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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

[Redacted]

DATE: JUN 17 2014

OFFICE: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner:
Beneficiary:

[Redacted]

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

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,

Handwritten signature of Elizabeth McCormack in black ink.

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, (director) denied the employment-based 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 general management and administrative services business. It seeks to permanently employ the beneficiary in the United States as an associate consultant-IT desktop management. On the Form I-140, Immigrant Petition for Alien Worker, the petitioner marked box “e” at Part 2, indicating that it seeks to classify 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).

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 November 5, 2012. *See* 8 C.F.R. § 204.5(d).

The director’s decision denying the petition concludes that the beneficiary did not possess a U.S. bachelor’s degree or foreign equivalent in computer science, information technology or a related field as required by the terms of the labor certification.

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The Roles of the DOL and USCIS in the Immigrant Visa Process

At the outset, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL’s role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

¹ 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).

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is left to USCIS to determine whether the offered position and the beneficiary qualify for the requested preference classification, and whether the beneficiary satisfies the minimum requirements of the offered position as set forth on the labor certification.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).² *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

² Based on revisions to the Act, the current citation is section 212(a)(5)(A).

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

Eligibility for the Classification Sought

In the instant case, the petitioner requests classification of the beneficiary as a professional. 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(1)(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)

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 at least a U.S. bachelor’s degree or a foreign equivalent degree from a college or university; and the job offer portion of the labor certification requires at least a bachelor’s degree or a foreign equivalent degree.

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).

At issue in this case is not whether the beneficiary possesses a U.S. bachelor’s degree or a foreign equivalent degree, but whether the beneficiary meets all of the requirements of the offered position as required by the labor certification.

The Beneficiary Must Meet the Minimum Requirements of the Offered Position

The beneficiary must meet all of the minimum requirements of the offered position as set forth on the labor certification by the priority date. In evaluating the beneficiary’s qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate that the beneficiary has to be found qualified for the position.

Madany, 696 F.2d at 1015. USCIS interprets the meaning of terms used to describe the requirements of a job in a labor certification by “examin[ing] 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]” even if the employer may have intended different requirements than those stated on the form. *Id.* at 834 (emphasis added).

The required education, training, experience and skills for the offered position are set forth at Part H 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.
- H.4-B. Major field of study: Computer science, information technology, or related.
- H.5. Training: None required.
- H.6. Experience in the job offered: None required.
- 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: 48 months as a system engineer/analyst; programmer analyst; software specialist; etc.
- H.11. Job Duties: Utilize programming and analysis experience in end user computing and PC/Workstation based LAN applications, end user computing systems and hardware, client functions and applications to provide consultation to business area management and staff at the highest technical level for all aspects of end user computing and PC/Workstation based LAN systems software and hardware. Consult with business area management and staff on the usage of end user computing and PC/Workstation based LAN systems and hardware, PC/Workstation data and systems security. Provide technical support and guidance to client and systems areas through consulting, teaching and publication of documentation. Evaluate, maintain, modify and document PC applications packages using Wise Package Studio for Altiris, participate in the testing and evaluation of new PC packages, implement prototypes, and consult with clients on selection of packages and equipment. Monitor project status from start to completion. Design, develop, test and maintain IT standard software and enterprise packages.
- H.14. Specific skills or other requirements: The position requires a bachelor’s degree (or foreign equivalent) in Computer Science, Information Technology or related field plus 4 years of post-baccalaureate experience reflecting demonstrable ability in the skill set described above.

The labor certification, signed by the beneficiary under penalty of perjury, states that the beneficiary’s highest level of education relevant to the offered position is a master’s degree in

business administration from [REDACTED] in Kolhapur, India. Regarding the beneficiary's work experience, the labor certification states that he worked in the offered job for the petitioner since November 19, 2007; as a programmer analyst for [REDACTED] Inc., in Pittsfield, Maine, from September 16, 2004, through November 18, 2007; as a programmer analyst for [REDACTED] Inc., in Memphis, Tennessee, from June 9, 2004, through September 15, 2004; as a system engineer/analyst for [REDACTED] Inc., in Whippany, New Jersey, from January 18, 2000, through May 19, 2004; and as a software specialist for [REDACTED] Ltd., from July 1, 1995, through June 1, 1998.

