

(b)(6)

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: **MAY 23 2014**

OFFICE: TEXAS SERVICE CENTER

FILE

IN RE: Petitioner:
Beneficiary:

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 employment based visa petition was denied by the Director, Texas Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a software development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the labor certification did not support the classification requested, as the petitioner indicated that it would accept a combination of education and experience in lieu of a bachelor's degree. The director additionally noted that the petitioner had not established that the beneficiary possessed a bachelor's degree or equivalent in the required field of study.

On appeal, the petitioner, through counsel, maintains that the designation of the professional visa category was a typographical error and that an amended designation had been requested.

The AAO conducts appellate review¹ on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

We concur that the labor certification does not support the visa classification sought. The determination of whether a worker is a professional or skilled worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.² The regulation at 8 C.F.R. § 204.5(l)(3)(i) states in pertinent part that the "job offer portion of an individual labor certification, Schedule A application, or Pilot Program application for a professional must demonstrate that the job requires the minimum of a baccalaureate degree." The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

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. To show that the alien is a member of the professions,

¹ 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.

²See *i.e.*, 8 C.F.R. § 204.5(l) that also states in pertinent part:

(4) *Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The above regulation uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), also provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

In this case, the ETA Form 9089, Part H-4 requires a Bachelor's degree in Computer Science, Engineering, Math, Physics or related field. H-5 states that no training is required for the offered position of programmer analyst, but H-6 requires 12 months of experience in the job offered. The petitioner also repeats the fields of study listed in H-4 as an acceptable alternate fields of study in H-7. In H-8, the petitioner states that no alternate combination of education and experience will be accepted, however it subsequently contradicts this requirement in H-11 where it states that it will "accept a bachelor's equivalent based on a combination of education and/or work experience as determined by a professional evaluation service. (3 years experience equals 1 year education.) Applicants with any suitable combination of education, training, or experience are acceptable." Additionally, H-10 states that 12 months of experience in an alternate occupation defined as software engineer, software developer, compliance officer, or related is acceptable. In H-14, the petitioner lists specific skills or other requirements as:

Must have 1 year experience using MySQL and SSL. Must be willing to travel/relocate to anywhere in the US for extended periods of time on short notice.

The ETA Form 9089 indicates that it will accept less than an academic minimum of a bachelor's degree. The visa classification sought on Form I-140, Immigrant Petition for Alien Worker designated the professional category (paragraph 1.e) of Part 2. As this classification requires a single bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree, the labor certification does not support the classification requested. In order to be classified as a professional, the ETA Form 9089 must require a minimum of a baccalaureate degree pursuant to section 203(b)(3)(A)(ii) of the Act.

On appeal, counsel cites prior Service practice and asserts that a request to amend the visa classification to a skilled worker had been submitted in response to the director's request for additional evidence. Even so, it is a discretionary decision and there is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a

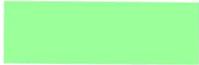
different visa classification in response to a petitioner's request to change it. Moreover, Part 2 of the Form I-140 permits the filing of a petition to amend a previously filed petition. Based on the foregoing, the record failed to establish that the labor certification supports the visa classification sought.

On Part J of the ETA Form 9089, the beneficiary claims that the highest level of education he achieved relevant to the requested occupation is a Bachelor's degree in Computer Applications received in 1999 from the [REDACTED] (India). The record contains a copy of a diploma from the [REDACTED] "indicating that the beneficiary received an Advanced Diploma in Computer Applications of [REDACTED] during a period from May 27, 1998 to May 27, 1999. [REDACTED] does not appear on this document. The record also reflects that the beneficiary obtained a Bachelor of Arts degree in Political Science from [REDACTED] (India) in 1986, a Master of Arts in Political Science from [REDACTED] in 1989, a Bachelor of Education degree (distance education) from [REDACTED] (India) in 1992 and a Bachelor of Laws in 1992 from [REDACTED] (India).³ Counsel does not address the director's finding that the beneficiary's education does not reflect a field of study set forth in the ETA Form 9089, and it is additionally noted that the record contains no grade transcript representing the beneficiary's course of study at the [REDACTED] or that it was an institution authorized to confer degrees or was accredited by the All-India Council for Technical Education (AICTE) at the time that the beneficiary received his diploma.

Beyond the decision of the director, the petition will be denied and the appeal dismissed based on the petitioner's failure to submit sufficient evidence of the ability to pay the proffered wage of \$83,845 per year from the 2012 priority date onward, pursuant to the regulation at 8 C.F.R. 204.5(g)(2). The petitioner submitted some financial documentation for 2011 and 2012, including a copy of its 2012 federal income tax forms and a W-2 showing the beneficiary was paid less than the proffered wage. It is noted, however, that USCIS electronic records show that the petitioner has filed at least 55 petitions for foreign workers and that at least ten are immigrant petitions. The petitioner is obligated to show that it has sufficient funds to pay the proffered wages to all the sponsored beneficiaries from their respective priority dates until permanent resident status is obtained and in accordance with the regulation at 8 C.F.R. § 204.5(g)(2). The record does not contain any documentation relating to the other beneficiaries that the petitioner has sponsored. Therefore, the ability to pay the proffered wage to the instant beneficiary has not been established. This issue must be addressed with any further filings of employment-based petitions.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO 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*, 299 F. Supp. 2d 1025, 1043 (E.D.

³ None of the beneficiary's grade transcripts from [REDACTED] or [REDACTED] show that any computer science, engineering, math, physics or related courses were undertaken.



Cal. 2001); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(AAO's *de novo* authority supported by federal courts.)

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.