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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

B5

[redacted]

DATE: APR 1 8 2011 Office: NEBRASKA SERVICE CENTER FILE: [redacted]
SRC 09 004 50098

IN RE: Petitioner:
Beneficiary: [redacted]

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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Mary Clerson

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition and reaffirmed that decision on multiple motions. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to 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. The petitioner seeks employment as a technical engineer. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States.

Throughout the proceeding, the director has found that the petitioner does not qualify for the classification sought either as an alien of exceptional ability or as a member of the professions holding an advanced degree. The director has further concluded that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner asserts that the director erred by dismissing the petitioner's final motion as failing to meet the requirements of a motion. The petitioner asserts that he supported his most recent motion with "17 Pages of Supporting Evidence." The most recent motion, receipt number LIN-011-082-50307, consists of a 16-page statement with no supporting evidence.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. According to 8 C.F.R. § 103.5(a)(3), 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 U.S. Citizenship and Immigration Services (USCIS) policy.

The AAO recognizes that the petitioner's statement included the reasons for reconsideration and relied on federal case law. That said, a party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. 94, 110 (1988). The petitioner in this matter filed an initial late appeal, considered as a motion pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(*2*), and five subsequent motions to reopen and/or reconsider. The director considered the evidence on the merits in all but the final motion and has even considered the evidence in light of a recent federal court decision raised by the petitioner in one of his motions. The director has even considered whether the petitioner might qualify as a member of the professions holding an advanced degree even though the petitioner has never expressly advanced that claim. The AAO concludes that the director properly determined that the final motion did not require yet another decision on the merits.

In the alternative, a review of the record as a whole reveals that the petitioner has failed to establish his eligibility for either the classification sought or a waiver of the alien employment certification process in the national interest, especially as of the initial date of filing in this matter, October 6, 2008. The petitioner must establish his eligibility as of that date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). Specifically, the AAO finds that the director raised appropriate considerations when evaluating the evidence submitted to demonstrate exceptional

"equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[1]

The petitioner received a bachelor's degree in October 2008, the month he filed the petition. Thus, the petitioner did not have five years of post-baccalaureate experience as of the date of filing, the date on which he must establish his eligibility. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971).

The petitioner submitted an August 21, 2009 "Expert Opinion Evaluation" from a member of the faculty at the In a separate letter, asserts that the University of Phoenix has "a program which acknowledges credit based on the work experience of students and applicants." considered the petitioner's concluding that it corresponded with "at least three years of academic coursework from an accredited institution of higher education in the United States." en considered the petitioner's experience and concluded: "Considering that a Bachelor's degree followed by five years of full-time work experience in the field of Computer Information Systems is equivalent to a Master's degree in Computer Information Systems, [the petitioner] has attained the equivalent of a Master of Science in Computer Information Systems." does not explain how he reached this conclusion when the petitioner did not, in fact, receive a bachelor's degree. Moreover, the petitioner also provided a contradictory evaluation from World Education Services (WES) indicating that the petitioner's National Diploma was equivalent to one semester of undergraduate study, that his Higher National Certificate was equivalent to one year of undergraduate study and that an "Academic Transcript" from was equivalent to one semester of undergraduate study.

As noted by the director in the February 4, 2010 decision, the WES evaluation is inconsistent with the evaluation from The petitioner acknowledged the claims of inconsistencies in his April 13, 2010 motion but declined to address them. The director noted that the petitioner had failed to address these inconsistencies in the August 17, 2010 decision, although the director incorrectly referenced an April 17, 2009 notice as one in which he had raised these concerns, rather than the February 4, 2010 decision. In response to the director's August 17, 2010, the petitioner notes that the director did not raise these concerns in the April 17, 2009 notice. Regardless, the director did raise these concerns that the petitioner has failed to address.

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r. 1988). It is incumbent upon the petitioner to resolve any

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[1] *Cf.* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* The petitioner has not submitted objective evidence to resolve the inconsistencies between the two evaluations; therefore, the AAO is precluded from accepting either of these contradictory evaluations.

