



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAR 06 2014**

OFFICE: NEBRASKA SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

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 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 an information technology business. It seeks to permanently employ the beneficiary in the United States as an engineer. The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment 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 October 3, 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 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

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-

(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

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).

(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 significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

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.

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:

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

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 skilled worker pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i).³ Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. *See also* 8 C.F.R. § 204.5(l)(2).

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

³ Employment-based immigrant visa petitions are filed on Form I-140, Immigrant Petition for Alien Worker. The petitioner indicates the requested classification by checking a box on the Form I-140. In the instant case, the petitioner selected Part 2, Box 1.f of Form I-140 for a skilled worker.

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.

The determination of whether a petition may be approved for a skilled worker is based on the requirements of the job offered as set forth on the labor certification. *See* 8 C.F.R. § 204.5(1)(4). The labor certification must require at least two years of training and/or experience. Relevant post-secondary education may be considered as training. *See* 8 C.F.R. § 204.5(1)(2).

Accordingly, a petition for a skilled worker must establish that the job offer portion of the labor certification requires at least two years of training and/or experience, and the beneficiary meets all of the requirements of the offered position set forth on the labor certification.

In evaluating 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).

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: Master’s degree in computer science.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months.
- H.7. Alternate field of study: Engineering, computer information systems, or related field.
- H.8. Alternate combination of education and experience: Bachelor’s degree and five years of work experience accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: Software engineer, programmer

analyst.

- H.14. Specific skills or other requirements: "Application development working in Java J2EE, PL/SQL, Unix Scripting, Spring, Hibernate, Oracle, TOAD, XML, SVN, CSS, C and C++. For foreign educational equivalency employer accepts multiple foreign degrees that are equivalent to a U.S. degree. Employer accepts any suitable combination of education, training and experience."

In the instant case, the labor certification states that the beneficiary earned a bachelor's degree in computer information systems from [REDACTED] in 1996. The record contains a copy of the beneficiary's diploma issued April 21, 1997 and transcripts from the [REDACTED]. It is noted that the beneficiary's diploma states that the major field of study was "Physics," not computer information systems as was claimed on the labor certification. The petitioner also submitted a "Higher Diploma" in software engineering issued to the beneficiary on April 10, 1996, by [REDACTED].

The record contains an evaluation of the beneficiary's educational credentials prepared by [REDACTED] for Education Evaluation and Immigration Services on May 13, 2006. The evaluation states that the beneficiary's two diplomas combine to form "the equivalent of a bachelor's degree in computer information systems from an accredited university in the United States."

On appeal, the petitioner submits a credentials evaluation performed by [REDACTED] who claims affiliation with [REDACTED] of New York. [REDACTED] refers to the beneficiary's academic history as "four years of progressive post-secondary studies" and concludes that the beneficiary had "fulfilled the equivalency requirements for a four-year bachelor's degree in Computer Science."

The petitioner also submits on appeal an evaluation of the beneficiary's credentials performed by [REDACTED] states that "it is a general practice among American institutions of higher education to accept the bachelor's-level studies in Software Engineering and Computer Science completed by [the beneficiary] at [REDACTED] Computer Education as equivalent to a Bachelor of Science Degree in Computer Science at US institutions."⁴

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec.

⁴ This conclusion is not sourced in the evaluation.

190 (Reg. Commr. 1972)); *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011) (expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

The petitioner relies on the beneficiary's three-year bachelor's degree combined with his "Higher Diploma" as being equivalent to a U.S. bachelor's degree. A three-year bachelor's degree will generally not be considered to be a "foreign equivalent degree" to a U.S. baccalaureate. See *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the analysis of the beneficiary's credentials relies on a combination of lesser degrees and/or work experience, the result is the "equivalent" of a bachelor's degree rather than a full U.S. baccalaureate or foreign equivalent degree as required by the labor certification.

The AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." See <http://www.aacrao.org/About-AACRAO.aspx>. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." See <http://edge.aacrao.org/info.php>. USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.⁵

According to EDGE, a three-year Bachelor of Science degree from India is comparable to "three years of university study in the United States." EDGE also discusses postsecondary diplomas, for which the entrance requirement is completion of secondary education. EDGE provides that a postsecondary diploma is comparable to one year of university study in the United States, but does not suggest that, if combined with a three-year degree, it may be deemed a foreign equivalent degree to a U.S. bachelor's degree.