The record contains copies of transcripts and diploma relating to the Bachelor of Commerce degree issued to the beneficiary by [REDACTED] Nizam College, on April 9, 1994. The transcripts reveal that this coursework was completed from 1990 through 1992. The record also contains copies of transcripts and diploma relating to the Master of Business Administration degree issued to the beneficiary in April 1994. The transcripts reveal that this coursework was completed in 1993 and 1994.

The record also contains an evaluation of the beneficiary's credentials conducted by [REDACTED] for [REDACTED] Inc., on May 2, 2012. Ms. [REDACTED] concluded that "as a result of the education and relevant employment experience, [the beneficiary] has a background equivalent to that of an individual with a bachelor's degree in information technology from a regionally accredited college or university in the United States."

Ms. [REDACTED]'s evaluation concludes that the beneficiary satisfies the requirements of the labor certification based on a combination of education and work experience. However, the labor certification does not indicate that such a combination would be acceptable from job applicants. Moreover, Ms. Comer equated three years of experience for one year of education, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5). The beneficiary was required to have a bachelor's degree on the ETA Form 9089. The petitioner's actual minimum requirements could have been clarified or changed before the ETA Form 9089 was certified by the Department of Labor. In this case, that was not done.

At issue in this case is whether the beneficiary's Master of Business Administration degree satisfies the requirements stated in the labor certification; namely, that the job requires at least a bachelor's degree in "Computer science, information technology, or related." We accept the beneficiary's qualifications as equivalent to a bachelor's degree in business administration offered by a regionally accredited university in the United States.³ We do not, however, accept that a degree in business administration is related to computer science or information technology.

³ In determining whether the beneficiary's diploma from [REDACTED] is a foreign equivalent degree, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, www.aacrao.org, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than

Therefore, on April 1, 2014, we issued a Request for Evidence (RFE) requesting that the petitioner submit evidence that it intended the terms of the labor certification to allow a bachelor's degree in Business Administration (or any other field that does not include any college-level computer-related coursework) or that a combination of education and work experience would be acceptable. Specifically, the AAO requested that the petitioner provide 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 was also requested to include any other communications with the DOL that may be probative of its intent, such as correspondences or documents generated in response to an audit.

In response to the RFE the petitioner provided the following evidence:

- A copy of the DOL Application for Prevailing Wage Determination, which states at line b.5 that the offered position requires at least a bachelor's degree in "Computer Science, or related field."
- A copy of the Notice of the Filing of an Application for Permanent Employment Certification which states that the offered position requires at least a "Bachelor's degree (or foreign equivalent) in Computer Science, Information Technology, or related field."
- A printout of the job order from New Jersey's Labor Exchange, which states that the offered position requires at least a "Bachelor's degree (or foreign equivalent) in Computer Science, or related field."
- A copy of the petitioner's advertisements in the August 12, 2012, and August 19, 2012, [REDACTED] which state that the offered position requires at least a "BS in CS, IT, or rel."
- A printout of the petitioner's listing on "[REDACTED].com," which states that the offered position requires at least a "BS in CS, IT, or rel."

2,600 institutions and agencies in the United States and in over 40 countries around the world." <http://www.aacrao.org/About-AACRAO.aspx> (accessed June 16, 2014). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." <http://edge.aacrao.org/info.php> (accessed June 14, 2014).

According to EDGE, a Master of Business Administration degree in India "represents the attainment of a level of education comparable to a bachelor's degree in the United States." (<http://edge.aacrao.org/country/credential/master-of-arts-or-commerce?cid=single> accessed June 16, 2014.) The website of the University Grants Commission confirms that [REDACTED] is an accredited state university in India. (<http://www.ugc.ac.in/stateuniversitylist.aspx?id=21&Unitype=2> accessed June 16, 2014)