Even if the AAO were to accept Dr. Jelen's more generous evaluation, the regulations only allow consideration of experience where the alien has five years of post-baccalaureate experience. Dr. Jelen does not suggest that the petitioner has five years of post-baccalaureate experience and the record does not contain a bachelor's degree or a foreign equivalent degree that predates the petition by at least five years.

In light of the above, the AAO affirms the director's determination in the August 17, 2010 decision that the petitioner did not possess an advanced degree as of the filing date.

B. Exceptional Ability

The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the following six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business:

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

In his September 14, 2010 filing, the petitioner noted a recent federal court decision, *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010), and requested that the director reconsider the evidence under the standards set forth in the Ninth Circuit's decision. On January 3, 2011, the director issued a new decision using the standards set forth by the *Kazarian* court. On appeal, the petitioner now asserts that *Kazarian* is not relevant to the classification sought. The petitioner does not explain why he himself requested that the evidence be reevaluated under the standards set forth in the Ninth Circuit's decision.

If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates "a degree of expertise significantly above that ordinarily encountered" in the arts. 8 C.F.R. § 204.5(k)(2). *Kazarian*, 596 F.3d at 1115, sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. While involving a different classification than the one at issue in this matter, both classifications require evidence qualifying under a specific number of evidentiary criteria. Thus, the *Kazarian* court's reasoning is persuasive to the classification sought in this matter. The petitioner's conclusion that the reasoning in *Kazarian* cannot be applied to the classification sought is based in part on the assertion that "none" of the regulatory criteria for aliens of extraordinary ability are "objectively measurable." This assertion is factually incorrect. For example, the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires evidence of publication of scholarly articles. As with a degree, the example the petitioner uses, evidence of a published article is "objectively measurable."

In his two most recent filings, the petitioner has asserted that the director misapplied the *Kazarian* decision by utilizing a final merits determination after counting the evidence. The petitioner stated that the director "incorrectly quoted (only two words were correct)" the decision in *Kazarian* and "changed the whole meaning of the Case." The AAO has reviewed the quotations used by the director and compared them to the actual *Kazarian* decision. The director correctly quoted the decision with the minor exception of using the phrase "a final merits determination" rather than "the final merits determination." *Compare* quote on page 3 of the director's decision with *Kazarian*, 596 F.3d at 1121. This minor typographical error does not change "the whole meaning" of the court's decision.

More than once, the *Kazarian* court discusses the final merits determination as the appropriate means to raise concerns about the nature of the evidence. For example, the court accepted that the AAO's analysis of the strictly internal nature of the alien's judging experience "might be relevant to a final merits determination." *Kazarian,* 596 F.3d at 1122. In addition, the court accepted that whether an author's articles have garnered citations in the field "might be relevant to the final merits determination of whether a petitioner is at the very top of his or her field of endeavor." *Id.* at 1121. The petitioner asserts that the court's use of the word "might" does not suggest that USCIS can "expand" the requirements. Regardless, the court felt compelled to acknowledge the AAO's concerns in that case and expressly stated that they were legitimate concerns but should have been addressed separately after counting the evidence. Significantly, the court explicitly states that counting the evidence is the "antecedent procedural question" USCIS must determine. Webster's

New College Dictionary 48 (3rd ed. 2008) defines antecedent as follows: "1. One that precedes. 2. An occurrence or event preceding another." Thus, it is clear that the court was setting forth a two-step procedure where the procedural question of whether the petitioner submitted evidence is only the "antecedent" step preceding an evaluation of the nature of the evidence in a "final merits determination."

