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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: JUN 20 2014

OFFICE: TEXAS 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)(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,

A handwritten signature in black ink that reads "Elizabeth McCormack".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based visa petition was denied by the Director, Texas Service Center, (director) and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the appeal will be dismissed.

The petitioner describes itself as a financial services software business. It seeks to employ the beneficiary permanently in the United States as a computer systems engineer (principal consultant). As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).

The director denied the petition on October 10, 2013. The decision states that the petitioner failed to establish that the beneficiary satisfied the requirements of the labor certification. The director properly gave notice to the petitioner that it had 33 days to file the appeal. The petitioner filed the Form I-290B, Notice of Appeal or Motion, on November 13, 2013, or 34 days after the decision was issued. Accordingly, the appeal is untimely. However, we have *sua sponte* reopened the matter pursuant to 8 C.F.R. § 103.5(a)(5)(ii) for purposes of entering a new decision.<sup>1</sup>

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.<sup>2</sup>

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-

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<sup>1</sup> The regulation at 8 C.F.R. § 103.5(a)(5)(ii) states:

When a Service officer, on his or her own motion, reopens a Service proceeding or reconsiders a Service decision, and the new decision may be unfavorable to the affected party, the officer shall give the affected party 30 days after service of the motion to submit a brief. The officer may extend the time period for good cause shown. If the affected party does not wish to submit a brief, the affected party may waive the 30-day period.

<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).

(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).<sup>3</sup> *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.

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<sup>3</sup> 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.

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(l)(2).

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

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a

baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.

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

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

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).

In the instant case, the labor certification states that the offered job requires at least a bachelor’s degree in computer science, engineering, computer applications, or a related technical field. The beneficiary possesses a master’s degree in applied sciences issued in 2004 by [REDACTED] in India. The labor certification also states that the offered position requires 24 months of experience in the offered job or 24 months of experience in a “computer-related occupation.” The ground for denial cited in the director’s decision is whether or not the petitioner has established that the beneficiary satisfied all of the requirements of the labor certification as of the priority date.

*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).

In the instant case, the labor certification states that the offered job requires at least a bachelor’s degree in computer science, engineering, computer applications, or a related technical field. The beneficiary possesses a master’s degree in applied sciences issued in 2004 by [REDACTED] in India.

The labor certification also states that the offered position requires 24 months of experience in the offered job or 24 months of experience in a “computer-related occupation.” The beneficiary indicated on the labor certification that he had worked for the petitioner in the offered job since May 16, 2007.

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 or experience in an alternate occupation cannot be used to qualify the beneficiary for the certified position.<sup>4</sup> Specifically, in response to question J.21, which asks, “Did the alien gain any of

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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.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

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 the terms of the ETA Form 9089 at

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

H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.1 that his position with the petitioner was as a computer system engineer (principal consultant), and the job duties are the same duties as the position offered. Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as he was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position.

The beneficiary also claimed the following employment experience on the labor certification:

- work as an associate consultant for [REDACTED] in Bangalore, India, from October 17, 2005, through May 15, 2007.
- work as a software engineer for [REDACTED] Ltd., in Chennai, India, from June 6, 2005, through October 7, 2005.
- work as a programmer trainee for [REDACTED], Ltd. in Chennai, India, from October 1, 2004, through May 31, 2005.

The director denied the petition after finding that the beneficiary had only 19 months of experience with [REDACTED] a specific computer application listed under Specific Skills on line H.14 of the labor certification. However, a beneficiary can satisfy the requirements of the labor certification with more than 24 months of experience in a “computer-related occupation,” even if only a portion of that experience involved that one specific skill.

Nevertheless, the beneficiary’s claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary’s experience. See 8 C.F.R. § 204.5(g)(1). The record contains the following supporting documentation:

- an employment letter from [REDACTED] Consulting Practice Director, who affirmed the beneficiary’s full-time employment for [REDACTED] in Bangalore, India, as an associate consultant from October 17, 2005, to May 15, 2007. The letter describes in detail the beneficiary’s duties there, and specifies that the beneficiary gained the following experience, “use of various modules of [REDACTED] (which is the [REDACTED]) and [REDACTED] internal design; [REDACTED] coding standards, debugging and problem solving skills; using [REDACTED] to do performance tuning and [REDACTED] and [REDACTED] skills to do customization.”
- an employment certification from [REDACTED] Vice President, who affirmed the beneficiary’s employment for [REDACTED] Ltd., in Chennai, India, as a software engineer from June 6, 2005, through October 7, 2005.
- an employment certification from [REDACTED] General Manager, who affirmed the beneficiary’s employment for [REDACTED] Ltd., in Chennai, India, as a programmer trainee in the information systems department from October 1, 2004, through May 31, 2005.