- A copy of the petitioner's advertisement in the August 11, 2012, [REDACTED] [REDACTED] which states that the offered position requires at least a "BS in CS, IT, or rel."
- A copy of the petitioner's "PERM Recruiting Report" which states that the position requires at least a "Bachelor's degree (or foreign equivalent) in Computer Science, Information Technology, or related field." The report summarized that eight U.S. workers applied for the offered position and that seven of those candidates did not meet the minimum education requirements required by the labor certification.
- Copies of the resumes of the candidates for the offered position. These resumes indicate that the other candidates possessed the following educational credentials:
 - Bachelor of Science in accounting from [REDACTED]
 - Certificate in Programming from [REDACTED]
 - Bachelor of Science in accounting from [REDACTED]
 - Certified Electronics Technician from [REDACTED]; Certificate Network Systems Administrator from [REDACTED] Certification Free BSD/UNIX System Administrator from [REDACTED]
 - Associate's degree in accounting from [REDACTED]
 - M.S., Information Technology, MIS, from [REDACTED] B.S., Electrical Engineering from [REDACTED]
 - "Diploma" in Technical Support from [REDACTED]

The terms of the labor certification require a four-year U.S. bachelor's degree in "Computer science, information technology, or related" or a foreign equivalent degree. The petitioner states on appeal and in response to our RFE that the beneficiary's degree in Business Administration should be considered a "related" major and counsel asserts that "notwithstanding the lack of coursework in computers, [a degree in business administration] is still related and relevant to the job duties, whereas, for example, a degree in psychology or literature would not be."

Counsel points out in response to the RFE that two of the U.S. applicants for the position possessed bachelor's degrees in accounting from U.S. institutions. However, counsel did not address the fact that the "PERM Recruitment Report" submitted by the petitioner summarizes that seven of the eight U.S. candidates for the offered job "do not meet the minimum education requirements." Though it was not expressly stated in the Recruitment Report, it appears that the one U.S. candidate who was considered to have satisfied the educational requirements of the offered job was the candidate who possessed the M.S. in Information Technology, MIS, from [REDACTED] and the B.S. in Electrical Engineering from [REDACTED]. Thus, counsel's assertion that the beneficiary meets the minimal education requirements advertised for the position is contradicted by the evidence submitted by the petitioner.

Counsel also asserts in response to the RFE that the AAO "misses the point" by stating in the RFE that the beneficiary's business administration degree could not be considered "related." Counsel further states that we should not interpret the requirements of the labor certification such that "only academic programs centered on information technology are related to the job opportunity." Counsel states that

the beneficiary's degree in business administration "involves the study and development of skills related to needs analysis, management, cost-benefit and financial analysis, process development and process management, and consulting to business managers, all of which are related to the performance of the job duties."

However, counsel's description in the previous paragraph of the related nature of the business administration degree to the duties of the offered job does not take into account the job duties in Part H.11 of the labor certification:

Utilize programming and analysis experience in end user computing and PC/Workstation based LAN applications, end user computing systems and hardware, client functions and applications to provide consultation to business area management and staff at the highest technical level for all aspects of end user computing and PC/Workstation based LAN systems software and hardware. Consult with business area management and staff on the usage of end user computing and PC/Workstation based LAN systems and hardware, PC/Workstation data and systems security. Provide technical support and guidance to client and systems areas through consulting, teaching and publication of documentation. Evaluate, maintain, modify and document PC applications packages using Wise Package Studio for Altiris, participate in the testing and evaluation of new PC packages, implement prototypes, and consult with clients on selection of packages and equipment. Monitor project status from start to completion. Design, develop, test and maintain IT standard software and enterprise packages.

The job duties stated by the petitioner reflect a highly technical position, not simply a traditional business management position. The technical job duties described by the petitioner on the labor certification are consistent with the educational requirement stated on the labor certification, the Prevailing Wage Determination, the Posting Notice, the Job Order, the classified advertisements, the online job advertisement, and the Recruitment Report, all of which specify that the position requires a degree in "Computer science, information technology, or related," and none of which state that a business administration degree would satisfy the educational requirements of the position. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Any United States applicant for the position would not have been put on notice by the advertisements that a degree unrelated to computer science or information technology would qualify the worker for the position. The petitioner cannot narrow the pool of potential applicants for the position by advertising for a particular requirement, and then choose the beneficiary who does not meet the minimum requirements advertised.

The petitioner has failed to establish that the beneficiary possessed a U.S. bachelor's degree or a foreign equivalent degree in "Computer science, information technology, or related," and, therefore, has failed to establish that the beneficiary met the minimum educational requirements of the offered

position set forth on the labor certification. Accordingly, the beneficiary does not qualify for classification as a professional 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.