The final merits discussion appears in the majority opinion and is a necessary corollary to the majority's discussion of how USCIS should consider evidence under the regulatory criteria. In other words, the court's conclusion that USCIS cannot raise certain concerns when counting the evidence is predicated on the understanding that USCIS can do so at a later stage. To apply only half of the court's procedure would effectively negate USCIS' ability to consider the quality of the evidence at any stage. Such an outcome is untenable and would undermine the regulatory standard. Significantly, a recent federal court decision has acknowledged that the *Kazarian* court described a two-step procedure. *Rijal*, 2011 WL 22067 at *2.

> *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*

The petitioner received his Bachelor of Science degree from the [redacted] in October 2008. The petitioner submitted the degree itself, which only indicates the month of issue, and a September 30, 2008 email from the Office of the Registrar stating that the petitioner's degree award date is October 1, 2008, which predates the filing of the petition. The petitioner also submitted two certifications from Sun Microsystems dated September and November 1999. The petitioner also submitted his 1987 Higher National Certificate in Engineering and his 1985 National Diploma in Electronics and Communications Engineering. As discussed above, the petitioner has not resolved the inconsistent evaluations regarding the equivalence of this education in the United States. The evaluations do not evaluate the petitioner's foreign education as more than three years of coursework.

In light of the above, the petitioner has submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A).

> *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*

According to the plain language of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B), the petitioner must have ten years of experience in the "occupation for which he or she is being sought." On the petition, the petitioner indicated that the proposed position is "technical engineer." According to [redacted] Chief Executive Officer (CEO) of Forean, Inc., the petitioner works there as a software engineer and is pursuing his plans in that capacity. Thus, the petitioner must demonstrate at least 10 years of full-time experience as a software engineer as of October 6, 2008.

As stated above, confirms that the petitioner has been working as a software engineer. confirms a start date of October 1, 2004. Thus, the petitioner had four years of experience as a software engineer with as of the date of filing.

confirms that the petitioner worked as a sales executive for Morse from October 1, 1999 through March 31, 2004. While an email from Samantha Baker-Odlin affirms that he petitioner "used his knowledge of GRID computing to successfully sell products and solutions, his occupation was that of sales executive rather than software engineer. Thus, this experience cannot be counted towards the necessary ten years of experience in the occupation of software engineer.

On his self-serving curriculum vitae, the petitioner indicated that he worked for (BT) from June 1, 1996 through September 30, 1999. While the petitioner does not list his job title, he indicates that his duties involved working with "Computer Vendors, 'Content' Suppliers, and BT's own Staff, to design and implement this GRID Network." The record contains a local Bradford newspaper article dated October 7, 1997 announcing that Bradford had entered into a £12 million agreement with BT to link the schools to a district-wide network "using the most advanced communications technology and state-of-the-art computers." The petitioner also submitted the acceptance letter from the In addition, the petitioner submitted a facsimile cover sheet dated October 6, 1997 from to the petitioner regarding the acceptance letter. Finally, the petitioner submitted an October 13, 1997 letter from signed on behalf of at BT to the petitioner expressing his thanks for the petitioner's efforts towards successfully securing the contract. None of this evidence confirms the petitioner's dates of employment, actual duties or position title with BT.

The plain language of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B) requires evidence in the form of letters. The regulation at 8 C.F.R. § 204.5(g)(1) provides that evidence of experience "shall be in the form of letter(s) from current or former employer(s)" and "shall include the name, address, and title of the writer and a specific description of the duties performed by the alien." The petitioner did not submit such evidence regarding his past employment for BT. Thus, that experience cannot be considered towards the necessary 10 years of experience.

