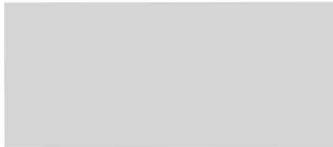




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: JUL 21 2015

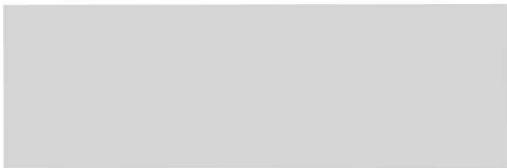
FILE #: [REDACTED]

PETITION RECEIPT #: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. The Form I-290B web page ([www.uscis.gov/i-290b](http://www.uscis.gov/i-290b)) contains the latest information on fee, filing location, and other requirements. **Do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). A motion to reopen was dismissed by the Director. The petitioner filed an appeal, which was dismissed by the Administrative Appeals Office (AAO). The case is now before the AAO on a motion to reopen and a motion to reconsider. The motion(s) will be granted, but our dismissal of the appeal will be affirmed. The petition will remain denied.

The petitioner describes itself as a signage and exhibits business. On September 24, 2010 it filed the instant Form I-140, Immigrant Petition for Alien Worker, seeking to employ the beneficiary permanently in the United States as a graphic designer and to classify him 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). As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was filed with the U.S. Department of Labor (DOL) on May 30, 2008, and certified by the DOL (labor certification) on April 2, 2010.

The Director denied the petition on November 12, 2010, finding that the beneficiary did not meet the minimum educational requirement specified on the labor certification – specifically, a four-year baccalaureate degree in computer applications or a foreign educational equivalent. The Director found that the beneficiary’s educational credentials and work experience – including a three-year bachelor of commerce from an Indian university, assorted certificates from other Indian institutions, and work experience as a computer-based graphic designer – did not satisfy the labor certification requirement of a stand-alone, four-year bachelor’s degree in computer applications. The petitioner filed a motion to reopen. On April 25, 2011 the Director dismissed the motion and affirmed the denial of the petition.

The petitioner filed a timely appeal, along with a brief from counsel and additional documentation. We conduct appellate review on a *de novo* basis. See *Soltane v. Department of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). Following a Request for Evidence (RFE) and the petitioner’s response thereto, we issued a decision on June 27, 2013 which dismissed the appeal and affirmed the denial of the petition on two grounds: (1) the beneficiary did not have the requisite education under the terms of the labor certification – a U.S. bachelor’s degree in computer applications or a foreign equivalent degree from a college or university – to qualify for the proffered position and the requested immigrant classification, and (2) the petitioner did not establish that the beneficiary had six years of qualifying experience, as required under the labor certification to qualify for the proffered position. With respect to the latter ground, we found that the evidence of record – including letters from the beneficiary’s former employer [REDACTED], affidavits from co-workers and the beneficiary, and several certificates of appreciation from [REDACTED] to the beneficiary – was both substantively deficient and internally inconsistent.

The petitioner filed a motion to reopen and a motion to reconsider, accompanied by a brief from counsel and supporting documentation. The requirements of a motion to reopen, set forth in the regulation at 8 C.F.R. § 103.5(a)(2), read as follows: “A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.” The requirements for a motion to reconsider, set forth in the regulation at 8 C.F.R.

§ 103.5(a)(3), read as follows: “A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [USCIS] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.” In light of the additional evidence and legal arguments presented with the motion(s), we will reopen the proceeding for re-examination based on the current record and to consider the petitioner’s claim that we incorrectly applied existing law.

Upon review of the entire record – including additional commendation letters and award certificates from [REDACTED] to the beneficiary in the years 1994, 1996, 2002, and 2004 (supplementing the certificates of appreciation from 1994, 1996, and 2000 that were already in the record), copies of employment contracts between [REDACTED] and the beneficiary dated in 2000, 2002, and 2004, an additional letter from [REDACTED] confirming that the beneficiary was employed as a computer graphic designer from April 1992 to December 2005, initially in the job of computer graphic artist and, as of July 1998, in the job of senior visualizer, and additional declarations by the beneficiary and two co-workers clarifying their earlier affidavits – we find that the petitioner has established, by a preponderance of the evidence, that the beneficiary had more than six years of qualifying experience as a graphic designer before the priority date of the instant petition (May 30, 2008). Thus, the beneficiary meets the minimum experience requirement of the labor certification to qualify for the proffered position, and has overcome this ground for our dismissal of the appeal and denial of the petition. Accordingly, we withdraw our finding that the beneficiary did not meet the minimum experience requirement of the labor certification to qualify for the proffered position. For the reasons discussed hereinafter, however, we will affirm our previous finding that the beneficiary does not meet the minimum educational requirement of the labor certification.

