



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: JUL 31 2014

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

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

PETITION: Immigrant Petition for Alien Worker as a Professional Pursuant to Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(ii)

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 (the director) 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 a computer software engineering business. It seeks to permanently employ the beneficiary in the United States as a management analyst/lead consultant. 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).<sup>1</sup>

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 January 15, 2013. *See* 8 C.F.R. § 204.5(d).

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 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.

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.<sup>2</sup>

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).

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<sup>1</sup> 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.

<sup>2</sup> 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 Comp. Sci, Engg. Sci, Busi. Com.
- H.5. Training: None required.
- H.6. Experience in the job offered: 12 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: Must have skills and experience in JAVA, C language, HTML, JAVA Script, Oracle, MySQL, MS Windows, MS Project and MS Visio. Financial applications for smart phones, specialization in strategy and finance. Strong knowledge in project management tools such as PeopleSoft ESA, PPM, HCM, ELM. Must be willing to relocate frequently.

The labor certification states that the beneficiary qualifies for the offered position based on a Bachelor’s degree in engineering from [REDACTED] completed in 1994 and the following experience:

- (1) As a business development manager with [REDACTED] Chennai, India, from October 21, 2007 to March 26, 2008;
- (2) As a business development manager with [REDACTED] Germany), Bad Homburg, Germany, from March 27, 2008 to August 29, 2008;
- (3) As a business development manager with [REDACTED] Somerset, New Jersey, from February 10, 2009 to May 29, 2009;
- (4) In the proffered position with the petitioner from June 1, 2009 to October 11, 2013, the date on which the labor certification was signed by the beneficiary.

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 contains a copy of the beneficiary's Bachelor of Engineering diploma and transcripts from [REDACTED] completed in 1994. The record also contains an evaluation of the beneficiary's educational credentials prepared by [REDACTED] for the [REDACTED] dated November 18, 1998. The evaluation states that the beneficiary's Bachelor of Engineering is equivalent to a Bachelor of Science degree in engineering in the United States. Additionally, the [REDACTED] a reliable, peer-reviewed source of information about foreign credentials equivalencies<sup>3</sup> finds a Bachelor of Engineering degree from India to represent "attainment of a level of education comparable to a bachelor's degree in the United States."

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 a March 13, 2012 experience letter from [REDACTED] HR manager, on [REDACTED] letterhead stating that the company employed the beneficiary as a business development manager from February 2009 to May 2009. However, the letter does not state whether the employment was full-time or part-time, describe the beneficiary's duties in detail or sufficiently specify his dates of employment.

The record contains an August 27, 2008 letter and a September 3, 2008 service certificate from [REDACTED] Head of human resources (Europe), on [REDACTED] letterhead stating that the company accepted the beneficiary's resignation as of August 29, 2008 and confirming that the company employed the beneficiary from March 27, 2008 to August 29, 2008. The service certificate states that the beneficiary's designation at the time of his departure was business development manager. However, the letter and service certificate do not state whether the

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<sup>3</sup> 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.

beneficiary's position was as a business development manager for his entire employment, whether the employment was full-time or part-time or describe the beneficiary's duties in detail.

The letters and certificate from [REDACTED] are deficient. Moreover, none of them speak as to whether the beneficiary obtained any of the special skills listed at H.14.

The record contains a March 17, 2008 experience letter from [REDACTED], human resource, on [REDACTED] letterhead stating that the company employed the beneficiary from August 17, 2000 to October 8, 2007. The letter states that the beneficiary's designation at the time of his departure was senior manager.

The record contains an undated recommendation letter from [REDACTED] head-human resources, on [REDACTED] letterhead stating that the signatory has known the beneficiary for three years. The recommendation letter is accompanied by an October 7, 1999 employee agreement between the beneficiary and [REDACTED] president of [REDACTED] indicating that the beneficiary was hired as a market analyst.

The record contains a February 23, 1999 service certificate from [REDACTED], general manager-HR, on [REDACTED] letterhead stating that the company employed the beneficiary from June 6, 1997 to January 31, 1999. The letter states that the beneficiary's designation at the time of his departure was executive.

However, the letters and certificate from [REDACTED] are deficient because they do not state whether the beneficiary's position at the time of his departure was identical to the position he held throughout his employment or describe the beneficiary's duties in detail.

The record contains an undated experience letter from [REDACTED] CEO, on [REDACTED] letterhead stating that the company employed the beneficiary as a market analyst from March 1999 to November 1999. However, the letter does not state whether the employment was full-time or part-time, describe the beneficiary's duties in detail or sufficiently specify his dates of employment. Furthermore, the limited job description contained therein does not indicate that the beneficiary's duties in this position would qualify as experience in the proffered position of management analyst/lead consultant.

On appeal, counsel states that the director erred in not considering the beneficiary's employment experience not listed on the labor certification. Without certification by DOL, the credibility of the evidence and facts asserted for experience not listed on the labor certification is lessened. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976). While counsel is correct that the omission of this experience from the ETA Form 9089 does not preclude its consideration, this experience must be supported by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). No independent, objective evidence, such as tax or pay records were submitted.

Even if we consider the experience not listed on the ETA Form 9089, the letters, certificates and employee agreements indicating the beneficiary's experience with Birlasoft, [REDACTED]

are all deficient. Further, none of these letters speaks to whether the beneficiary obtained any of the special skills listed at H.14.

Finally, the record contains a January 23, 2014 letter from [REDACTED] director human resources, on the petitioner's letterhead stating that the company has employed the beneficiary since May 2009. The letter provides a list of the beneficiary's job responsibilities with the petitioner and a list of knowledge and skills he has demonstrated through his exercise of those duties. The letter goes on to state that, during the beneficiary's 15+ years of experience in the industry, he has gained significant broad-based exposure to various technologies, methodologies, models and tools which include JAVA, C language, HTML, Oracle, MS Project and financial applications for smart phones.

The experience, skills and knowledge obtained by the beneficiary must be established through a letter from the beneficiary's employer or trainer at the time the experience was obtained. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). As such, it does not appear that Mr. [REDACTED] is an appropriate individual to attest to the beneficiary's experience prior to joining the petitioner. The petitioner has not established the need for secondary evidence with any documentary evidence of any of the qualifying employer's closings; and does not submit affidavits from two persons to establish the fact of the beneficiary's employment as required by 8 C.F.R. § 103.2(b)(2).

Representations made on the certified ETA Form 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 cannot be used to qualify the beneficiary for the certified position.<sup>4</sup> In response to question

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<sup>4</sup> 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.

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.” 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 comparable<sup>5</sup> and

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

<sup>5</sup> 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

the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the record indicates that the beneficiary's employment with the petitioner has only been in the proffered position and section H.10 does not provide that applicants can qualify through an alternate occupation. According to DOL regulations, therefore, the petitioner cannot rely on experience gained with the petitioner for the beneficiary to qualify for the proffered position.

Therefore, the submitted experience letters do not establish that the beneficiary possesses 12 months of experience in the proffered position or the special skills listed at H.14.

We affirm 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 worker under section 203(b)(3)(A)(ii) of the Act.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

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