Finally, the record contains evidence of the petitioner's military service from November 23, 1977 through October 7, 1988. Prior counsel asserted that the petitioner "was working directly at the forefront of the rudimentary fundamentals of GRID computing while enlisted in the British Army as they were only of only a few institutions in the world that had the technology." The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). The petitioner's record of service indicates that he served in the "R Signals" Corps. His job description is as follows: " Now Designated " Subsequently, the petitioner submitted an email from

with the British Army stating that the petitioner was "employed in the Army on Regular Service, which means [the petitioner was] a full time soldier." continues that the petitioner's trade when discharged was which means that [the petitioner was] employed as a A Certificate of Serve also lists the petitioner's trade as

The Department of Labor's *Occupational Outlook Handbook* (OOH) provides the following:

> *Electrical and electronics installers and repairers, transportation equipment* install, adjust, or maintain mobile electronic communication equipment, including sound, sonar, security, navigation, and surveillance systems on trains, watercraft, or other vehicles. *Electrical and electronics repairers, powerhouse, substation, and relay* inspect, test, maintain, or repair electrical equipment used in generating stations, substations, and in-service relays. These workers may be known as powerhouse electricians, **relay technicians**, or power transformer repairers.

(Bold emphasis added.) *See* http://www.bls.gov/oco/ocos184.htm (accessed April 18, 2010 and incorporated into the record of proceedings).

Separately, the OOH provides the following duties for software engineers:

> *Computer software engineers* design and develop software. They apply the theories and principles of computer science and mathematical analysis to create, test, and evaluate the software applications and systems that make computers work. The tasks performed by these workers evolve quickly, reflecting changes in technology and new areas of specialization, as well as the changing practices of employers.

See http://www.bls.gov/oco/ocos303.htm (accessed April 7, 2010 and incorporated into the record of proceeding.

The director accepted the petitioner's military service as qualifying experience and concluded that the petitioner has submitted qualifying evidence pursuant to 8 C.F.R. § 204.5(k)(3)(ii)(B). The AAO must withdraw this conclusion. The AAO maintains plenary power to review cases on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). As is clear from the OOH materials quoted above, the occupation of "Radio Relay Technician" is not the same occupation as a software engineer. The AAO reiterates that the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B) requires 10 years of experience "in the occupation" for which the petitioner seeks employment, in this case, software engineer.

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B).

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

The petitioner submitted a letter from stating "As far as I can tell from our records, [the petitioner's] gross earnings were as follows:- April 2000 – March 2001 £286,396.39." The petitioner also submitted a January 31, 2001 paystub listing the petitioner's gross pay year-to-date (apparently for 2000) as £264,657.93. According to an online currency converter, £286,396 was equivalent to $413,739 on March 2, 2001. As discussed above, the petitioner worked for Morse as a sales executive. The AAO will not compare the petitioner's wages as a sales executive with prevailing wages for software engineers. The petitioner has not provided wage levels for sales executives in Great Britain for comparison purposes. Thus, the petitioner has not documented that his remuneration is notable for a sales executive. Moreover, even if they are high, the petitioner has not sufficiently explained why high wages as a sales executive are indicative of exceptional ability as a software engineer. As the petitioner has not demonstrated that his wages are indicative of exceptional ability as a software engineer, he has not submitted evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(D).

Evidence of membership in professional associations

The petitioner submitted a screen print of his membership confirmation in the Institute of Electronics and Electrical Engineers (IEEE). The petitioner also submitted a "Membership Confirmation" with the Open Grid Forum. This confirmation is a printed document saved on the petitioner's own computer rather than a copy downloaded and printed from the Internet directly. The petitioner also submitted what appears to be his profile on the listing his "membership name." Once again, this information is a printed document saved on the petitioner's own computer rather than a copy downloaded and printed from the Internet directly. Finally, the petitioner's Army Form B 6320 indicates that the petitioner is "eligible for membership" in the Institution of Electrical and Electronic Technician Engineers, the Association of Supervisory and Executive Engineers and the Society of Electronic and Radio Technicians. The petitioner did not submit any evidence that he actually joined these associations.

