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

DATE: JAN 16 2015 OFFICE: NEBRASKA SERVICE CENTER

IN RE: Petitioner:
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:

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 employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. We will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the sciences, the arts, or business. The petitioner seeks employment as a engineer for . The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner has not established that he qualifies for classification as an alien of exceptional ability, and therefore declined to make a determination as to whether an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a legal brief, a personal statement, and letters from third parties.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

I. Law

(ii) To show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition must be accompanied by at least three of the following:

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

(iii) If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.

II. Analysis

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on October 24, 2012, accompanied by an introductory statement and initial evidence. The director issued a request for evidence (RFE) on July 19, 2013. In the RFE, the director stated:

> If you are submitting comparable evidence:
> - Submit evidence to establish that the six criteria do not apply to the beneficiary's field of endeavor; or,
> - The reasons the required evidence is not available.

The petitioner responded with a new statement and additional evidence. The director issued the denial notice on March 12, 2014.

On Part 6, line 2 of the petition form, the petitioner identified his occupation's SOC (Standard Occupational Classification) Code as 41-9031, which corresponds to sales engineers. An adjacent notation indicated: "The SOC code can also be: 17-2141.00 Mechanical Engineers."

At various times in this proceeding, the petitioner has claimed to have met four of the six exceptional ability standards at 8 C.F.R. § 204.5(k)(3)(ii), as detailed below:

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(A)

The petitioner submitted a copy of a transcript from showing that the petitioner studied there from 1993 to 1997 but did not receive a degree. A letter submitted with the petition claims eligibility under the "comparable evidence" clause at 8 C.F.R. § 204.5(k)(3)(iii) because the petitioner "actually attended four years of an American university program in engineering, but only did not take a degree. The program of study was in engineering, which is directly related to his current field of work and the area of exceptional ability in which he is requesting consideration."

In the RFE, the director stated that the petitioner had not met this requirement because the university did not award the petitioner a degree. The petitioner's response included the following argument:

> Since he does not possess the degree itself, but yet pursued his education at a U.S. university and has extensive experience, we are requesting the Service to consider this comparable evidence. The petitioner's employment history and the extensive documentation of his achievements in engineering clearly show that he is only lacking a document (the degree certificate) but not the underlying knowledge, skill and ability.

The director, in the denial notice, concluded that the petitioner had not met this criterion because he had not documented his receipt of any academic degree. The director also found that the petitioner had not submitted comparable evidence of such a degree.

The petitioner, on appeal, asserts that the director "did not apply the 'comparable evidence' regulation appropriately in this matter." The accompanying brief asserts that the director should have taken into account the petitioner's employment experience, as well as the fact that "he completed essentially the entire program of study in engineering." The regulatory standard is not attendance at a university, but rather completion of a course of study as shown by the awarding of a degree.

The petitioner cannot claim eligibility using comparable evidence because he is unable to meet the requirements of the regulation. The regulation at 8 C.F.R. § 204.5(k)(3)(iii) provides for "comparable evidence" only "[i]f the [six specified] standards do not readily apply to the beneficiary's occupation." The petitioner has made no such showing, and therefore there is no support for the claim that the director "did not apply the 'comparable evidence' regulation appropriately in this matter."

Regarding the contention that the director should have considered the petitioner's work experience in place of his absent degree, another criterion (below) covers work experience; that same experience cannot also serve in place of an academic degree. The record clearly shows that baccalaureate degrees are available in the petitioner's area of claimed exceptional ability, and therefore the degree criterion is applicable to his occupation.

The brief contends that, by insisting on a degree, the director "elevates form over substance to focus solely on the lack of a document (the degree certificate)." There is no dispute that the petitioner attended for four years, but when "the degree certificate" is the university's way of acknowledging that the petitioner has satisfactorily completed his studies and passed all required courses, the absence of that document is not a matter of "form over substance" – it is central to the question of whether the university considered the petitioner to be fully qualified for the degree he sought.

The brief notes that the petitioner earned 123 credits, whereas '[redacted]. . . requires 124 credits for a degree." One hundred and twenty-three out of 124 credits do not entitle the petitioner to a partial degree or "the equivalent [of a] U.S. engineering degree." Furthermore, earning a degree requires more than the accumulation of credits; every major has specific course requirements. The petitioner has not shown that he passed all of the courses required to graduate. When the question is not whether the petitioner is qualified to work as an engineer, but whether he has a degree of expertise significantly above that ordinarily encountered, indicative of exceptional ability, this issue is of central relevance.

