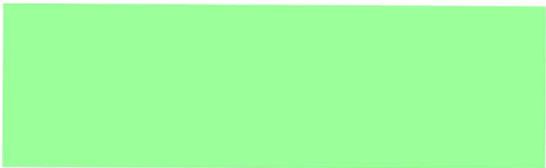




U.S. Citizenship
and Immigration
Services

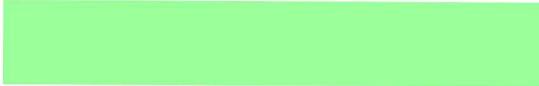
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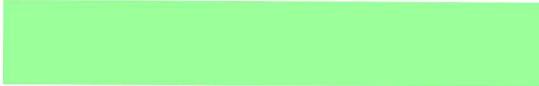


DATE: **JUL 18 2014**

OFFICE: NEBRASKA SERVICE CENTER

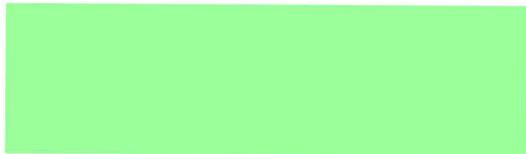
FILE: 

PETITIONER: 

BENEFICIARY: 

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3)(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 Director, Nebraska Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a manufacturer of mass finishing and shot blast surface finishing equipment. It seeks to employ the beneficiary permanently in the United States as a sales and product manager. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary possessed the minimum education required on the ETA Form 9089, Application for Permanent Employment Certification (labor certification). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is July 19, 2012. *See* 8 C.F.R. § 204.5(d).

The record shows that the appeal is properly filed, timely 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.

As set forth in the director's January 6, 2014 denial, the primary issue in this case is whether or not the beneficiary possesses the education required on the ETA Form 9089, a high school diploma.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal, counsel states that the petitioner would hire, and an applicant would qualify, for the offered position without any recognized formal education, such as a baccalaureate degree or a high school diploma.

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

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the [labor certification]. The minimum requirements for this classification are at least two years of training or experience.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulation at 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).

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).

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 will not look beyond the plain language of the labor certification to determine the employer’s claimed intent.

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

- H.4. Education: Bachelor’s degree in Mechanical Engineering or related field.
- H.5. Training: None required.
- H.6. Experience in the job offered: 84 months.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: Yes, High School and 9 years of experience.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: Any suitable combination of education, experience, and training with a Bachelor’s degree or functional equivalent in mechanical engineering or a related field, and seven years progressive experience specific to operations management for technical sales and engineering related services in surface-finishing machining manufacturing. Extensive US and Canada travel to customers and trade shows, normal for sales management in this industry.

Part J of the labor certification states that the beneficiary's highest level of education related to the offered position is a high school education from [REDACTED] Ontario, completed in 1972. The beneficiary signed the Form 9089 under penalty of perjury on February 25, 2013.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a product manager/sales manager with [REDACTED] in Canada from September 1, 1980 until July 3, 2006. 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 record of proceeding contains a copy of the beneficiary's Canadian school record. The record indicates that the beneficiary stopped attending the high school in October of 1971. There is no evidence of record that the beneficiary completed a high school education.

On appeal, counsel claims that the petitioner intended to seek any U.S. worker with the proper skill set and without any formal education. The Form ETA 9089 indicates at part H.8, however, that the petitioner will accept a high school education and nine years of experience to qualify for the position as an alternative to a bachelor's degree in mechanical engineering or a related field.

The employer's subjective intent may not be dispositive of the meaning of the actual minimum requirements of the proffered position. *Maramjaya v. USCIS*, Civ. Act. No. 06-2158, 14 n. 7. The best evidence of the petitioner's intent concerning the actual minimum educational requirements of the proffered position is evidence of how it expressed those requirements to DOL during the labor certification process and not afterwards to USCIS. The timing of such evidence is needed to ensure inflation of those requirements is not occurring in an effort to fit the beneficiary's credentials into requirements that do not seem on their face to include what the beneficiary has.

Thus, on May 22, 2014, we sought information from the petitioner through a Notice of Intent to Dismiss (NOID). We sought evidence of the petitioner's claimed intent concerning the actual minimum requirements of the position as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers. We also requested evidence of the petitioner's ability to pay the proffered wage for 2012 and 2013.

In response to the NOID, the petitioner through counsel, submits a copy of the signed recruitment report required by 20 C.F.R. § 656.17(g)(1), together with copies of the prevailing wage determination, all online, print and additional recruitment conducted for the position, the job order, the posted notice of the filing of the labor certification, and all resumes received in response to the recruitment efforts. The petitioner states, through counsel, that the employer sought a specific skill set rather than a formal education and did not require a bachelor's degree, a high school diploma, or any formal education. Counsel states that the ETA Form 9089 allows at part H.14 for the candidate for the position to qualify based on "any suitable combination of education, experience and

training.”² Counsel states that the petitioner reviewed the resumes submitted in response to the advertisements with a view toward finding the specific skill set required, and that the petitioner did not categorically reject any applicant because he or she did not have any formal education. The petitioner also submitted financial statements for the petitioner for 2013 and 2014 and copies of Forms W-2 issued to the beneficiary for 2009 through 2012.