In light of the above, the petitioner has not submitted any evidence of membership in British associations. Material saved to the petitioner's own computer and printed from a file on his computer rather than directly from the Internet has less evidentiary value than material downloaded and printed directly from the Internet. Thus, the only membership the petitioner has established is his membership in IEEE. The plain language of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E) requires evidence of membership in qualifying associations in the plural. Significantly, some of the regulatory criteria are worded in the singular, such as 8 C.F.R. § 204.5(k)(3)(ii)(A), (C) and (D). When a regulatory criterion wishes to include the singular within the plural, it expressly does so as when it states at 8 C.F.R. § 204.5(k)(3)(ii)(B) that evidence of experience must be in the form of "letter(s)." Thus, USCIS must infer that the plural in the remaining regulatory criteria has meaning. In

a different context, federal courts have upheld USCIS' ability to interpret significance from whether the singular or plural is used in a regulation.[2]

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

In response to the director's April 17, 2009 notice of intent to deny the petition, the petitioner submitted a newspaper article about the agreement whereby Bradford schools would receive new telecommunications and computer technology and letters. The AAO notes that one of the letters is purportedly from one of the petitioner's professors at the State University of New York. While the record contains multiple letters purportedly from he did not sign any of these letters. Rather, name appears preprinted in a cursive font at the bottom of the letter. Thus, none of these letters have any evidentiary value.

The remaining letters, which will be addressed in more detail below as they relate to the issue of the waiver of the alien employment certification, primarily affirm generally that the petitioner has a degree of expertise significantly above that ordinarily encountered in the field. Merely repeating the language of the regulations does not satisfy the petitioner's burden of proof.[3]

The petitioner also submitted a June 12, 2007 letter and a May 8, 2009 email from Employer Services. In 2007, outlines the resources available to the petitioner in New Jersey. In 2009, states that "if" the petitioner's GRID computing technology "proves to be successful, our can certainly find workers to fill any openings your employer (Forean Inc) may have." does not recognize any past achievements in or contributions to the industry or field as a whole.

As stated above, the record includes a letter signed on behalf of thanking the petitioner for his efforts to secure ntract with The letter notes that the contract is first in four years with The letter does not explain how securing the contract to supply technology to a local school district represents an achievement in or contribution to the industry of software design.

The AAO interprets "recognition" as used in 8 C.F.R. § 204.5(k)(3)(ii) to require formal recognition

[2] *See Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at 12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for "a" bachelor's degree or "a" foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials).

[3] *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States*, 745 F. Supp. 9, 15 (D.C. Dist. 1990).

rather than brief letters of appreciation from employers acknowledging the petitioner's successful completion of assigned job duties or reference letters written to support the visa petition. The record contains no such evidence.

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements of 8 C.F.R. § 204.5(k)(3)(ii)(E).

In light of the above, the petitioner has not submitted evidence that qualifies under three of the evidentiary criteria. Nevertheless, the AAO will next conduct a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated that the beneficiary has "a degree of expertise significantly above that ordinarily encountered." 8 C.F.R. § 204.5(k)(2).

Section 203(b)(2)(C) of the Act provides that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of exceptional ability. Thus, in a final merits determination, USCIS must determine whether the beneficiary's degrees and other academic credentials are indicative of or consistent with a degree of expertise significantly above that ordinarily encountered.

The OOH contains information on the general education held by software engineers. The OOH states:

> A bachelor's degree commonly is required for software engineering jobs, although a master's degree is preferred for some positions. A bachelor's degree also is required for many computer programming jobs, although a 2-year degree or certificate may be adequate in some cases. Employers favor applicants who already have relevant skills and experience. Workers who keep up to date with the latest technology usually have good opportunities for advancement.
>
> ***Education and training.*** For software engineering positions, most employers prefer applicants who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The usual college majors for applications software engineers are computer science, software engineering, or mathematics. Systems software engineers often study computer science or computer information systems. Graduate degrees are preferred for some of the more complex jobs.

See http://www.bls.gov/oco/ocos303.htm (accessed April 7, 2011 and incorporated into the record of proceedings.

In addition, O*NET Online indicates that 23 percent of respondents in the occupation indicated that they have a Master's degree while 54 percent of respondents indicated that they have a bachelor's degree. *See* http://www.onetonline.org/link/summary/15-1032.00#Education (accessed April 18, 2011 and incorporated into the record of proceeding.