The director correctly found that the petitioner has not documented an academic degree in his field.

> *Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.* 8 C.F.R. § 204.5(k)(3)(ii)(B)

Letters from officials of [redacted], collectively attest to the required experience. There is no disagreement that the petitioner has met this requirement.

> *Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(D)

The petitioner did not originally claim to have met this requirement. Part 6, line 9 of Form I-140 indicated that [redacted] would pay the petitioner $82,451 per year. [redacted] pay receipts from the third quarter of 2012 show a salary of $4,917.50 per month, which extrapolates to $59,010 per year. That same annual amount appears on Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, for 2011.

In the RFE, the director instructed the petitioner to submit evidence to establish that the beneficiary's compensation reflects exceptional ability. In response, the petitioner again claimed eligibility under the "comparable evidence" clause, but did not claim or demonstrate that the regulatory criterion does not readily apply to his occupation. Instead, the petitioner's response statement included these claims:

> We are providing . . . the petitioner's company tax returns and his individual tax returns. . . . [T]he petitioner takes a smaller salary from the company, as an entrepreneur, in order to ensure that sufficient funds remain with the company to build and expand the business. The remaining profits of the company go to the petitioner and his family, and so the remuneration for two of the past three years (2010-2012), in effect, has been well over $100,000. The income was lower in 2012 because of the amount of money invested in the development of the product leading to the petitioner's patent application . . . [T]he petitioner estimates that approximately $200,000 was spent on that effort.

The assertion that the petitioner, as an entrepreneur, has drawn a reduced salary in order to keep the money in the company is a plausible one. This may well be the case with a majority of relatively new small businesses. The wording of the regulation, however, requires the petitioner to show that his

remuneration demonstrates exceptional ability, *i.e.*, a degree of expertise significantly above that ordinarily encountered. Taking a lower salary to keep money in the company might be typical of such businesses, but it does not demonstrate exceptional ability.

Uncertified copies of IRS Form 1065, U.S. Return of Partnership Income, include the following figures:

Year	2010	2011	2012
Gross receipts or sales	$538,404	$871,788	$195,107
Total income	538,404	871,788	123,378
Salaries and wages	61,047	63,949	76,519
Total deductions	444,599	738,309	133,204
Ordinary business income (loss)	93,805	133,479	(9,826)

The petitioner's RFE response included the claim that income for 2012 would have been greater, had the company not invested "approximately $200,000" on product development. The expenses itemized on that year's return, however, do not include product development, and the company's total expenses were well under $200,000 for the year. The expenses listed on the 2011 return include $126,000 for "Consulting" and $97,879 for "Outside services," which might relate to product development. These expenses, however, were reported in 2011 and therefore did not count against the petitioner's 2012 income, nor do they explain why gross receipts declined by more than 77% from 2011 to 2012.

IRS Forms 1040, U.S. Individual Income Tax Returns, jointly filed by the petitioner and his spouse show partnership income of $65,663 in 2010 and $93,435 in 2011. It is the petitioner's spouse, however, and not the petitioner, who is a partner in (she owns 70% of the business) and therefore entitled to a share of its profits. Thus, the profits are not the petitioner's remuneration.

In the denial notice, the director noted that "the petitioner is earning well below the proffered wage rate," and that the petitioner had not submitted any evidence "to show the occupational or industry standard rate of pay," without which the petitioner cannot show that his compensation demonstrates exceptional ability. The director found that the petitioner had not established that overall financial performance reflects exceptional ability, and therefore the director did not consider this evidence as comparable evidence relating to the petitioner's compensation.

The petitioner does not address this finding on appeal. Therefore, he has effectively abandoned this claim. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n.2 (11th Cir. 2005); *Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885, at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims abandoned when not raised on appeal to the AAO).

The record supports the director's finding, uncontested on appeal, that the petitioner has not met the criterion relating to compensation.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations. 8 C.F.R. § 204.5(k)(3)(ii)(F)

The petitioner's initial submission included the following statement:

> Although there are no awards granted by professional associations for expertise in vapor phase decomposition technology, [the petitioner] has garnered the respect and admiration of peers, competitors and associates in the semiconductor industry for his significant abilities in this specialized area that make him stand apart from others in his industry.