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 “[q]ualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.”

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) provides, in pertinent part, that “[i]f 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. . . . The minimum requirements for this classification are at least two years of training or experience.”

Thus, there are two elements that a beneficiary must fulfill – one statutory and the other regulatory – to qualify for classification as a skilled worker. The Act sets forth the basic requirement that the beneficiary must have at least two years of relevant training or experience. The regulation states that the beneficiary must also meet the requirements of the labor certification, which may exceed the statutory requirement of two years training or experience by including an educational requirement and/or or other requirements.

In this case, the labor certification set forth the following minimum requirements in Part H of the ETA Form 9089 to qualify for the job of graphic designer:

- |       |  |                                |  |
|-------|--|--------------------------------|--|
| 4.    | <u>Education:</u>  | <u>Minimum level required:</u> | Bachelor's degree  |
| 4-B.  | <u>Major Field of Study:</u>   |                                | Computer Applications  |
| 5.    | <u>Is training required in the job opportunity?</u>                                      |                                | "No"   |
| 6.    | <u>Is experience in the job offered required?</u>  |                                | "Yes"  |
| 6-A.  | <u>Number of months experience required:</u>   |                                | 72 months  |
| 7.    | <u>Is there an alternate field of study that is acceptable?</u>                          |                                | "No"   |
| 8.    | <u>Is there an alternate combination of education and experience that is acceptable?</u> |                                | "Yes"  |
| 8-A.  | <u>If Yes, specify the alternate level of education required:</u>                        |                                | Bachelor's degree  |
| 8-C.  | <u>If applicable, indicate the number of years of experience acceptable:</u>             |                                | 6 years  |
| 9.    | <u>Is a foreign educational equivalent acceptable?</u>                                   |                                | "Yes"  |
| 10.   | <u>Is experience in an alternate occupation acceptable?</u>                              |                                | "Yes"  |
| 10-A. | <u>Number of months experience in alternate occupation required:</u>                     |                                | 72 months  |
| 10-B. | <u>Identify the job title of the acceptable alternate occupation:</u>                    |                                | Any occupation with similar duties in sign industry <sup>1</sup> |
| 14.   | <u>Specific skills or other requirements:</u>  |                                | Willing to travel  |

<sup>1</sup> The job duties are described in an attachment to Part 4, box 11, as follows:

Design for manufacture custom signage & interpretive exhibits incl. Neon, LED, acrylic, metal, CNC, mill work products, etc. Duties incl. understanding & analyzing design intent, dev. comp. generated designs for concepts & manufacture drawings using MAC & PC based SW design appl. prog. such as Corel Draw, Adobe Photo Shop, Freehand, AUTOCAD, Gerber, etc. Proven exp. in operating digital printing equip. such as Gerber plotters, HP inkjet printers, electrostatic printers, etc. Provide engineered designs between the design intent & design for manufacture costs. Ability to read blue prints, electronic design data, usage of FTP site for transfer of design data, dev. shop drawings & other prod. control design docs.

At issue on appeal, and in the current motion, is the proper interpretation of the labor certification requirements. The petitioner does not contest our finding that the beneficiary does not have a four-year baccalaureate degree in computer applications. However, the petitioner asserts that the labor certification allows the beneficiary to satisfy its educational requirement with a combination of education and experience that is equivalent to a baccalaureate degree in computer applications. Moreover, the petitioner contends that the DOL, not USCIS, has the authority “to decide if an equivalency combining education and experience is being required by the education requirement in the ETA 9089 Form [*sic*].” Motion Brief at 7. The petitioner claims that the beneficiary has the requisite education and experience to meet the equivalency requirement of the ETA Form 9089. According to the petitioner, therefore, the beneficiary qualifies for the job of graphic designer under the terms of the labor certification.

The authority to determine whether the beneficiary meets the educational and experience requirements of the ETA Form 9089 rests with USCIS, not the DOL. As explained in our previous decision, case law is clear that the DOL’s responsibility in the labor certification process is limited to determining “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.” *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9<sup>th</sup> Cir. 1983); *see also Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). It is the responsibility of U.S. Citizenship and Immigration Services (USCIS) to determine whether the alien is qualified for the job offered under the terms of the labor certification and whether the alien is entitled to the immigrant classification requested. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, 1209 (9<sup>th</sup> Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may neither ignore a term of the labor certification nor 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 (1<sup>st</sup> Cir. 1981). 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). The interpretation of the job requirements must involve “reading and applying the plain language of the [labor certification].” *Id.* at 834.