In light of the above, the petitioner's education does not itself appear indicative of or consistent with a degree of expertise significantly above that ordinarily encountered in the field.

Even if the AAO were to conclude that the petitioner is a member of OGF and the World Community Grid and, thus, submitted qualifying evidence pursuant to 8 C.F.R. § 204.59k)(3)(ii)(E), the petitioner has not documented the membership requirements of IEEE, OGF and the World Community Grid. Accordingly, it is not possible to determine whether or not these memberships are indicative of or consistent with a degree of expertise significantly above that ordinarily encountered in the field. If the associations merely require education and/or employment in the field, they cannot establish any unusual expertise beyond that normally encountered by those working in the field.

Even if the AAO were to conclude that the petitioner has the necessary experience such that he technically meets the requirements at 8 C.F.R. § 204.5(k)(3)(ii)(B), as discussed above, much of that experience is as a radio relay technician and sales executive. The petitioner has not persuasively demonstrated how this experience, which is minimally relevant to his current plans, demonstrates his degree of expertise significantly above that ordinarily encountered among software engineers. While the petitioner's years of experience is probably his strongest evidence, that evidence alone cannot demonstrate eligibility as an alien of exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii).

In light of the above, the AAO affirms the director's conclusion that the petitioner has not documented his eligibility for the classification sought. Nevertheless, in the interest of thoroughness, the AAO will also address whether the petitioner has documented that a waiver of the alien employment certification process, a process the petitioner's employer has successfully completed, is warranted in the national interest.

II. National Interest Waiver

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

The petitioner has repeatedly asserted that he "meets" several of the "USCIS Website Requirements" for the waiver of the alien employment certification. As explained by the director these "requirements" derive from an unpublished decision. The director correctly noted while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. The petitioner continues to cite these "requirements" on appeal.

The only place the AAO was able to discover these "requirements" is a guide entitled "Helping a Foreign National Employee Get Permanent Resident Status." The guide does not suggest that these requirements are the only requirements for the waiver. Rather, it states: "While *there are other requirements*, a petitioner who requests a National Interest Waiver should be able to establish that employment of the foreign national will fulfill at least one of the following criteria." (Emphasis added.) Regardless, information on agency websites does not constitute final agency action reviewable under the Administrative Procedure Act and does not create legally enforceable entitlements. *See Air Brake Systems, Inc. v. Mineta*, 357 F.3d 632, 646 (6th Cir. 2004).

As repeatedly stated by the director, the relevant authority in this matter is *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 217-18 (Comm'r. 1998) (hereinafter "NYSDOT"). That decision is a published designated precedent that is binding on all USCIS employees in the administration of the Act pursuant to 8 C.F.R. § 103.3(c). To date, neither Congress nor any other competent authority has overturned the precedent decision.[4]

NYSDOT, 22 I&N Dec. at 217-18 has set forth several factors that USCIS must consider when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, the petitioner must show that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

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[4] Congress has amended the Act to facilitate waivers for certain physicians. This amendment demonstrates Congress' willingness to modify the national interest waiver statute in response to *Matter of New York State Dept. of Transportation*; the narrow focus of the amendment implies (if only by omission) that Congress, thus far, has seen no need to modify the statute further in response to the precedent decision. *See Talwar v. INS*, No. 00 CIV. 1166 JSM, 2001 WL 767018 (S.D.N.Y. July 9, 2001) (upholding *NYSDOT*, 22 I&N Dec. at 215 as a valid precedent.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien,, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

The AAO concurs with the director that the petitioner works in an area of intrinsic merit, GRID programming. The director then concluded that the proposed benefits of the petitioner's work would not be national in scope. Specifically, the director concluded that the petitioner's plans to train Veterans and the unemployed to work on GRID computing would only impact New Jersey and Pennsylvania. On appeal, the petitioner notes that *NYSDOT*, 22 I&N Dec. at 217, involved an engineer working on a local bridge but the benefits were deemed to be national in scope because New York's bridges and roads connect the state to the national transportation system. The petitioner explains that while his project will begin in New Jersey and Pennsylvania, it will expand nationally and bring outsourced jobs back to the United States. A September 24, 2009 email from the petitioner to Citi, a potential client, indicates that the petitioner was considering moving the project from New Jersey to Philadelphia rather than expanding a successful New Jersey program to Philadelphia.

