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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: OFFICE: NEBRASKA SERVICE CENTER

NOV 13 2014

FILE:

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 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 lingerie and personal care retailer. It seeks to permanently employ the beneficiary in the United States as a senior programmer analyst. The petitioner requests classification of the beneficiary as 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 a labor certification approved by the U.S. Department of Labor.

The director's decision denying the petition concluded that the beneficiary did not have the minimum education required by the ETA Form 9089 application for labor certification, a bachelor's degree or foreign equivalent degree. On appeal, the petitioner states that the ETA Form 9089 allows for a combination of education, experience and/or training substantially equivalent to a bachelor's degree.

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.

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.¹

On July 31, 2014, we sent the petitioner a notice of intent to dismiss the appeal (NOID) with a copy to counsel of record. We indicated that the evaluations submitted into the record each relied on a formula allowing three years of work experience to equate to one year of higher education. We stated that the educational evaluations relied, in part, on work experience that could not be considered under the Form 9089, and that the record did not establish the required work experience. We requested evidence that, during recruitment, the petitioner advised potential applicants that it would consider work experience as a substitute for the degree requirement. We also indicated that the record did not establish the petitioner's ability to pay in 2013, the year of the priority date. The petitioner submitted a response on September 3, 2014.

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:

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).



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

(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

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

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:

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 duties of 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). Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), 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.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* 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 individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

The proffered position's requirements are found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. The instructions for the ETA Form 9089, Part H, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the labor certification reflects the following requirements:

H.4. Education: Minimum level required: Bachelor's.

4-B. Major Field Study: Information Technology, Computer Science.

7. Is there an alternate field of study that is acceptable?

The petitioner checked "no" to this question.

8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked "yes" to this question.

8-A. If yes, specify the alternate level of education required: Other.

8-B. If other is indicated in Question 8-A, indicate the alternate level of education required:

Any combination of education/experience/training that equals H.4.

8-C. If applicable, indicate the number of years of experience acceptable in Question 8:

12.

9. Is a foreign educational equivalent acceptable?

The petitioner listed "yes" that a foreign educational equivalent would be accepted.

6. Experience: 60 months in the position offered,
10. or 60 months in the related occupation of Senior Programmer, Software Programmer, Project Lead, Software Executive.

14. Specific skills or other requirements:

2 yrs exp with C#, WCF, MSMQ, Enterprise Library, OOPS, Oracle, PL/SQL, DB2 and OneClick Deployment/Build Tools (NANT, SVN, TFS) and 1 yr exp with Smart Client Architecture (CAB). Employer accepts any suitable combination of education, experience and/or training substantially equivalent to H.4 through H.10 of the ETA Form 9089.

The labor certification states that the beneficiary possesses a "bachelor equivalency based on education/experience/training" in Information Technology from the [REDACTED] India, completed in 2000. The record contains a copy of the beneficiary's Bachelor of Commerce degree and transcripts from the [REDACTED] issued in 2000. The record also contains a copy of the

beneficiary's certificate of course completion (VB6, VC++, Sunjava 2) issued by [REDACTED] India, on March 6, 2002. The record does not contain a description of the course or the length of this training.

The language of Part H. 14 of the ETA Form 9089 seems to allow for the petitioner to establish that the beneficiary has a bachelor's degree equivalent based on a combination of education, experience and/or training. We additionally consider the petitioner's intention during recruitment to determine whether, when recruiting for the position, the petitioner advised potential job candidates that it would accept less than a four-year bachelor's degree equivalent.

On September 3, 2014, in response to our NOID, the petitioner through counsel submitted a copy of its signed recruitment report; prevailing wage determination ETA Form 9141; recruitment advertisements; job order; internal posting; and two resumes.

The prevailing wage request form that the petitioner filed with the DOL to obtain prevailing wage information for the proffered position indicates that the petitioner's minimum job requirements are a bachelor's degree in Information Technology or Computer Science and five years of experience, or "professional experience/education equivalent," and other specific qualifications. The job advertisements placed in the [REDACTED] with its associate referral program, on two websites and on the job order with the State of Ohio Department of Job and Family Services, also require a bachelor's degree in Information Technology or Computer Science (or its professional experience/educational equivalent) and five years of experience.

