, and the petition will remain denied.

The petitioner describes itself as a "Specialized Software Consulting" business. It seeks to employ the beneficiary permanently in the United States as a "Programmer Analyst." As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director's decision denying the petition concludes that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date. The AAO affirmed this decision and further held that the petitioner had not established its ability to pay the proffered wages for the beneficiary and other sponsored workers for 2003, 2005 and 2009.

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 instant motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted. 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. Therefore, the petitioner's motion is properly filed. The AAO conducts appellate review on a *de novo* basis.¹ The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal or motion. A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision.²

Beneficiary's Qualifications

The record reflects that the Form I-140 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).³ On motion, the

¹ See 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See, e.g., *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

² See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

³ 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

petitioner only addresses whether the beneficiary is qualified under the professional worker category. Therefore, on motion the AAO will only consider whether the petition may be approved in the professional classification.⁴

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. *See also* 8 C.F.R. § 204.5(l)(2).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in part:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.

Section 101(a)(32) of the Act defines the term “profession” to include, but is not limited to, “architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.” If the offered position is not statutorily defined as a profession, “the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.” 8 C.F.R. § 204.5(l)(3)(ii)(C).

In addition, the job offer portion of the labor certification underlying a petition for a professional “must demonstrate that the job requires the minimum of a baccalaureate degree.” 8 C.F.R. § 204.5(l)(3)(i)

The beneficiary must also 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).

Therefore, a petition for a professional must establish that the occupation of the offered position is listed as a profession at section 101(a)(32) of the Act or requires a bachelor’s degree as a minimum for entry; the beneficiary possesses a U.S. bachelor’s degree or foreign equivalent degree from a college or university; the job offer portion of the labor certification requires at least a bachelor’s degree or foreign equivalent degree; and the beneficiary meets all of the requirements of the labor certification.

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.

⁴ In its decision affirming the director’s decision that denied the instant petition, the AAO addressed whether the beneficiary met the requirements of the labor certification for both the professional and skilled worker categories. The AAO determined that the petitioner had not established that the beneficiary met the requirements of the labor certification under either category.

It is noted that the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) uses a singular description of the degree required for classification as a professional. In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now USCIS or the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991) (emphasis added).

It is significant that both section 203(b)(3)(A)(ii) of the Act and the relevant regulations use the word "degree" in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *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). It can be presumed that Congress' requirement of a single "degree" for members of the professions is deliberate.

The regulation also requires the submission of "an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study." 8 C.F.R. § 204.5(l)(3)(ii)(C) (emphasis added). In another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning." Section 203(b)(2)(C) of the Act (relating to aliens of exceptional ability). However, for the professional category, it is clear that the degree must be from a college or university.

In *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the court held that, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, USCIS properly concluded that a single foreign degree or its equivalent is required. *See also 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).

Thus, the plain meaning of the Act and the regulations is that the beneficiary of a petition for a professional must possess a degree from a college or university that is at least a U.S. baccalaureate degree or a foreign equivalent degree.

In the instant case, the labor certification states that the offered position, "Programmer Analyst," has the following minimum requirements:

EDUCATION

College: 4 years

College Degree Required: "Bachelor of Science"

Major Field of Study: Computer Science, Engineering, or Math

Experience: 2 years in the job offered or 2 years in the related occupation of Systems Analyst

The record contains a copy of the beneficiary's Bachelor of Commerce degree and transcripts from [REDACTED] India, awarded on August 3, 1998. The record also contains a certificate from The Academic Council of the [REDACTED] which states that the beneficiary obtained an "Advanced Diploma in Software Technology & Systems Management" on December 15, 1995.

The petitioner relies on the beneficiary's three-year bachelor's degree combined with his diploma from NIIT as being equivalent to a U.S. bachelor's degree. A three-year bachelor's degree will generally not be considered to be a "foreign equivalent degree" to a U.S. baccalaureate. *See Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the analysis of the beneficiary's credentials relies on a combination of lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a full U.S. baccalaureate or foreign equivalent degree required for classification as a professional.

As stated in the AAO's dismissal of the instant appeal, dated June 5, 2013, the AAO reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).⁵ USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.⁶ According to EDGE, a three-year Bachelor of Commerce degree from India is comparable to "three years of university study in the United States." Therefore, the beneficiary's Bachelor of Commerce degree is insufficient to qualify him for professional worker classification under Section 203(b)(3)(A)(ii) of

⁵ According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." *See* <http://www.aacrao.org/About-AACRAO.aspx>. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." *See* <http://edge.aacrao.org/info.php>.

⁶ 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. v. USCIS*, 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.

the Act.

The AAO also previously cited to EDGE regarding whether the beneficiary's diploma from [REDACTED] combined with his three-year Bachelor of Commerce Degree qualifies him under the professional worker category. EDGE states that the entrance requirement for postgraduate diplomas is completion of a two- or three-year baccalaureate degree. EDGE further states that a postgraduate diploma following a two-year bachelor's degree represents attainment of a level of education comparable to one year of university study in the United States. EDGE also states that a postgraduate diploma following a three-year bachelor's degree represents attainment of a level of education comparable to a bachelor's degree in the United States. However, the "Advice to Author Notes" section states:

Postgraduate Diplomas should be issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE). Some students complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor's degree.

