

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

(b)(6)

DATE: **JAN 20 2015**

OFFICE: NEBRASKA 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)(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 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 developer of video/IP technology. It seeks to permanently employ the beneficiary in the United States as a senior software engineer. The petitioner requests classification of the beneficiary as a professional pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii).¹

The director's denial notice concludes that the beneficiary did not possess the experience required to perform the duties of the offered position.

The petitioner's appeal of the director's decision 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.² This means that we are not required to defer to findings made in the appealed decision. Furthermore, we may address new issues that were not raised in the denial notice.³ We consider all relevant evidence in the record, including new evidence properly submitted on appeal.⁴

The minimum qualifications required to perform the duties of the offered position are set forth on the ETA Form 9089, Application for Permanent Employment Certification (labor certification). The record contains a labor certification for the offered position which has been approved by the U.S. Department of Labor (DOL).

The beneficiary must meet all of the job requirements 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 priority date of the instant petition, which is the date the DOL accepted the labor certification for processing, is June 20, 2013. *See* 8 C.F.R. § 204.5(d).

¹ 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. The regulation for the professional classification is located at 8 C.F.R. § 204.5(l).

² *See* 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dep't of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

³ *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

⁴ 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).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *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 statute or 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. USCIS interprets the meaning of terms used to describe the requirements of a job in a labor certification by examining the stated requirements of “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 requirements stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification].” *Id.* at 834 (emphasis added). Accordingly, USCIS does not look beyond the plain language of the labor certification to determine the employer’s claimed intent.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Bachelor’s in Computer Science, CIS, Computer engineering, or related.
- H.5. Training: None required.
- H.6. Experience in the job offered: 60 months.
- H.7. Alternate field of study: Related fields.
- H.8. Alternate combination of education and experience: Master’s degree plus two years experience.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: Related Software Development positions.
- H.14. Specific skills or other requirements: 3 years of professional application development involving understanding of Data Structures and Algorithms; 3 years of experience developing highly scalable libraries shared across multiple products and teams; 3 years of professional development using Java, C#, and C/C++; 1 year of experience using SIP, RTP, RTMP, H264, or similar codecs; and 1 year of experience with mobile development. Note: Experience in 6. and 10. must be progressive and post-baccalaureate in nature. Candidates may also qualify under alternate occupation in 10. with a Master’s degree and 2 years of experience in the alternate occupation. Employer will accept any relevant combination of experience, training, and education.

The labor certification states that the beneficiary was employed as a software engineer by [REDACTED] India from August 21, 2006 through October 31, 2006; as a software engineer by [REDACTED] India from November 1, 2006 through July 15, 2009; as a business partner by [REDACTED], India from September 1, 2009

through July 31, 2010; as a software engineer by [REDACTED] India from August 23, 2010 through September 30, 2011; as a software engineer with [REDACTED] California from October 1, 2011 to October 14, 2011; and as a senior software with the petitioner engineer from October 14, 2011 through the date of signing, March 27, 2014.

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.

The record contains the following letters of experience:

- [REDACTED] software architect with [REDACTED] stating that the beneficiary worked as a software engineer from November 1, 2006 to July 15, 2009 where he did application development involving understanding of Data Structures and Algorithms; development of highly scalable libraries shared across multiple products and teams; and skilled in the use of Java, C#, and C/C++.
- [REDACTED] CEO of [REDACTED] stating that the beneficiary was employed as a software engineer from August 21, 2006 to October 31, 2006. The letter also stated that the beneficiary was involved in application development involving understanding of Data Structures and Algorithms, development of highly scalable libraries shared across multiple products and teams, and JavaScript, C#, and ASP.NET.
- [REDACTED] director of [REDACTED] stating that the beneficiary was employed as a business partner from September 2009 to July 2010 and used Java, C#, and C/C++; developed highly scalable libraries shared across multiple products and teams; and used application development involving understanding of Data Structures and Algorithms.
- [REDACTED] manager QA of [REDACTED] stating that the beneficiary was employed as a software engineer from August 23, 2010 to October 14, 2011 where he analyzed core abilities of iOS devices to play audio and video; designed and developed iOS app to bring video collaboration on iOS devices using [REDACTED] technology; used Java, Objective-C, and C/C++ to develop iOS offering; designed and developed the ability to play ViVu video archives on flash disabled devices; demonstrated solid understanding of data structures and algorithms while designing and developing various products; used SIP and RTP, RTMP, and H264 codecs in the development of video conferencing solution for iOS devices and integrated the functionality of multimedia calls to SIP endpoints; and developed highly scalable libraries across multiple products and teams.

The letter from [REDACTED] states that the beneficiary worked as a business partner at a start-up company that provides mentorship and practice tests for competitive Indian exams. Although the letter states that the beneficiary was employed in a full-time capacity and utilized certain skills of a

software developer or computer scientist, the job title of “business partner” indicates that the beneficiary did not devote the majority of his time to those job duties. As a result, the letter is insufficient to demonstrate that the beneficiary was engaged in relevant job duties for the majority of his time employed with [REDACTED] to allow us to consider the full amount of time spent with that company towards the requirements of the labor certification.

The letter from [REDACTED] establishes that the beneficiary has 2.5 months of relevant experience. The letter from [REDACTED] establishes that the beneficiary has 13 months of relevant experience. The letter from [REDACTED] establishes that the beneficiary has 32.5 months of experience. These letters establish that the beneficiary has a total of 48 months of relevant experience. If we were to consider the experience with [REDACTED] the petitioner would have demonstrated a total of 59 months of experience, which is less than the required 60 months of experience on the labor certification.

On appeal, counsel asserts that the beneficiary’s training should be considered in determining whether the beneficiary holds the qualifications required by the terms of the labor certification. Specifically, counsel notes that Question H.14 states that the petitioner would accept “any relevant combination of experience, training, and education” to meet the qualifications of the position. Counsel explains how the beneficiary’s training amounts to two months of relevant qualifications for the position.

The petitioner submitted the following evidence of the beneficiary’s training: a June 17, 2003 Certificate of Merit stating that the beneficiary completed a May 2003 to June 2003 course on “C” language; and a July 29, 2003 Certificate of Merit stating that the beneficiary completed a June 2003 to July 2003 course on Programming in “C++.” The labor certification states that an applicant would have experience and knowledge of those programs to be qualified for the position, but the labor certification does not specifically require training. In addition, the labor certification states in Part H.14 that the required experience must be “progressive and post-baccalaureate in nature.” 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 v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). The beneficiary earned his bachelor’s degree in 2006, which was after he received his training certificates. The petitioner indicated on Part H.14 that any experience must be post-baccalaureate in nature. Therefore, training attended prior to the award of the beneficiary’s baccalaureate degree does not qualify as experience pursuant to the guidelines provided by the petitioner on the labor certification.

The training certificates are sufficient to demonstrate that the beneficiary has the special skills required, but cannot be used to demonstrate that the beneficiary has the experience required by the terms of the labor certification.

For the reasons explained above, we conclude that the petitioner failed to establish that the beneficiary satisfied the minimum requirements of the offered position, and affirm the director's decision denying the petition.

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.