We disagree that the express language of the labor certification on the Form ETA 9089 in Part H, which lists the primary requirements for the position at parts H.4, H.5 and H.6, and the secondary or alternative requirements at parts H.7, H.8, H.9 and H.10, may be nullified by part H.14. The petitioner could have chosen to list no education in part H.8, but instead checked that a high school diploma is required.

The petitioner did not submit any evidence that the beneficiary has a high school diploma in response to our NOID. As such, the beneficiary does not meet the minimum requirements of the Form ETA 9089 as of the priority date, and does not qualify for classification as a skilled worker. For this reason, the appeal must be dismissed.

We further note that the recruitment materials submitted in response to the NOID reflect that the petitioner recruited for a worker with a bachelor’s degree in mechanical engineering or a related field. All of the advertisements, posting notices, and the prevailing wage determination form state that the petitioner requires a bachelor’s degree or the functional equivalent in mechanical engineering or related fields. The petitioner did not define on the Form ETA 9089 or in its advertisements, posting notices, or the prevailing wage determination form, what it meant by “functional equivalent in mechanical engineering” or related fields. The materials do not state that the petitioner would be willing to consider less than a bachelor’s degree for the position, or if so, what it would consider an acceptable alternative. None of the job advertisements suggest that the petitioner would consider any applicant for the position who had a specific skill set and no formal education, or a high school diploma and nine years of work experience, or anything less than a bachelor’s degree.³

² The language cited is commonly referred to as *Kellogg* language, the requirement for which was outlined in *Francis Kellogg*, 1994-INA-465 and 544, 1995-INA 68 (Feb. 2, 1998) (en banc). *Kellogg* language in a Form ETA 9089 reads: “any suitable combination of education, training or experience is acceptable.” We do not interpret this language to mean that the employer would accept lesser qualifications than the stated primary and alternative requirements on the labor certification.

³ The petitioner received applications from 16 workers in response to its advertisements and job postings for the position. Of these, 12 people, or 75% of the applicants, had a bachelor’s degree in mechanical engineering or a related field. It thus appears as if the advertisements for the position may not have accurately reflected that the petitioner would accept less than a bachelor’s degree in mechanical engineering. Additionally, the petitioner submitted a hiring matrix for those resumes that it received. One of the categories listed by the petitioner on the matrix is whether or not the degree requirements were met, reflecting that a bachelor’s degree in mechanical engineering or related was an important consideration for the petitioner.

The petitioner is required during the labor certification application recruitment period to apprise candidates of the minimum requirements for the position. The petitioner cannot advertise for a narrower pool of candidates than it is willing to accept. The record reflects that the petitioner in this case recruited for candidates who had a bachelor's degree in mechanical engineering or a related field, or the functional equivalent. The petitioner, having advertised for a bachelor's degree, cannot now state that a degree is not required. This issue does not seem to have been considered by the DOL before approving the labor certification.⁴

As noted above, the Form ETA 9089 specifically requires a high school diploma. The record does not reflect that the beneficiary has a high school diploma. 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.

Beyond the decision of the director, the labor certification states that the beneficiary qualifies for the offered position based on experience as a product manager/sales manager with [REDACTED] in Canada from September 1, 1980 until July 3, 2006. No other experience is listed.

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 an experience letter from [REDACTED], HR Manager on [REDACTED] letterhead dated February 22, 2013 stating that predecessors of Wheelabrator employed the beneficiary in engineering and management positions during his tenure from November 1977 until July 1980 and that the beneficiary rejoined a predecessor company again in February 1997 and remained with the predecessors and [REDACTED] (Canada) Limited continuously until July 2006. The record also contains a reference letter dated June 15, 2008 from [REDACTED] President, [REDACTED] stating that his company employed the beneficiary until 1997 when it was sold to [REDACTED] claims that [REDACTED] employed the beneficiary, from 1981 until 1997 in various sales manager positions. However, neither letter describes the beneficiary's job duties. Nor do the employment dates in the letters match the dates provided by the beneficiary on the approved labor certification. This has created an inconsistency between the beneficiary's claims and the experience letters in the record. *See Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). No objective, independent evidence resolves these inconsistencies.

⁴ The record reflects that the DOL received the Form ETA 9089 on July 19, 2012 and approved the application on September 17, 2012. Because of this relatively brief time period (two months), it does not appear that DOL conducted an audit during the recruitment process in this case.

Because of the noted deficiencies, the experience letters in the record do not establish the beneficiary's nine years of work experience as required in the alternative education and experience section of the approved labor certification. For this additional reason, the beneficiary is not qualified for the position.

For the reasons noted above, 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 skilled worker under section 203(b)(3)(A) of the Act.

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.