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 AICTE, or that a two- or three-year bachelor's degree was required for admission into the program of study. On motion, counsel cites a document from the AICTE that lists unapproved institutions. Counsel notes that because the [REDACTED] is not listed as an unapproved institution the AAO should view this diploma together with the beneficiary's bachelor's degree as being the foreign equivalent of a U.S. bachelor's degree. However, counsel has not provided evidence that the [REDACTED] is listed on the portion of AICTE's website entitled "Accredited Institutions." Counsel states that the AICTE is not the only agency in India that determines whether an institution is accredited and submits a list of six other entities besides the AICTE that establish standards of teaching as well as evaluate programs of higher education. Counsel has not stated whether any of these other entities recognizes the [REDACTED] as an accredited institution of higher learning.

On motion, counsel asserts that neither the labor certification nor the recruitment conducted in support of that application explicitly stated that the postgraduate diploma must be issued by an accredited institution. While this assertion may be accurate, it is not relevant to whether the beneficiary qualifies for classification as a professional under section 203(b)(3)(A)(ii) of the Act. As noted above, according to EDGE, only postgraduate diplomas issued by an accredited university or institution approved by AICTE are considered when evaluating their equivalency to a U.S. bachelor's degree. The petitioner has submitted no evidence to dispute the findings of EDGE. As the petitioner has not demonstrated that the beneficiary's postgraduate diploma was issued by an AICTE accredited institution, the beneficiary's [REDACTED] diploma cannot be considered the equivalent of a U.S. bachelor's degree.

Furthermore, and most importantly, even if the [REDACTED] was accredited by the AICTE or another accrediting body in India, this education, coupled with the beneficiary's three-year bachelor's degree does not equate to a single source degree to qualify for the professional classification under Section 203(b)(3)(A)(ii) of the Act. As stated above, both section 203(b)(3)(A)(ii) of the Act and the relevant regulations use the word "degree" in relation to professionals. In *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the court held that, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, USCIS properly concluded that a single foreign degree or its equivalent is required. See also *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). Therefore, for the reasons stated above, and based on the conclusions of EDGE, the evidence in the record is not sufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree in "Computer Science, Engineering, or Math."

After reviewing all of the evidence in the record, it is concluded that the petitioner has failed to establish that the beneficiary has a U.S. baccalaureate degree or a foreign equivalent degree from an accredited college or university. The petitioner has failed to overcome the conclusions of EDGE with reliable, peer-reviewed information. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act.

Petitioner's Ability to Pay the Proffered Wage

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.⁷ If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

According to USCIS records, the petitioner has filed I-140 petitions on behalf of many other beneficiaries. Therefore, 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).

⁷ See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

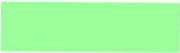
At issue on motion is whether the petitioner can establish that it had the ability to pay the beneficiary's proffered wage for 2003, 2005 and 2009, in addition to the other sponsored workers. On motion, counsel asserts that the petitioner has demonstrated that it paid prorated wages for each of its sponsored workers for 2003. The regulation at 8 C.F.R. § 204.5(g)(2) requires evidence of the ability to pay in the form of "copies of annual reports, federal tax returns, or audited financial statements." Each of these pieces of evidence relate to a petitioner's financial status during the entire year. Therefore, USCIS will not accept evidence of a petitioner's ability to pay the beneficiary's proffered wage for part of the year. The petitioner must demonstrate its ability to pay the entire amount of the beneficiaries' proffered wages from the year of the priority date onward. The USCIS will not prorate the wages of a petitioner's sponsored workers for any reason in another year; accordingly, the petitioner must establish that it has the ability to pay the full proffered wages of all of its sponsored workers in every year, including the year that the priority date is established. Therefore, the petitioner's claim that it had the ability to pay the prorated wages of all of its sponsored workers for 2003 is insufficient to establish the ability to pay. The petitioner has not established that it had the ability to pay the full proffered wages of all of its sponsored workers for 2003. On motion, counsel did not address the petitioner's ability to pay the proffered wages of its sponsored workers for 2005 or 2009. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wages to the beneficiary and the other sponsored workers.

Conclusion

In summary, the petitioner has failed to establish that the beneficiary qualifies for classification as a professional under section 203(b)(3)(A)(ii) of the Act. The petitioner has also failed to establish that it had the ability to pay the beneficiaries proffered wage from the priority date onward.

The petitioner has also failed to meet an applicable filing requirement for motions to reopen and motions to reconsider. See 8 C.F.R. §§ 103.5(a)(1)(iii). The regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. See *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion will be dismissed.



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). The petitioner has not sustained that burden. Accordingly, the motion will be dismissed, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is granted; the previous decision of the AAO, dated August 29, 2013, is affirmed. The petition remains denied.