Applying these criteria to the ETA Form 9089 at issue in this proceeding, the language of the labor certification plainly states that the minimum level of education required is a bachelor’s degree in computer applications (Part H.4 and H.4-B). Part H.4 does not state that “other” education or an “other” combination of education and experience equivalent to a baccalaureate degree in computer applications may substitute for a full baccalaureate degree in that field. The ETA Form 9089 also states that 72 months (6 years) of qualifying experience is required (Part H.6 and H.6-A). While the ETA Form 9089 states that an alternate combination of education and experience is also acceptable

(Part H.8), it repeats the specifications of “bachelor’s degree” and “6 years” (Part H.8-A and H.8-C), thus plainly indicating that the minimum educational requirement is still a bachelor’s degree and the experience requirement is still 6 years. Part H.9 of the ETA Form 9089 states that a “foreign educational equivalent” is acceptable. The plain language of this provision indicates that foreign education equivalent to a U.S. bachelor’s degree in computer applications would meet the educational requirement of the labor certification. It does not indicate that foreign education at a less than baccalaureate level, in combination with some experience, is an acceptable alternative to a U.S. bachelor’s degree. Nowhere does the job requirements section (Part H) of the ETA Form 9089 indicate that a less than baccalaureate level education in combination with experience can be considered equivalent to a bachelor’s degree for the purpose of meeting the minimum educational requirement of the labor certification. Nothing in Part H.8 or H.14 indicates that less than a bachelor’s degree is required.<sup>2</sup>

The petitioner asserts that the AAO erred in stating that the beneficiary could not qualify for the job offered based on a combination of education and experience because the ETA Form 9089 did not include the language – “any combination of education, training, and experience is acceptable” – required by 20 C.F.R. § 656.17(h)(4)(ii).<sup>3</sup> The petitioner points out that the Board of Alien Labor Certification Appeals (BALCA) has ruled that the absence of the regulatory language in an ETA Form 9089 does not preclude a beneficiary who does not meet the primary requirements of the labor certification from qualifying for the job based on the alternate job requirements described therein. While we did state on page 16 of our decision that “[t]he petitioner did not state on the labor certification that it would accept any suitable combination of education, training, or experience,” we did not indicate that the absence of such language was fatal to the petitioner’s claim that the beneficiary qualified for the proffered position based on an alternate combination of education and

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<sup>2</sup> The DOL has provided the following field guidance: “When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the [labor certification] as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job.” See Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep’t. of Labor’s Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep’t of Labor’s Empl. & Training Administration, Interpretation of “Equivalent Degree,” 2 (June 13, 1994). The DOL’s certification of job requirements stating that “a certain amount and kind of experience is the equivalent of a college degree does in no way bind [USCIS] to accept the employer’s definition.” See Ltr. from Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor’s Empl. & Training Administration to Lynda Won-Chung, Esq., Jackson & Hertogs (March 9, 1993). The DOL has also stated that “[w]hen the term equivalent is used in conjunction with a degree, we understand [that] to mean the employer is willing to accept an equivalent foreign degree.” See Ltr. from Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor’s Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

<sup>3</sup> This regulation provides as follows: “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.” 20 C.F.R. § 656.17(h)(4)(ii).

experience. The quoted sentence was one small part of our extended analysis of the labor certification. We found that the petitioner did not indicate anywhere in the job requirements section (Part H) of the ETA Form 9089 that a combination of (less than baccalaureate level) education and experience could be considered equivalent to a bachelor's degree for the purpose of meeting the minimum educational requirement of the labor certification.<sup>4</sup> Thus, the petitioner's implication that we found the beneficiary unable to qualify for the proffered position under the terms of the labor certification because it lacked the "mandatory" language of 20 C.F.R. § 656.17(h)(4)(ii) is incorrect.

Furthermore, in Part J of the ETA Form 9089 (Alien Information) the petitioner indicated that the beneficiary's highest level of education "relevant to the requested occupation" was a PGDCA (Post Graduate Diploma in Computer Applications) completed in 1990 at a technical institute in [REDACTED] India. Nothing in Part J of the ETA Form 9089 indicates that the beneficiary sought to rely on a combination of education and experience to meet the minimum educational requirement of the labor certification.