As the petitioner criticizes the director for failing to reference the language in *NYSDOT* on the issue of national scope, the AAO reproduces that language here:

> For instance, pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. Similarly, while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act. As another example, while nutrition has obvious intrinsic value, the work of one cook in one restaurant could not be considered sufficiently in the national interest for purposes of this provision of the Act.

Id. at 217, n.3.

Ultimately, the petitioner proposes to provide a technological service to customers and train U.S. workers to perform the necessary duties such that the customers will reduce their outsourcing and hire U.S. workers. He plans to expand this program nationally. The test for this factor is whether the *proposed* benefits would be national in scope. That said, highly speculative proposals theorizing how an alien in an occupation that inherently produces local benefits might potentially provide a national benefit are not persuasive. Unlike bridges that are already connected to the national

transportation system, the petitioner proposes to start a new national program, beginning locally. His assertion that clients will adopt his technology and hire the workers he trains is highly speculative as is his assertion that there will be a market nationally. Without an existing successful model of a similar project that has produced national benefits, it is difficult to conclude that the petitioner's plan is likely to produce benefits that are national in scope. Even if the AAO were to conclude that merely proposing a program that could conceivable expand nationally was sufficient to establish the national scope of the proposed benefits, the petitioner's track record in this area does not warrant a waiver of the alien employment certification process for the reasons discussed below.

It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. The merits of retraining U.S. workers and reducing outsourcing are not in contention. Eligibility for the waiver, however, must ultimately rest with the alien's own qualifications rather than with the position sought and the merits of the proposal. In other words, that the AAO generally does not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background."

As noted by the director, special or unusual knowledge or training does not inherently meet the national interest threshold. On an earlier motion, the petitioner attempts to rebut this concern by relying on Schedule A, Group II designation pursuant to 20 C.F.R. § 656.15, which allows *an employer* to file application for labor certification with USCIS rather than the Department of Labor (DOL). Specifically, the petitioner states that he is an alien of exceptional ability and meets the other requirements of Schedule A, Group II designation. First, as discussed above, the petitioner has not demonstrated that he is an alien of exceptional ability pursuant to the requirements set forth 8 C.F.R. § 204.5(k)(3)(ii). Regardless, the DOL regulations define "exceptional ability" far different than the USCIS regulations. Specifically, 20 C.F.R. § 656.15(d)(1) defines "exceptional ability" as follows:

> An employer seeking labor certification on behalf of an alien to be employed as an alien of exceptional ability in the sciences or arts (excluding those in the performing arts) must file documentary evidence showing the *widespread acclaim and international recognition* accorded the alien by recognized experts in the alien's field; and documentation showing the alien's work in that field during the past year did, and the alien's intended work in the United States will, require exceptional ability.

(Emphasis added.) The regulation then provides seven criteria of which an alien must meet at least two. These criteria are unrelated to the criteria set forth at 8 C.F.R. § 204.5(k)(3)(ii), discussed above. While admittedly confusing, the fact that both DOL and USCIS regulations use the phrase "exceptional ability" does not mean that the classification set forth at section 203(b)(2) of the Act and Schedule A, Group II designation as discussed at 20 C.F.R. § 656.15(d) are synonymous with each other.