However, we note that there are anomalies in the record regarding the petitioner's recruitment. The internal posting notice posted by the petitioner at its location, notice required by the DOL at 20 C.F.R. § 656.20(g), as well as the postings on the petitioner's website, require a bachelor's degree in Information Technology or Computer Science plus 5 years experience or a master's degree plus 2 years' experience. No alternate work experience or training is allowed on the internal posting notice. As the posted notice and the posting on the petitioner's website have more restrictive requirements than the Form 9089, the labor certification application may have been improperly certified.

Further, in response to the advertisements, the petitioner received resumes from two individuals. In a letter to the DOL Employment and Training Administration dated February 26, 2013 from [REDACTED] the petitioner stated that neither applicant was qualified for the position because neither possessed a bachelor's degree or master's degree in informational technology or computer science. Ms. [REDACTED] stated, with reference to each applicant:

[The applicant] does not possess a Bachelor's Degree or Master's Degree in Information Technology or Computer Science. Additionally, he does not possess 5 years of relevant professional experience including 2 years' experience with C#,

³ This company is the petitioner's predecessor.

WCF, MSMQ, Enterprise Library, OOPS, Oracle, PL/SQL, DB2, and OneClick Deployment/Build Tools (NANT, SVN, TFS) and 1 year experience with Smart Client Architecture (CAB). Therefore he does not meet the minimum requirements for the position.

The letter from Ms. [REDACTED] seems to state that the petitioner rejected the applicants for not having a bachelor's or master's degree, neither of which are minimally required as claimed by the petitioner and as stated on the Form 9089.

The record does not reflect that the labor certification application was audited during the recruitment process before the DOL. Pursuant to our consultation authority at section 204(b) of the Act, 8 U.S.C. §1154(b), we will refer the labor certification to DOL following our adjudication⁴ to consider whether, in light of these anomalies, the certification was erroneous.

Even if the labor certification application was properly certified, we find that the record does not establish that the beneficiary meets the minimum qualifications for the offered position, as stated on the labor certification.

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

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

On the Form 9089 the beneficiary listed the following work experience, and in our NOID, we requested that the petitioner address deficiencies in each of the experience letters, as noted below.

1. Empire Industries Limited in [REDACTED] India from August 6, 2001 to July 13, 2003 as a Software Programmer. The letter from Empire Industries Limited signed by [REDACTED] Sr. Project Manager, verifies the dates of the beneficiary's employment from August 6, 2001 to July 12, 2003 as a Software Programmer. We stated in the NOID does not state whether the employment was full- or part-time.
2. [REDACTED] In Mumbai, India from July 15, 2003 to September 24, 2004 as Senior Programmer. The experience letter from [REDACTED] signed by Nitin Salunkhe, COO/Director, verifies the dates of the beneficiary's employment from July 15, 2003 to September 24, 2004 as a Senior Programmer. The letter does not state whether the employment was full- or part-time.

⁴ While the appeal will be dismissed on unrelated grounds, this does not preclude the DOL from invalidating the labor certification if it determines that certification was not warranted.

3. [REDACTED] India from October 7, 2004 to February 25, 2005 as a Software Executive. The experience certificate from [REDACTED] dated February 25, 2005 and signed by [REDACTED] Manager-HR, verifies the dates of the beneficiary's employment from October 7, 2004 to February 25, 2005 as a Software Executive. The letter does not state whether the employment was full- or part-time and does not list the beneficiary's duties.
4. [REDACTED] in [REDACTED] NY from February 28, 2005 to February 2, 2012 as a Project Lead. The experience letter from [REDACTED] dated November 8, 2013 and signed by [REDACTED] Human Resources, verifies the dates of the beneficiary's full-time employment from February 28, 2005 to February 2, 2012 as a Technical Analyst/Delivery Project Lead. The letterhead for [REDACTED] lists an address in [REDACTED] India, but the ETA Form 9089 states that the beneficiary was employed in [REDACTED] NY during this time. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).
5. The petitioner since February 6, 2012 as a Sr. Programmer Analyst.

In response to our NOID, the petitioner submitted an updated experience letter from [REDACTED] Human Resources, on [REDACTED] dated August 27, 2014, stating that the beneficiary was employed full-time as a senior software engineer in India from February 28, 2005 until March 17, 2008 and in the United States from March 18, 2008 until February 2, 2012. This work experience letter updates the previous letter by stating when the beneficiary worked in the United States.

