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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: AUG 26 2014 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

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,

Elizabeth McCormack

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 consulting/ software/ engineering company. It seeks to permanently employ the beneficiary in the United States as a software engineer. The petitioner requests classification of the beneficiary as a member of the professions holding an advanced degree or an alien of exceptional ability pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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, which is the date the DOL accepted the labor certification for processing, is September 4, 2012. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess the minimum experience required to perform the duties of the offered position by the priority date.

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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

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)(l), (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).

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).

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[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).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by 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. 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)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS will 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: Master's degree in Computer Science, CIS, MIS, or a related field.
H.5. Training: None required.
H.6. Experience in the job offered: 24 months.
H.7. Alternate field of study: Yes, Computer Science, CIS, MIS, or a related field.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: Yes, 24 months as a Software Developer, Programmer Analyst, or related experience.
H.14. Specific skills or other requirements: Prior experience with Visual Studio.Net and MEGA Tool required. Will accept and suitable combination of education, training, or experience as per the requirements contained in items H.4 through H.14.

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of

the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
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> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

Therefore, an advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Further, an "advanced degree" is a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

In the instant case, the petitioner claims that the beneficiary may be classified as an advanced degree professional based on the beneficiary's Master's Degree.

The record reflects that the beneficiary has the required education for the position. The beneficiary has a Master's Degree in Computer and Information Science from 2008. The record contains copies of the beneficiary's degree and transcripts from

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1). If such evidence is unavailable, USCIS may consider other documentation relating to the beneficiary's experience. *Id.*

The labor certification states that the beneficiary has the following work experience:

- with the petitioner from May 25, 2012 until an indefinite end date.[2]

[2] USCIS records indicate that the beneficiary had an approved H-1B visa from April 24, 2012 through July 24, 2014, when USCIS automatically revoked the beneficiary's H-1B approval to work for the petitioner. The beneficiary currently has an approved H-1B visa to work for MI valid from May 22, 2014 to January 21, 2016.

- Information Systems Specialist/Architect with the petitioner from May 27, 2009 until May 24, 2012.
- Programmer Analyst with in Illinois from October 1, 2008 until April 30, 2009.
- Programmer Analyst with in Texas from November 1, 2006 until May 4, 2007.
- Programmer/Analyst with in Florida part-time from January 9, 2006 until July 7, 2006 and September 5, 2005 until December 16, 2005.
- Software Developer with in India from May 5, 2003 until August 13, 2004.

The regulation at 8 C.F.R. § 204.5(g)(1) states:

> Specific requirements for initial supporting documents for the various employment-based immigrant classifications are set forth in this section. In general, ordinary legible photocopies of such documents (except for labor certifications from the Department of Labor) will be acceptable for initial filing and approval. However, at the discretion of the director, original documents may be required in individual cases. Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record contains the following evidence in support of the beneficiary's work experience:

- Original letter from Manager, dated November 19, 2010, on letterhead stating that the company employed the beneficiary as a full-time Programmer Analyst from October 1, 2008 until April 30, 2009.
  - Notarized statement from , dated March 13, 2014, stating that he provided an experience letter to the beneficiary and attesting to its accuracy.
- Original letter from Sr. Project Manager, dated December 2, 2010, on letterhead stating that the company employed the beneficiary as a full-time Programmer Analyst from November 1, 2006 until May 4, 2007.
- Copy of a letter from Sr. Project Manager, dated December 17, 2010, on letterhead stating that the company employed

the beneficiary as a full-time Software Developer from May 5, 2003 until August 13, 2004.

- Affidavit from the beneficiary dated February 19, 2014, stating that no other experience letters could be obtained from and identifying as his former manager.
- Affidavit from dated December 8, 2013, stating that the beneficiary was employed by as a Software Developer from May 5, 2003 until August 13, 2004.
- Second affidavit from , stating that he was the manager of the beneficiary and that he wrote a previous experience letter attesting to the beneficiary's experience with . Mr. further states that the beneficiary provided him a template for the experience letter.[3]

The three letters of experience from initially submitted were identical in form and substance. The director issued a Request for Evidence (RFE) dated December 2, 2013 indicating that USCIS found the letters unreliable to establish the beneficiary's work experience. The director stated:

> The petition is accompanied by three employment verification letters. We first note that all of the letters submitted are nearly identical in form, phrasing, and structure, with the names of the employers and dates of employment different. Also of interest is the insertion of an alternate type size and punctuation of the telephone number in the letter from former employer which appears to be a manipulation of a common template. These nearly identical letters call into question whether the signatories of these letters from three different employers, on two different continents a world apart, are the actual authors attesting to the real experience of the beneficiary. Therefore, additional evidence is requested below.
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> Evidence must be in the form of ORIGINAL letters from current or former employers, giving the name, address, and title of the employer, and a description of the experience of the alien, including the dates of employment.

In response to the director's RFE the petitioner submitted the original letters of the letters previously submitted from letterhead, dated November 19, 2010, and from

[3] This person identified as seems to be the same signatory as who previously wrote the December 8, 2013 experience letter attesting to the beneficiary's employment with

letterhead, dated December 2, 2010. For the petitioner stated it could not locate the original letter, and submitted an affidavit from dated December 8, 2013, stating that the beneficiary was employed by as a Software Developer from May 5, 2003 until August 13, 2004. The director denied the petition, finding that the evidence did not overcome his concerns raised in the RFE, and that the petitioner had not established the beneficiary's qualifications for the proffered position as of the priority date.