The petitioner submitted letters from a number of former co-workers and clients. Some of these individuals attested, in general terms, to the petitioner's skill and expertise, while others referred to the petitioner's work on specific projects. As an example of the latter, Dr. section manager at , stated that the petitioner is "one of the only [*sic*] engineers who [are] capable of servicing" an unidentified "million dollar analysis tool." of asserted that the petitioner performed repairs and enhancements on "a million dollar tool" used by that company. The letters do not identify any specific achievements or contributions to the industry or field.

In the RFE, the director instructed the petitioner to provide additional details regarding his claimed contributions, as well as documentation such as patents, technology licenses, and contracts. The petitioner's response included the assertion that "U.S. manufactures [have stated] that the petitioner provides the only U.S. manufactured machinery of [its] type and that the service he provides is unparalleled in the industry."

The petitioner submitted copies of purchase orders dated between 2011 and 2013, and patent application documents from 2012, identifying the petitioner as the assignee and co-inventor of a The petitioner's RFE response included the claim that "[a] patent, by its very definition, means that the petitioner has created something new and notable that deserves protection under intellectual property laws." The petitioner did not submit any evidence that the patent application had been approved. Regardless of the merits of a patent, an application for a patent is not recognition for achievements or significant contributions to the industry or field.

In denying the petition, the director concluded: "The record contains no examples of recognition for achievements and significant contributions to the industry or the field by government entities, or professional or business associations." The director acknowledged the petitioner's submission of letters, but found that the record lacks documentation to support the claims in the letters.

On appeal, the petitioner submits a statement repeating the claim that, given the narrowness of his particular specialty, no avenues of recognition exist apart from the "handful of people [who] are knowledgeable worldwide" in the petitioner's area of endeavor. The statement adds that the petitioner "has provided objective documentary evidence of his achievements and significant contributions to [his]

particular industry, including documentation of the machine he has created and built in the U.S." The record documents the petitioner's role in inventing specialized equipment, but an invention is not, itself, evidence of recognition. The only letter that appears to mention this invention is from Mr. named on the patent application as a co-inventor. The other letters largely focused on the petitioner's earlier work as a support technician. Some of the letters also mentioned the petitioner's development of equipment, but they did so in very general terms, identifying no specific achievements or contributions.

The petitioner has not overcome the director's finding regarding recognition for achievements and significant contributions. Had the petitioner done so, he still would have satisfied only two of the six regulatory standards for exceptional ability. The petitioner has abandoned his claim regarding compensation. The record indicates that the standard relating to academic degrees readily applies to his occupation, and the petitioner has not claimed otherwise. Instead, he has claimed eligibility for this criterion based on comparable evidence, which the regulations do not support.

The record supports the director's finding that the petitioner did not meet at least three of the six regulatory standards for exceptional ability. The director added that, because the petitioner had not established eligibility for the underlying immigrant classification, the issue of the national interest waiver is moot. The waiver is available only to foreign workers who otherwise qualify for classification under section 203(b)(2)(A) of the Act.

Beyond the legal brief, the letters and statement submitted on appeal address the issue of how the petitioner's work benefits the United States, and thereby serves the national interest. Because the director made no initial determination regarding the waiver, and because we agree with the director's finding regarding the petitioner's ineligibility for the underlying classification as an alien of exceptional ability, a *de novo* determination regarding the national interest waiver claim would not change the outcome of the appeal and, therefore, would serve no constructive purpose. The petitioner cannot qualify for the waiver without first qualifying for the underlying classification.

III. Conclusion

The petitioner has not satisfied at least three of the six evidentiary standards specified at 8 C.F.R. § 204.5(k)(3)(ii). The petitioner has sought an alternative standard of review using comparable evidence under 8 C.F.R. § 204.5(k)(3)(iii), but he has not shown that the regulatory standards do not readily apply to his occupation. Therefore, the petitioner has not established that he qualifies for classification as an alien of exceptional ability under section 203(b)(2)(A) of the Act.

We will dismiss the appeal for the above stated reasons. 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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.