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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: **MAY 29 2015**



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 is the non-precedent decision of the Administrative Appeals Office (AAO) in 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) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition and subsequent motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a jewelry business. It seeks to employ the beneficiary permanently in the United States as a market development manager. On the Form I-140, Immigrant Petition for Alien Worker, the petitioner marked box “e” at Part 2, indicating that it seeks to classify 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 As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is December 15, 2011, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

The director determined that the petitioner had not established that the labor certification supported the request for classification as a professional, as the minimum requirements of the proffered position allowed for less than a U.S. or foreign equivalent bachelor’s degree. The director further determined that the beneficiary did not qualify for classification as a professional, as he does not possess a U.S. or foreign equivalent bachelor’s degree. The director denied the petition accordingly.

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.

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.²

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

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.

Section 101(a)(32) of the Act defines the term “profession” to include, but is not limited to, “architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges,

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. *See also* 8 C.F.R. § 204.5(l)(2).

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 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).

academies, or seminaries.” If the offered position is not statutorily defined as a profession, “the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.” 8 C.F.R. § 204.5(1)(3)(ii)(C). In addition, the job offer portion of the labor certification underlying a petition for a professional “must demonstrate that the job requires the minimum of a baccalaureate degree.” 8 C.F.R. § 204.5(1)(3)(i)

In *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the court held that, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, U.S. Citizenship and Immigration Services (USCIS) properly concluded that a single foreign degree or its equivalent is required. See also *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008)(for professional classification, USCIS regulations require the beneficiary to possess a single four-year U.S. bachelor’s degree or foreign equivalent degree).

Thus, the plain meaning of the Act and the regulations is that the beneficiary of a petition for a professional must possess a degree from a college or university that is at least a U.S. baccalaureate degree or a foreign equivalent degree.

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

- H.4. Education: Bachelor’s degree in business administration.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months of experience.
- H.7. Alternate field of study: None Accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None Accepted.
- H.14. Specific skills or other requirements: Employer will accept any suitable combination of education, experience and training (E.g. Employer will accept a three year foreign Bachelor’s degree + three years of progressive professional experience as equivalent to a US Bachelor’s degree). The employer recognizes a Bachelor of Commerce as a bachelor’s degree, plus three years of experience as the equivalent of a bachelor’s degree.

The director determined that the language in Part H.14 of the ETA Form 9089 allows for a candidate to qualify for the proffered position with a combination of education and experience (specifically, a three-year foreign bachelor’s degree plus three years of progressive professional experience) which is less than a U.S. baccalaureate degree or foreign equivalent degree.

The petitioner asserts on appeal that the beneficiary holds a bachelor’s degree equivalent and qualifies under the skilled worker classification.³ The petitioner also requests us to amend the instant

³ Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for

petition to request classification of the beneficiary as a skilled worker. The petitioner claims counsel incorrectly filed the instant petition for a professional worker. The petitioner cites to the United States Citizenship and Immigration Services (USCIS) Adjudicator's Field Manual (AFM) and NSC Liaison Committee, I-140 Practice Tips and Updates (NLC).

There is no provision in statute or regulation that compels USCIS to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

The petitioner's claim that its counsel made a mistake in the filing of the I-140 because they marked the incorrect box in the form as "Professional" instead of "Skilled Worker" is unsupported by the record. On the instant Form I-140 petition, Part 2, the petitioner marked Box e for the "Professional" classification. However, the record contains a cover letter dated December 5, 2012 from counsel and a support letter dated November 18, 2012 from the petitioner. Both letters reference that the petitioner is seeking advanced degree professional, "EB-2" classification in the subject line. However, counsel's cover letter states, in the last paragraph, that "classification as a Professional worker" is requested. These additional inconsistencies and further reference to the professional classification in the cover letter do not support the position that counsel merely checked the wrong box on the Form I-140.

Concerning the AFM and NLC, we are bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals within the circuit where the action arose. See *N.L.R.B. v. Askkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

The petitioner references Section 22.2(b)(F)(i) of the AFM titled "Validity of Approved Labor Certifications, Exception," which states in part:

USCIS will continue to accept amended or duplicate Form I-140 petitions that are filed with a copy of a labor certification that is expired at the time the amended or duplicate Form I-140 petition is filed, if the original labor certification was submitted in support of a previously filed petition during the labor certification's validity period. These filings may occur when . . .

- An amended petition is filed to request a different visa classification than the visa classification requested in the previously filed petition; . . .

which qualified workers are not available in the United States. See also 8 C.F.R. § 204.5(l)(2).

This section of the AFM discusses circumstances under which a petition may be accepted without an original certified labor certification or with an expired certified labor certification. The instant petition is not an amended petition, and the petitioner does not submit evidence that it previously filed a petition supported by the same certified labor certification. Therefore, this section of the AFM is not applicable to the instant case.