On appeal, the petitioner submitted a new affidavit dated March 19, 2014 from formerly of and a second affidavit from dated March 9, 2014, to establish the beneficiary's employment with We do not find this evidence to establish the beneficiary's employment qualifications.

None of the evidence submitted in response to the director's RFE or on appeal addresses the director's primary concern, which is that the authors of the letters did not reliably describe duties specific to the beneficiary's employment with each of the qualifying employers. The regulation at 8 C.F.R. § 204.5(g)(1) states that the specific duties of the qualifying employment must be detailed in the employment verification letter: "[e]vidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received." But for the dates of the qualifying employment and the names of the respective companies, the letters were identical, and were thus apparently not written by the signatories of the letters. The petitioner did not provide evidence from each of the companies corroborating the identical job descriptions initially submitted in support of the petition.

Depending on the specificity, detail, and credibility of a letter, USCIS may give the document more or less persuasive weight in a proceeding. The Board of Immigration Appeals (BIA) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g.*, *Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The BIA also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

On appeal, the petitioner submits an affidavit from dated March 19, 2014 attesting to the accuracy of his previous statement. This affidavit is deficient in that it neither identifies the affiant's and the beneficiary's former employer, the date of the previous letter, the duties outlined in that letter, provide any explanation for the author's initial submission of duties identical to the two other companies' description of duties, and does not outline his former managerial duties at The company's location on the letterhead is IL. The petitioner did not explain why it could not obtain information from a United States company; did not submit the beneficiary's Internal Revenue Service (IRS) Forms W-2 or 1099-MISC from

; a new letter from identifying the duties the beneficiary performed while employed at or any independent, objective evidence of the beneficiary's employment with

Nor does the record establish the beneficiary's qualifying work experience with In response to the director's RFE, the petitioner submitted the original letter from dated December 2, 2010, but provided no explanation from the company or from Mr. about issuing an employment verification letter in which the duties were not apparently authored by Mr. The company's location identified on its letterhead is Houston, TX. The petitioner did not submit a new letter from IRS Forms W-2 or 1099-MISC establishing the beneficiary's employment, or other objective, independent evidence to corroborate the beneficiary's qualifying employment with the company.

Similarly, the copy of the letter from does not establish the beneficiary's employment with The petitioner failed to submit the original as requested by the director. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner did not submit the original letter as requested by the director, or any evidence from the company to authenticate the letter from The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

In lieu of evidence from the petitioner provided two affidavits from Neither affidavit is written on letterhead. The affiant does not state when he was employed at and does not describe his duties as the beneficiary's claimed former manager. These two affidavits do not comply with the regulation at 8 C.F.R. § 204.5(g)(1) in that they are not from the beneficiary's former employer(s) or trainer(s) and do not include the name and address of If an original letter from is unavailable, other documentation relating to the alien's experience or training may be considered. The petitioner has not, however, established that is out of business. The petitioner has not explained why the company was not willing to provide evidence of the beneficiary's work experience, or why we should accept secondary evidence in lieu of primary evidence of the beneficiary's employment with The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). If a required document does not exist or cannot be obtained, the petitioner must demonstrate this and submit secondary evidence pertinent to the facts at issue. *Id.* Where a record does not exist, the petitioner must submit an original written statement from the relevant authority establishing this as fact. The statement must indicate the reason the record does not exist and indicate whether similar records for the time and place are available. 8 C.F.R. § 103.2(b)(2)(ii).

The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the

burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

For the reasons outlined, we do not find that the record establishes the beneficiary's claimed work experience with [redacted][4] As noted by the director, the letters verifying the beneficiary's employment do not appear to be authored by any of the signatories of the letters, thus diminishing their probative value. Although notified of USCIS concerns, the petitioner has not submitted reliable corroborating evidence to bolster the authenticity of the statements of the beneficiary's duties outlined in each identical letter. Therefore, we find that the beneficiary does not possess 24 months of experience in the job offered or in an alternative occupation as a Software Developer, Programmer Analyst, or related occupation.

We further note that the record contains no evidence of the beneficiary's part-time work experience with [redacted] in Florida from September 5, 2005 until December 16, 2005 and January 9, 2006 until July 7, 2006.[5]

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 cannot be used to qualify the beneficiary for the certified position.[6] Specifically, in response

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[4] Nor does the record establish that the beneficiary has experience in the technical environment of [redacted] and [redacted] as required by the labor certification. ETA Form 9089, at part H.14.

[5] The record contains transcripts from [redacted] indicating that the beneficiary withdrew from all of his graduate classes in the fall semester of 2005 and resumed studies in the fall semester of 2007. From September 5, 2005 until December 16, 2005 and January 9, 2006 until July 7, 2006, the beneficiary worked for [redacted] USCIS records reflect that while employed at [redacted] the beneficiary was not authorized to work in the U.S.

[6] 20 C.F.R. § 655.17 states:

> (b) *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
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> . . . . .
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> (4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and
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> > (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.
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> > (ii) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).
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> (1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.
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> (2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

to question J.21, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?," the petitioner answered "no." The petitioner specifically indicates in response to question H.6 that 24 months of experience in the job offered is required and in response to question H.10 that experience as a software developer, programmer analyst or related experience is acceptable. 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 comparable[7] 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 questions K.1. and K.2 that his positions with the petitioner were as a mega architect and information systems specialist/architect, 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 the beneficiary 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.

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(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.

[7] 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.

Thus, we affirm the director's decision that the petitioner failed to establish that the beneficiary meets the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as an advanced degree professional under section 203(b)(2) of the Act.

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.