The petitioner submitted copies of previously submitted letters from [REDACTED]. The petitioner did not respond to our concerns that the remaining letters did not state whether the employment was full-time or part-time, and that the letter from [REDACTED] did not list the duties as required by the regulation.

The petitioner relies on the beneficiary's three-year bachelor's degree combined with professional training and experience as being the foreign equivalent of 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 stated in our NOID, 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, 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 Commerce degree from India is comparable to “three years of university study in the United States.”

EDGE further discusses postgraduate diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate degree. EDGE states that a postgraduate diploma following a two-year bachelor’s degree represents attainment of a level of education comparable to one year of university study in the United States. EDGE also states that a postgraduate diploma following a three-year bachelor’s degree represents attainment of a level of education comparable to a bachelor’s degree in the United States. However, the “Advice to Author Notes” section states:

Postgraduate Diplomas should be issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE). Some students complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor’s degree.

The evidence in the record does not establish that the beneficiary’s certificate from [REDACTED] was issued by an accredited university, or that a two- or three-year bachelor’s degree was required for admission into the program of study.

Based on the conclusions of EDGE, the evidence in the record is not sufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor’s degree from a college or university to meet the minimum requirements of the offered position listed on the ETA Form 9089.

Further, the record does not establish that the beneficiary has the required bachelor’s degree equivalent through a combination of education and experience. The record contains four evaluations

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.

of the beneficiary's educational credentials and work experience. As each of them rely in part on the beneficiary's work experience, the evidence for which is not established in the record, we decline to accept the reliability of the conclusions.⁶

We discussed the evaluations in detail in our NOID to the petitioner. In response to the NOID, the petitioner stated that the ETA Form 9089 allows for the combination of education and experience to reach the equivalent of a bachelor's degree.

The first evaluation was prepared by [REDACTED] on February 15, 2006. The evaluation states that the beneficiary "has the equivalent of three years of university-level credit from a regionally accredited college or university in the U.S. [and], as a result of his educational background and employment experiences (3 years of experience = 1 year of university-level credit), [the beneficiary] has an educational background equivalent of an individual with a bachelor's degree in information technology from a regionally accredited college or university in the United States." Ms. [REDACTED] states that she relies on copies of three letters verifying the beneficiary's employment as a Software Programmer, Senior Programmer and Software Executive from August 2001 to February 2005 (3 1/3 years). As noted above, the beneficiary's employment with [REDACTED] India from October 7, 2004 to February 25, 2005 is not established by the letter from [REDACTED] as the letter does not list the duties that the beneficiary performed in the position as required by the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A). Nor do any of the letters relied upon by the evaluator state whether the employment was full-time or part time. As such, the letters do not establish the foundation of her analysis, that three years of experience equals one year of university level credit.

The second evaluation was prepared by [REDACTED] Ph.D. for [REDACTED] on February 12, 2014. The evaluation states that the beneficiary has "attained the equivalent of a U.S. Bachelor Degree with a major in Computer Information Systems" based upon 13 years of professional employment experience in Computer Information Systems, 3 years of formal post-secondary education, and a high level theoretical and practical understanding of Computer Information Systems. Dr. [REDACTED] relies upon the beneficiary's professional training with [REDACTED] and his professional employment from August 2001 to the present, and uses the formula of "3 years of professional employment/training experience equals one academic year (and one academic year is the equivalent of 30 semester credits)" to conclude that the beneficiary has 130 equivalency credits. Dr. [REDACTED] also analyzes the beneficiary's Bachelor of Commerce degree from the [REDACTED] India as equivalent to "90 credits." Dr. [REDACTED] asserts that a Bachelor's degree in Computer

⁶ 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. 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).

Information Systems consists of 120 credits, with at least 30-40 semester credits in the major. Dr. [REDACTED] concludes that the beneficiary has accumulated 220 total credits, with 130 credits in the major of Computer Information Systems. This evaluation does not include any authority or explanation as to how it was determined that the beneficiary's education, training and work experience was calculated as "220 credits," nor how it was determined that a bachelor's degree in Computer Information Systems typically consists of 120 credits.

