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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 07 2014

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:
[REDACTED]

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 immigrant visa petition. The director granted the petitioner's first motion to reopen and affirmed his decision. He dismissed the petitioner's second motion to reopen. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner provides information technology services. 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 under section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).¹

An ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL), accompanies the petition. The petition's priority date, which is the date the DOL accepted the labor certification for processing, is July 20, 2010. *See* 8 C.F.R. § 204.5(d).

The director found that the petitioner failed to demonstrate its continuing ability to pay the beneficiary's proffered wage and the beneficiary's qualifications for the offered position as specified on the labor certification by the petition's priority date. Accordingly, he denied the petition on August 7, 2012 and affirmed the decision on November 6, 2012.

The record shows that the appeal is properly filed and alleges errors in law and fact. The record documents the procedural history in the case, which is incorporated into the decision. The AAO will elaborate on the procedural history only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.²

Ability to Pay

A petitioner must establish its ability to pay the beneficiary's proffered wage as of the petition's priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

¹ Section 203(b)(3)(A)(i) of the Act allows the granting of preference classification to qualified immigrants who are capable 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.

² The instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow the submission of additional evidence on appeal.

The labor certification states the proffered wage of the offered position of programmer analyst as \$22.48 per hour, or \$46,758.40 per year for a 40-hour work week.

The director's decisions, his Request for Evidence (RFE) of May 8, 2012, and the AAO's Notice of Intent to Dismiss (NOID) the appeal and RFE of August 30, 2013 notified the petitioner of its failure to provide complete evidence of its ability to pay pursuant to the regulation at 8 C.F.R. § 204.5(g)(2). Specifically, the petitioner failed to provide a complete copy of its 2010 federal tax return (or of its annual report, or audited financial statements for 2010).

In response to the AAO's NOID, the petitioner provides complete copies of its federal tax returns for 2010, 2011, and 2012 pursuant to the regulation, and other evidence of its ability to pay. Although the petitioner now provides the regulatory required evidence of its ability to pay, it does not explain its failure to previously provide the required evidence: upon filing of the petition; in response to the director's RFE; and in support of its two motions before the director. *See* AAO NOID, p. 3 ("The petitioner has not offered any reasonable explanation as to why it cannot provide this required information.")

If a petitioner cannot obtain required evidence, it must demonstrate the unavailability of the evidence and submit secondary evidence. 8 C.F.R. § 103.2(b)(2)(i). Where U.S. Citizenship and Immigration Services (USCIS) notifies a petitioner of required evidence and affords the petitioner an opportunity to provide the evidence before adjudicating the petition, the AAO need not accept evidence offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988).

In the instant case, the petitioner offers no explanation of its previous failures to provide the required evidence of its ability to pay the beneficiary's proffered wage. While the petitioner previously provided copies of its Internal Revenue Service (IRS) Forms W-2 Wage and Tax Statements to the beneficiary for 2010 and 2011, the AAO cannot consider this secondary evidence of the petitioner's ability to pay the proffered wage until the petitioner demonstrates the previous unavailability of the evidence required by the regulation at 8 C.F.R. § 204.5(g)(2).³

³ Copies of Forms W-2 in the record state that the petitioner paid the beneficiary more than the annual proffered wage in 2010, 2011, and 2012. However, the petitioner submits copies of Forms W-2 of other beneficiaries showing that it paid total wages of more than \$2 million in 2011 and more than \$1.99 million in 2012. The wage amounts on the petitioner's Forms W-2 conflict with its tax returns, which state that it paid combined wages and officer compensation of \$388,817 in 2011 and \$986,485 in 2012. The unexplained discrepancies in the wage amounts on the Forms W-2 and on the corresponding tax returns cast doubt on the reliability of the petitioner's wage documentation. *See Matter of Ho*, 19 I&N Dec. at 591 (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence in support of the petition). In any future filings regarding this job opportunity, the petitioner must address these discrepancies.

Under these circumstances, the AAO will not consider the petitioner's evidence of its ability to pay on appeal and finds that the petitioner has failed to demonstrate its continuing ability to pay the beneficiary's proffered wage from the petition's priority date onward.