The beneficiary has claimed over 30 months of full-time employment. However, neither the representative of [REDACTED] Ltd., nor the representative of [REDACTED] Ltd., described the beneficiary's duties during his period of employment. Likewise, neither representative indicated whether the beneficiary's employment for them was full-time or part-time. Therefore, on April 11, 2014, we issued a Request for Evidence (RFE) requesting that the petitioner submit evidence to corroborate the beneficiary's claimed full-time employment.

In response to the RFE, the petitioner submitted an employment certification dated April 23, 2014, from [REDACTED] Project Manager, who affirmed that the beneficiary worked full-time under his supervision for [REDACTED] Ltd., in Chennai, India, as a software engineer from June 6, 2005, through October 7, 2005. Mr. [REDACTED] described the beneficiary's responsibilities as "designing the forms, designing new screens using oracle forms, writing stored procedures using [REDACTED] and preparing data conversion scripts. During his employment, he migrated an existing system which is in an earlier version of [REDACTED] Forms to later [REDACTED] platform along with data migration using various [REDACTED]. During his employment at [REDACTED] [the beneficiary] experience included: [REDACTED], [REDACTED] for various customizations, [REDACTED] for performance monitoring, developing customized modules and data conversion scripts."

The petitioner also submitted in response to the RFE an employment certification from [REDACTED] System Manager, who affirmed that he directly managed the beneficiary's full-time employment for [REDACTED] Ltd., in Chennai, India, from October 1, 2004, through May 31, 2005. Mr. [REDACTED] described the beneficiary's job duties as, "designing the forms, writing the stored procedures, functions and database triggers. During his employment he worked in an intercompany project for developing software systems for the same organization. Also he was responsible for designing customized reports as per requirements." Mr. [REDACTED] stated that the beneficiary's employment gave him experience with [REDACTED] skills, problem solving skills and report designing."

Thus, the documentation submitted affirms that the beneficiary satisfied the requirements of the labor certification as of the February 27, 2013, priority date. Therefore, the director's decision is withdrawn. However, the petition is not approvable, as the petitioner has not established the ability to pay the proffered wage to the beneficiary.

We conduct appellate review on a *de novo* basis. Our *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We may deny an application or petition that fails to comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003).

Ability to pay the proffered wage to each of multiple beneficiaries

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage. The petitioner must demonstrate its continuing ability to pay the proffered wage from the 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.*

According to USCIS records the petitioner has filed Form I-140 petitions on behalf of at least 194 beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg’l Comm’r 1977).

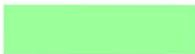
The petitioner was requested in our April 11, 2014, RFE to provide evidence showing the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. The petitioner did not acknowledge this request in its response to the RFE and provided no information regarding the beneficiaries of its other petitions.

The petitioner was advised in our April 11, 2014, RFE that while the petition was accompanied by a copy of a United States Securities and Exchange Commission Form 10-K, Annual report for [REDACTED] the Federal Employer Identification Number (FEIN) listed on the annual report does not match the FEIN [REDACTED] listed for the petitioner on the ETA Form 9089 labor certification. In response to the RFE, the petitioner submitted another copy of the Form 10-K that was submitted with the petition. The petitioner did not explain the discrepancy between the FEIN on this annual report and the FEIN listed on the labor certification. The petitioner also submitted a copy of the 2012-2013 annual report of [REDACTED] in Mumbai, India. The petitioner did not explain how this document relates to the petitioner’s ability to pay the proffered wage to this beneficiary or to the beneficiaries of its other petitions. Nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

In the instant case, the petitioner has failed to submit any documentation to establish its ability to pay the proffered wage. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Summary

The petitioner failed to establish the ability to pay the proffered wage to this beneficiary and to the beneficiaries of its 194 other Form I-140 petitions. As such, the petition may not be approved.



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.