In accord with the foregoing discussion, we reiterate our finding that the ETA Form 9089, by its plain language, requires a bachelor's degree in computer applications or a foreign educational equivalent to satisfy the minimum educational requirement of the labor certification. There is no language on the ETA Form 9089 that allows the minimum educational requirement to be met with an alternate combination of experience and education below the baccalaureate level. Therefore, the beneficiary must have a U.S. bachelor's degree in computer applications or an equivalent foreign degree to qualify for the proffered position of graphic designer.

The record shows that the beneficiary has the following post-secondary education:

- A Bachelor of Commerce from [REDACTED] India, awarded on December 12, 1988, following completion of a three-year degree program in the years 1985-1987.
- A "Certificate" in "Graphic Arts Management" from [REDACTED], India, awarded on June 9, 1989, following completion of prescribed coursework in advertising and marketing, visual communication, graphic design concept, and typography & photography in 1988-1989.
- A "Diploma Certificate" for a "Post Graduate Diploma in Computer Applications" from [REDACTED], Computer Training Division, in [REDACTED] India, awarded after the completion of coursework from July 1, 1989 to June 30, 1990 and passage of an examination on July 10, 1990.

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<sup>4</sup> Nor did any of the recruitment materials submitted as evidence of the petitioner's intent on the labor certification state that a combination of (less than baccalaureate level) education and experience could be considered equivalent to a bachelor's degree for the purpose of meeting the educational requirement of the job offered.

- A “Certificate” from [REDACTED], awarded on August 3, 1996 for 34 hours of courses taken from March 11, 1995 to June 5, 1995.

As discussed in our previous decision, the beneficiary’s three-year bachelor’s degree from [REDACTED] is not equivalent to a bachelor’s degree from a U.S. college or university, the standard length of which is four academic years. *See Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Nor is the degree in the field of computer applications. Thus, the beneficiary’s Bachelor of Commerce from an Indian university does not meet the minimum educational requirement of the labor certification.

In our previous decision we also noted that the petitioner had submitted no evidence that any of the three certificates earned by the beneficiary were awarded by an accredited university or educational institution. Nor were any transcripts of the coursework submitted. Those evidentiary deficiencies have not been remedied in the current motion. Accordingly, it is difficult to determine whether any academic value should be attributed to those programs. The “Post Graduate Diploma in Computer Applications” is the only certificate listed in the field of study required on the labor certification. As explained in our decision, however, without evidence that the granting institution – [REDACTED] – was accredited by the All-India Council for Technical Education (AICTE), its “Diploma Certificate” cannot be considered a credible educational credential for the purpose of meeting the minimum educational requirement of the labor certification.

In our previous decision we reviewed the evaluation of the beneficiary’s credentials by [REDACTED] [REDACTED], which was resubmitted by the petitioner with the current motion. The evaluation relies on a combination of the beneficiary’s university education, the programs of study listed above, and work experience. As previously noted, the evaluation concludes that the beneficiary’s “education and over six years of professional experience are equivalent to an individual with a bachelor’s degree in business administration with a specialization in graphic design and computer science.” The terms of the labor certification, however, do not clearly allow for a combination of education and experience to meet its minimum educational requirement. Additionally, the evaluator concludes that the beneficiary’s combination of education and experience result in an educational equivalent of a bachelor’s degree in a field of study – business administration with a specialization in graphic design and computer science – that is different from the major field of study required in the labor certification – computer applications. Nothing in the labor certification states that additional fields of study would be acceptable.<sup>5</sup>

Thus, the record does not show that the beneficiary has the foreign educational equivalent to a U.S. bachelor’s degree in computer applications, as required to meet the minimum educational requirement on the ETA Form 9089. As previously discussed, USCIS must “examine the certified

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<sup>5</sup> As indicated in the Electronic Database for Global Education (EDGE), produced by the American Association of College Registrars and Administrative Officers (AACRAO), Computer Science is not the same field of study as Computer Applications. See <http://edge.aacrao.org/country/credential/master-of-computer-applications?cid+single> (accessed July 20, 2015).

job offer exactly as it is completed by the prospective employer” to interpret the meaning of terms used to describe the job requirements in a labor certification. *Rosedale Linden Park Company v. Smith*, supra. The interpretation of the job requirements must involve “reading and applying th plain language of the [labor certification].” *Id.* Accordingly, the beneficiary does not qualify for the job of graphic designer under the terms of the labor certification, and is not eligible for classification as a skilled worker under the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B).

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden with respect to the beneficiary’s educational credentials.

**ORDER:** Our previous finding that the record did not establish the beneficiary’s qualifying employment experience is withdrawn. We affirm our previous finding that the beneficiary does not have the requisite education under the terms of the labor certification to qualify for the proffered position and the requested immigrant classification. Therefore, the petition remains denied.