The Beneficiary's Qualifications

A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the petition's priority date. 8 C.F.R. §§ 103.2(b)(1),(12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In examining the labor certification to determine the minimum job requirements of the offered position, USCIS may not ignore a term on the ETA Form 9089, nor may it impose additional requirements. *See K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

Where the job requirements are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" to determine the qualifications that the beneficiary must possess. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret job requirements is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale & Linden Park Co. v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of a job's requirements must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added).

In the instant case, the labor certification states the following minimum job requirements for the offered position of programmer analyst:

- H.4. Education: Bachelor's degree in computer science.
- H.5. Training: None required.
- H.6. Experience in the job offered: 12 months.
- H.7. Alternate field of study: Engineering, business, math, science or management information systems
- H.8. Alternate combination of education and experience: 3 years of college and 1 year of experience in lieu of a Bachelor of Science degree and 1 year of experience.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: 12 months as a software engineer, consultant, developer, programmer analyst, project manager
- H.14. Specific skills or other requirements: "Will accept any suitable combination of education, training and experience that is substantially equivalent to the items H-4 through H-10B of the instant ETA 9089."

The beneficiary states on the labor certification that he obtained a master's degree in computer science from [REDACTED] in Pakistan in 2005. He also claims more than 4 years of relevant employment experience before the petition's priority date, as follows:

- About 16 months of experience as a software engineer with the petitioner from March 1, 2009 until the filing of the labor certification on July 20, 2010;
- About 25 months of experience as a programmer analyst with [REDACTED] in the United States from February 14, 2007 to March 9, 2009; and
- About 11 months of experience as a project manager with [REDACTED] in Pakistan from March 6, 2006 to February 7, 2007.

The petitioner must support the beneficiary's claimed employment with letters from employers including "the name, address, and title of the writer, and a specific description of the duties performed by the alien." 8 C.F.R. § 204.5(g)(1); *see also* 8 C.F.R. § 204.5(l)(3)(ii)(A). "If such evidence is unavailable, other documentation relating to the alien's experience ... will be considered." 8 C.F.R. § 204.5(g)(1).

The record contains experience letters from claimed employers of the beneficiary who are both identified and unidentified on the labor certification. Letters from [REDACTED] and [REDACTED] state that the beneficiary worked in related occupations in Pakistan from October 2000 through February 2006. However, the beneficiary's failure to identify these employers on the labor certification casts doubt on the veracity of his claimed employment with the businesses. *See Matter of Leung*, 16 I&N Dec. 12, 14-15 (Dist. Dir. 1976), *disappr'd of on another ground*, *Matter of Lam*, 16 I&N Dec. 432 (BIA 1978) (upholding the denial of an adjustment of status application where the labor certification for the applicant did not identify his claimed former employer). The AAO therefore finds the experience letters from the three claimed employers that the beneficiary did not identify on the labor certification insufficient to establish his qualifying employment.

The director found that an August 8, 2006 letter from [REDACTED] stated that the company would employ the beneficiary, but did not confirm his actual employment there. In addition, a February 7, 2007 letter from [REDACTED] confirmed the beneficiary's employment there, but the employment was for less than the 12 months required on the labor certification.

In response to the AAO's NOID, the petitioner submits a May 1, 2009 letter on [REDACTED] stationery. The letter states that the beneficiary worked there as a programmer/system analyst from February 14, 2007 to March 9, 2009 and describes his duties. However, the letter does not comply with the regulations at 8 C.F.R. §§ 204.5(g)(1), (l)(3)(ii)(A) because it does not state the writer's title with the employer.

The record also contains copies of an offer letter on [REDACTED] stationery, signed by a vice president on August 7, 2006, and Forms W-2 stating that [REDACTED] paid the beneficiary the following annual amounts: \$42,410 in 2007; \$75,059 in 2008; and \$11,760 in 2009. In addition, copies

of monthly paystubs indicate that [REDACTED] employed the beneficiary from November 2008 through January 2009.