⁵ 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.

Based on the conclusions of EDGE, the evidence in the record on appeal was not sufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree in computer science, engineering, computer information systems, or a related field. The AAO informed the petitioner of EDGE's conclusions in a Notice of Intent to Dismiss and Request for Evidence (NOID/RFE) dated December 17, 2013. The NOID/RFE detailed shortcomings in the evidence submitted by the petitioner in an attempt to establish that [REDACTED] was an accredited institution and requested evidence that [REDACTED], was an accredited educational institution. In addition, the AAO noted that the credentials evaluators referred to the curriculum at [REDACTED] as "advanced post-secondary" and stated that it "requires the prior completion of post-secondary studies;" however, the AAO noted that these characterizations were contradicted by the fact that the beneficiary was concurrently enrolled in the two schools.⁶ Therefore, the NOID/RFE requested evidence that a bachelor's degree was required for admission into the beneficiary's program of study at [REDACTED].

In response to the NOID/RFE, counsel states that the labor certification states that the petitioner would "accept multiple foreign degrees that are equivalent to a U.S. Bachelor Degree." However, the petitioner has not submitted the requested evidence of [REDACTED] accreditation. Nor has the petitioner submitted any evidence to suggest that a bachelor's degree was required for admission into his study program at [REDACTED] or any other evidence to suggest that the beneficiary completed "four years of progressive post-secondary studies."

Both [REDACTED] liken the beneficiary's academic record to that of a U.S. student who completes part of his studies at one institution and then transfers those credits to a second institution where he completes his studies and is conferred a bachelor's degree. However, this analogy is not supported by the facts of the case before us. In this case there is no indication that either institution "transferred" credits from the other prior to admission or prior to conferring a diploma. Since the beneficiary's studies at these institutions were completed concurrently it is incorrect to refer to his record as "four years of progressive post-secondary studies." Further, as the petitioner has not submitted evidence that [REDACTED] required completion of the first post-secondary degree,⁷ the [REDACTED] degree may not be combined with the [REDACTED] degree to equal a bachelor's degree equivalent. The petitioner also failed to establish that [REDACTED] is an accredited university. While [REDACTED] is a recognized technical institution that may award vocational certificates or diplomas, a bachelor's degree in the United States is obtained upon completion of studies at a

⁶ School transcripts show that the beneficiary was taking classes at [REDACTED] from 1994 to 1996, and also at [REDACTED] from 1994 to 1996.

⁷ The [REDACTED] evaluation indicates that a post-secondary degree is required by Aptech prior to admission to its advanced diploma program in which the beneficiary was enrolled. This assertion is belied by the facts of the case. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

university. Thus, the credentials from [REDACTED] may not be combined with three years of university study to equal a bachelor's degree from an accredited institution in the United States. While the beneficiary may qualify as a skilled worker with his current level of education and work experience, in order to qualify for the visa the beneficiary must also meet all of the requirements of the labor certification, which, in this case, are a master's degree plus 24 months of experience or, alternatively, a bachelor's degree plus five years of experience.

After reviewing all of the evidence in the record, it is concluded that the petitioner has failed to establish that the beneficiary's academic record constitutes the foreign equivalent to as a U.S. baccalaureate degree. The petitioner has failed to overcome the conclusions of EDGE with reliable, peer-reviewed information. Therefore, the beneficiary does not qualify for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act.

Beyond the decision of the director, the NOID/RFE stated that the petitioner has also failed to establish its continuing ability to pay the proffered wage as of the priority date. *See* 8 C.F.R. § 204.5(g)(2).

According to USCIS records, the petitioner has filed I-140 petitions on behalf of other fifteen other 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 NOID/RFE requested that the petitioner submit evidence for each beneficiary documenting the name, receipt number, dates of employment, priority date, proffered wage, wages paid, and whether the petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence.

In response to the NOID/RFE, the petitioner did not submit any of the requested evidence and did not acknowledge the AAO's request regarding the additional beneficiaries. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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.