The third evaluation was prepared by Dr. [REDACTED] on February 13, 2014. The evaluation states that the beneficiary has "attained the equivalent of a U.S. Bachelor's degree in Computer Information Systems" based upon 13 years of professional employment experience in Computer Information Systems, 3 years of formal post-secondary education, and a high level theoretical and practical understanding of Computer Information Systems. Dr. [REDACTED] relies upon the beneficiary's professional training with [REDACTED] and his professional employment from August 2001 to the present, and uses the formula of "three years of work experience equates to one year of formal post-secondary education."

The fourth evaluation was prepared by [REDACTED] MS on February 13, 2014. The evaluation states that the beneficiary has "attained the equivalent of a U.S. Bachelor's degree in Computer Information Systems" based upon 13 years of professional employment experience in Computer Information Systems, 3 years of formal post-secondary education, and a high level theoretical and practical understanding of Computer Information Systems. Mr. [REDACTED] relies upon the beneficiary's professional training with [REDACTED] and his professional employment from August 2001 to the present, and uses the formula of "three years of work experience equates to one year of formal post-secondary education."

The evaluations prepared by [REDACTED] Dr. [REDACTED] and Mr. [REDACTED] all rely, in part, on the beneficiary's employment from August 2001 - February 2005, the proof for which, as noted above, does not reliably establish that the beneficiary's work was full-time or part-time. The record does not indicate what duties were performed by the beneficiary at [REDACTED]. In our NOID we requested the petitioner to clarify why the beneficiary's employment with [REDACTED] listed an address in [REDACTED] India, but the ETA Form 9089 stated that the beneficiary was employed in [REDACTED] NY during this time. The petitioner did not submit any objective evidence with its updated letter from [REDACTED] to establish the beneficiary's employment in the United States, such as Internal Revenue Service Forms 1099-MISC or W-2 issued to the beneficiary by [REDACTED]. The record does not contain any descriptive evidence of the [REDACTED] course. The evaluations, which each rely on a formula of three years of experience to one year of education, are thus not reliable because the record does not establish the beneficiary's employment or training as claimed.

Finally, we noted in the NOID that the evaluations by [REDACTED] Dr. [REDACTED] and Mr. [REDACTED] all rely, in part, on the beneficiary's experience gained with the petitioner since February 2012. 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.⁷ Specifically, the petitioner indicates that questions J.19 and J.20, which ask about experience in an alternate occupation, are not applicable. In response to question J.21, which asks, “Did the alien gain any of the

⁷ 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.

(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.

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 comparable⁸ and the terms of the ETA Form 9089 at 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 Sr. Programmer Analyst, 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.

Therefore, the record demonstrates that the beneficiary may possess a total of 10.5 years of professional experience before the priority date that may be considered in determining whether the beneficiary is qualified for the proffered position. This does not meet the requirement listed at Part H.8-C of the Form 9089, which requires 12 years of experience.

In summary, the evaluations in the record do not establish that the beneficiary has a combination of education and work experience equal to a bachelor’s degree as required by the ETA Form 9089.

Further, beyond the decision of the director, the petitioner requires the beneficiary to possess specific skills and other requirements in H.14. of the approved labor certification. Specifically, “2 yrs exp with C#, WCF, MSMQ, Enterprise Library, OOPS, Oracle, PL/SQL, DB2 and OneClick Deployment/Build Tools (NANT, SVN, TFS) and 1 yr exp with Smart Client Architecture (CAB). Employer accepts any suitable combination of education, experience and/or training substantially equivalent to H.4 through H.10 of the ETA Form 9089.” The record does not establish the beneficiary’s one year of experience with Smart Client Architecture (CAB), as required by the labor certification.

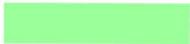
The evidence in the record does not establish that the beneficiary possessed any of the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has failed to establish that the beneficiary is qualified for the offered position.

Upon review, the petitioner has not established that the beneficiary has the education required by the labor certification application.

⁸ 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.



We mentioned in our NOID that the petitioner had not established its ability to pay the proffered wage from the priority date onwards. Upon review of the evidence submitted, the petitioner has demonstrated an ability to pay the proffered wage as of the priority date onwards.

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.