The dates and wage amounts on the Forms W-2 and paystubs from [REDACTED] are consistent with the representations on the labor certification and in the May 1, 2009 letter that [REDACTED] employed the beneficiary in a related occupation from February 14, 2007 to March 9, 2009. Although the May 1, 2009 letter does not comply with the regulations at 8 C.F.R. § § 204.5(g)(1), (1)(3)(ii)(A), the regulation at 8 C.F.R. § 204.5(g)(1) allows USCIS to consider other documentary evidence of the beneficiary's claimed employment if an employer letter is "unavailable." As indicated previously, if a required document cannot be obtained, a petitioner must demonstrate the unavailability of the document and submit secondary evidence. 8 C.F.R. § 103.2(b)(2)(i).

In his appeal brief, counsel states that the beneficiary "was unable to obtain the appropriate letter from [REDACTED] which met the legal requirements for immigration experience letters; however, he had provided the prospective letter [of August 8, 2006] despite having many years of proven experience." Counsel's assertion that the beneficiary could not obtain the required experience letter from [REDACTED] does not constitute evidence of the document's unavailability. See *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980) (the assertions of counsel are not evidence). The record fails to establish the unavailability of the required experience letter from [REDACTED]. Therefore, the AAO does not consider the May 1, 2009 letter, Forms W-2, and paystubs from [REDACTED] as sufficient secondary evidence of the beneficiary's qualifying employment experience.

The director also doubted the beneficiary's qualifications for the offered position because the beneficiary stated that he worked full-time while completing university courses from September 2003 to August 2005. In a September 6, 2012 letter, the beneficiary states: "While attending [REDACTED], I worked during the days and attended courses in the evenings." In rejecting the beneficiary's claim as "not ... feasible," the director noted that copies of transcripts from [REDACTED] showed that the beneficiary completed six semesters of coursework at the school, including: four semesters of four courses; one semester of three courses; and one semester of five courses.

In his appeal brief, counsel argues that the job requirements on the labor certification do not bar the petitioner from relying on experience that the beneficiary obtained while attending university. Counsel asserts that taking "3 or 4 courses in a semester" while working full-time "is not an easy endeavor," but "certainly is possible."

The AAO finds the beneficiary's claim that he completed university studies while working full-time to be immaterial to his qualifying experience for the offered position. As indicated previously, the AAO discounts evidence of the beneficiary's claimed qualifying experience before March 2006 because of its omission on the labor certification. However, the AAO acknowledges that it is possible to simultaneously work and attend school on full-time bases. Also, the website of [REDACTED] states that the school offers courses for its Master of Science degree in computer science weeknights from 5:30 to 8:30. See [REDACTED]

(accessed Jan. 24, 2014). Therefore, the AAO finds that the beneficiary's claim of full-time study while attending school does not undermine his educational qualifications for the offered position.

The director also questioned the beneficiary's claim that he attended a previous master's program in computer science at [REDACTED] Pakistan. The director noted that the beneficiary's name on a copy of a December 5, 2000 certificate from the college differs from his name elsewhere in the record and ends with the word "[REDACTED]". In his September 6, 2012 letter, the beneficiary claims that the term "[REDACTED]" refers to his caste in Pakistan and that, where he lived, castes were used like surnames for identification purposes.

Various publications confirm that the term "[REDACTED]" refers to castes in Pakistan (and elsewhere in southern Asia). *See, e.g.*, H.A. Rose, *A Glossary of the Tribes & Castes of Punjab*, p. 130f, Low Price Publications. The beneficiary's explanation of the discrepancy in his name therefore appears credible. Moreover, the beneficiary states that [REDACTED] was not an accredited institution when he studied there, and counsel states that the petitioner does not rely on his studies there as qualifying education for the offered position.

In his decision on the petitioner's first motion to reopen, the director rejected counsel's argument that the beneficiary's employment experience with the petitioner qualifies the beneficiary for the offered position. Counsel asserted that the duties of the beneficiary's current position of software engineer with the petitioner "differ by more than 50% from the proposed permanent position." However, the director found that the record did not support counsel's assertion.