The petitioner references the following portion of the NLC practice tips:

If the petitioner is requesting classification for an EB-32 professional, but the labor certification and the beneficiary's qualifications only support a EB-31 skilled worker classification, we will make that change and process the petition as a skilled worker.

The NLC practice tips are dated February 2007 and pre-date the instant Form I-140 petition. The Form I-140 version in effect when the NLC practice tips were issued did not have separate boxes for the professional and skilled worker classifications. Rather, Part 2, Box e of the Form I-140 requested classification for either a professional or skilled worker. Since that time, the Form I-140 was revised to include separate boxes in Part 2 to request classification for a Professional in Box e, and for a Skilled Worker in Box f. Therefore, the NLC practice tips are inapplicable to the instant petition.

We must look to the job offer portion of the labor certification to determine the required qualifications for the position and cannot ignore a term of the labor certification or impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). We interpret the meaning of terms used to describe the requirements of a job in a labor certification by "examin[ing] the certified job offer *exactly* as it is completed by the prospective employer" and our interpretation of the job's requirements must involve "reading and applying *the plain language* of the [labor certification]" even if the employer may have intended different requirements than those stated on the form. *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added).

In the instant case, we find that the plain language of section H.14 is that the petitioner would accept less than an actual bachelor's degree or foreign equivalent degree, which is less than the minimum requirements for the professional category. Therefore the position does not qualify for classification as a professional.

Additionally, the petitioner has not established that the beneficiary has a U.S. baccalaureate degree or a foreign equivalent degree from a college or university, as required for classification as a professional under section 203(b)(3)(A)(ii) of the Act. The petitioner relies on the beneficiary's three-year Bachelor of Commerce degree from the University of [REDACTED] combined with his work experience as a market development manager as being equivalent to a U.S. bachelor's degree. A three-year bachelor's degree will generally not be considered to be a "foreign equivalent degree" to a U.S. baccalaureate. *See Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the analysis of the beneficiary's credentials relies on a combination of lesser degrees and/or work experience, the

result is the “equivalent” of a bachelor’s degree rather than a full U.S. baccalaureate or foreign equivalent degree required for classification as a professional. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act.

Beyond the decision of the director,⁴ the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing’s Tea House*, 16 I&N Dec. 158, 159 (Acting Reg’l Comm’r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l Comm’r 1971). 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).

In the instant case, the labor certification states that the offered position requires a U.S. bachelor’s degree or foreign equivalent degree in business administration and 24 months of experience in the position offered. Alternatively, the petitioner will accept a three-year foreign bachelor’s degree and three years of progressive professional experience in lieu of a U.S. bachelor’s degree or foreign equivalent degree. Even if the instant petition had requested the correct classification, the labor certification does not indicate that the required 24 months of experience in the job offered is eliminated where a beneficiary possesses a three-year foreign bachelor’s degree combined with three years of progressive professional experience.

The record demonstrates that the beneficiary was awarded a Bachelor of Commerce degree in 2002 after three years of study at the University of [REDACTED]. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a Director Import/ Export and Market Development Manager for [REDACTED] from October 2006 through December 15, 2011, and as a Market Development Manager for [REDACTED] from June 1, 2002 through October 1, 2006. The beneficiary provided no additional work experience on the ETA Form 9089.

The beneficiary’s claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary’s experience. *See* 8 C.F.R. § 204.5(1)(3)(ii)(A). The record contains an experience letter written by [REDACTED] Partner, on [REDACTED] letterhead stating the beneficiary worked as a Business Development Consultant, Import/Export Assistant from June 2002 through December 2004, and as Director of Import/Export and Product Development (Bus Dev.) from December 2004 through at least December 15, 2005 (the date of the letter). We note that the dates of employment with [REDACTED] as listed

⁴ We may deny an application or petition that fails to comply with the technical requirements of the law 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

in the experience letter conflict with an evaluation of the beneficiary's education and experience in the record. The evaluation of Morningside Evaluations and Consulting dated July 9, 2013 states that the beneficiary gained professional experience with [REDACTED] as a Business Development Consultant from June 2002 to December 2004, and as a Director of Import/Export and Product Development from December 2004 to March 2005. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The record also contains an experience letter from an unknown author, signed [REDACTED] on [REDACTED] [REDACTED] letterhead, stating the beneficiary worked as a Business Development Consultant from January 2002 through June 2002. The author is unnamed and the employer is not listed on the approved labor certification. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

Therefore, based on a review of the record at hand, the petitioner has not established that the beneficiary possessed a U.S. or foreign equivalent bachelor's degree in Business Administration (or the accepted equivalent three-year foreign bachelor's degree combined with three years of progressive professional experience) and 24 months of experience in the job offered, as set forth on the labor certification by the priority date. Therefore, the petitioner has also not established that the beneficiary is qualified for the offered position.

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.