A labor certification employer cannot require U.S. applicants to possess more experience than the alien had at the time of his hire unless: the alien gained the experience while working for the employer in a position not "substantially comparable" to the offered position; or the employer demonstrates that it is no longer feasible to train a worker to qualify for the position. 20 C.F.R. § 656.17(i)(3)(i). A "substantially comparable" job means a job "requiring performance of the same job duties more than 50 percent of the time." 20 C.F.R. § 656.17(i)(5)(ii).

In the instant case, Part H.11 of the ETA Form 9089 states that the offered position of programmer analyst involves: analyzing, designing, coding, developing, and testing software systems; coordinating changes to computer databases; testing and implementing databases applying knowledge of database management systems; developing applications and coordinating with client in Oracle Applications, JavaScript, J2EE, Web Logic, SQL, Windows XP 2000, Solaris, Developer 2000, Windows NT and other technologies; tuning and reporting infrastructure performance; writing detailed descriptions of user needs, program parameters, and steps required to develop and modify existing applications; coordinating software implementation; testing, debugging, and correcting data conversions to new systems; programming code; modifying, analyzing, and reviewing coding; consulting with other professionals to evaluate interface between software and hardware; analyzing and designing existing client server systems to evaluate effectiveness; and developing new systems to improve production of workflow as required by the client.

Part K.9. of the ETA Form 9089 states that the beneficiary's current position of software engineer involves: analyzing requirements; designing database structure and application architecture; and development using C# 1.1, 2.0, 3.x, Web Services (ASMX & WCF), Infragistics controls v7.1, Oracle 9i, Smart Client Software Factory (SCSF), Web Service Software Factory (WSSF), MS application blocks (UIP, Data Access, etc.), ASP.Net 1.1, 2.0, 3.x, MOSS 2007, SQL Server 200/2005/2008, and AJAX.

The record also contains a September 7, 2012 letter from the petitioner's human resources manager. This letter states that the beneficiary's current position of software engineer involves: designing and developing .Net Window applications using C# 3.0 and Oracle database; designing and developing .Net Web Services (ASMX and WCF) using C# 3.0 and Oracle database; designing and developing databases using stored procedures, table, etc.; developing and designing interfaces to communicate with other systems; maintaining existing systems and providing support to end users; developing a financial application using .Net, WinForms, MVC Pattern, UIP, SOA, C#, C++. Core Java, JDBC, Servlets, JSP, Struts, HTML, Java Script, and Web-based object-oriented technologies; working with team members from the beginning of the product cycle through release; designing, developing, and implementing software solutions; leading complex projects; reviewing and recommending products from multiple vendors; developing technical specifications in the software development process; coordinating software system installation and monitoring equipment functioning to ensure specifications are met; designing, developing, and modifying software systems using scientific analysis and mathematical models to predict and measure outcome and consequences of design; determining system performance standards; developing software system testing and validation procedures, programming, and documentation; consulting other professionals to evaluate interface between hardware and software; analyzing and designing existing client server systems to evaluate effectiveness and to develop new systems to improve production of work flow as required by the client; and storing, retrieving, and manipulating data for analysis of system capabilities and requirements.

The description of the beneficiary's current position of software engineer on the labor certification appears to substantially differ from the description of the position in the petitioner's letter of September 7, 2012. The job description in the September 7, 2012 letter is much longer than the description on the labor certification, describing many duties not stated on the labor certification. The job description in the September 7, 2012 letter also involves many technologies not stated on the labor certification description, including: WinForms; MVC Pattern; SOA; C++; Core Java; JDBC; Servlets; JSP; Struts; HTML; and Java Script.

In the petitioner's second motion to reopen, counsel argued that the petitioner's description of the beneficiary's current position in its September 7, 2012 letter merely provides more detail than the position's description on the labor certification. Counsel asserted that "there are no inconsistencies to be noted as the beneficiary works in database design and development as described in both items."

But the job duties of the beneficiary's current position described in the petitioner's September 7, 2012 letter appear identical to many of the job duties of the offered position stated on the labor

certification. Both descriptions include the following duties: designing and developing software systems; coordinating software installation; consulting with other professionals to evaluate interface between software and hardware; analyzing and designing existing client server systems to evaluate effectiveness; and developing new systems to improve production of workflow as required by the client. Therefore, the record does not establish sufficient differences between the beneficiary's current and offered positions to allow consideration of his experience with the petitioner. *See Matter of Ho*, 19 I&N Dec. at 691-92 (a petitioner must resolve inconsistencies in the record by independent, objective evidence).

For the foregoing reasons, the AAO finds that the petitioner has not established the beneficiary's qualifying experience for the offered position by the petition's priority date.

Intent to Employ the Beneficiary in the Offered Position

Beyond the director's decision, the AAO also finds that the record does not establish the petitioner's intent to employ the beneficiary in the offered position specified on the labor certification.⁴

A labor certification remains valid only for the particular job opportunity, the alien for whom the certification was granted, and the area of intended employment stated on the ETA Form 9089. 20 C.F.R. § 656.30(c)(2); *see also Sunoco Energy Dev. Co.*, 17 I&N Dec. 283 (Reg'l Comm'r 1979) (upholding a petition's denial where the petitioner intended to employ the beneficiary in a different state than indicated on the labor certification); *Matter of Izdebska*, 12 I&N Dec. 54 (Reg'l Comm'r 1966) (the Service properly denies a petition where the petitioner did not intend to employ the beneficiary as a live-in domestic worker as specified on the labor certification).

The term "area of intended employment" means "the area within normal commuting distance of the place (address) of intended employment" and includes any place within the same Metropolitan Statistical Area (MSA) of the place of intended employment. 20 C.F.R. § 656.3.

In the instant case, the labor certification states the area of intended employment as Madison, Wisconsin. The labor certification does not state that the duties of the offered position will be performed at any other locations, or that travel or relocation is required.

The Form I-140 states the area of intended employment as [REDACTED] Illinois. The Form I-140 also does not state that the duties of the offered position will be performed at any other locations, or that travel or relocation is required.

⁴ The AAO may deny a petition that fails to comply with the technical requirements of the law, even if the director did not identify all of the grounds for denial in the initial decision. *See Spencer Enters., Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

In its NOID, the AAO notified the petitioner of the different areas of intended employment stated on the labor certification and in the petition. The AAO requested evidence of the petitioner's intent to employ the beneficiary in [REDACTED] Wisconsin as specified on the labor certification.

In response, counsel states:

The I-140 erroneously provided the [REDACTED] Illinois address as the work location. As such, we request that the error on the form be amended to the work location provided on the Certified ETA 9089 in [REDACTED] Wisconsin.

Counsel's assertion that the Form I-140 erroneously states the area of intended employment does not establish the petitioner's intent to employ the beneficiary in the offered position in [REDACTED] Wisconsin as specified on the labor certification. *See Obaigbena*, 19 I&N Dec. at 534; *Ramirez-Sanchez*, 17 I&N Dec. at 506 (the assertions of counsel do not constitute evidence). Even if counsel's assertion could be accepted as evidence, counsel does not state how the error was made or who made it.

Instead, the record establishes that the petitioner intends to employ the beneficiary in Illinois. In addition to the indication of [REDACTED] as the area of intended employment on the Form I-140, the record contains an April 25, 2012 letter from a senior manager of operations for [REDACTED], a sub-vendor of the petitioner. The letter states that the petitioner will employ the beneficiary full-time and that he will be assigned to work at a client site in Chicago. [REDACTED] is a suburb of Chicago in the same MSA as Chicago.

The record's failure to establish that the petitioner intends to employ the beneficiary within normal commuting distance of [REDACTED] Wisconsin, the area of intended employment specified on the labor certification, constitutes another ground on which to deny the petition.

Conclusion

The AAO finds that the petitioner has failed to establish its continuing ability to pay the beneficiary's proffered wage and the beneficiary's qualifying experience for the offered position. The AAO also finds that the record does not establish the petitioner's intent to employ the beneficiary in the offered position in the area of intended employment stated on the labor certification. Accordingly, the AAO will affirm the director's decision.

The petition will be denied for the above stated reasons, with each considered an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. 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, and the petition remains denied.