The petitioner has not explained how he has submitted the requisite evidence under 20 C.F.R. § 656.15(d)(1)(i)-(vii). Even if he had, the petitioner did not initially claim to be seeking Schedule A, Group II designation and is barred from advancing that claim as he filed the petition as a self-petitioner. Moreover, he has not explained how eligibility for that designation is relevant to a *waiver* of the alien employment certification process, which includes Schedule A, Group II designation.

Significantly, even if the petitioner had established exceptional ability pursuant to 8 C.F.R. § 204.5(k)(3)(ii), that classification normally requires an approved alien employment certification. Section 203(b)(2). Thus, by statute, "exceptional ability" is not, by itself sufficient cause for a national interest waiver. *NYSDOT,* 22 I&N Dec. at 218. Thus, the *benefit* which the alien presents to her field of endeavor must greatly exceed the "achievements and significant contributions" contemplated for that classification. *Id; see also id.* at 222.

As also noted by the director, the issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of DOL. *Id.* at 221. On appeal, the petitioner reiterates his assertion that his approved labor certification in a lesser classification "confirms that there is not 'an available U.S. worker having <u>the same minimum qualifications</u>.'" (Emphasis in original.) The petitioner also refers to the number of H-1B nonimmigrant visas issued approved annually as evidence that there is a shortage in his occupation.

The petitioner seriously misunderstands the final factor set forth in *NYSDOT,* 22 I&N Dec. at 217-18. The issue of whether a shortage issue exists falls under the jurisdiction of DOL. *Id.* at 221; section 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A). The petitioner seeks a waiver of that process in the national interest. If a shortage exists such that the petitioner's employer can obtain a labor certification from DOL, a waiver of that process is not warranted in the national interest. As stated in *NYSDOT,* 22 I&N Dec. at 223, nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process.

Significantly, *NYSDOT,* 22 I&N Dec. at 218 requires a showing that the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. This is a far different question from whether there are, in fact, available U.S. workers with the same minimum qualifications. USCIS does not have jurisdiction to even consider that question.

Ultimately, at issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, an original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

Before considering the evidence, the petitioner must establish his eligibility as of the date of filing, October 6, 2008. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). In this matter, he must demonstrate his track record of success with some degree of influence on the field as a whole as of that date. All of the case law on this issue focuses on the policy of preventing petitioners from securing a priority date in the hope that they will subsequently be able to demonstrate eligibility. *Matter of Wing's Tea House,* 16 I&N Dec. 158, 160 (Reg'l. Comm'r. 1977); *Matter of Katigbak,* 14 I&N Dec. at 49; *see also Matter of Izummi,* 22 I&N Dec. 169, 175-76 (Comm'r. 1998) (citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981) for the proposition that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition.") Consistent with these decisions, a petitioner cannot secure a priority date in the hope that his as of yet unrealized project will subsequently prove influential. Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey,* 541 F.3d 257, 261 (4th Cir. 2008).

Prior counsel acknowledged that the petitioner "does not have a past record of implementing large GRID computing solutions in the U.S." but asserts that the petitioner "does have a proven record of implementing large [redacted] solutions in the United Kingdom while he was employed at [redacted]. Prior counsel asserted that the petitioner designed and implemented "Campus World," which involved 32,000 schools and cost $18 million to implement. As stated above, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. at 534 n.2; *Matter of Laureano,* 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez,* 17 I&N Dec. at 506.

The evidence contradicts the above assertions. Specifically, the record contains an October 7, 1997 article in the *Telegraph and Argus* discussing the implementation of new technology at Bradford schools. The article describes the projects as follows: "Schools are to be connected to a district-wide network using the most advanced communications technology and state-of-the-art computers." Significantly, the article continues:

> And today's announcement coincided with [redacted] unveiling with [redacted] of a £100 million boost to the Government's National [redacted] cheme to link Britain's 32,000 schools to the internet by the year 2002.

The article makes clear that while the deal with [redacted] coincided with an announced plan to link all of Britain's 32,000 schools, the BT deal only concerned Bradford schools. BT's contribution was projected to be its Intranet Service but other companies, such as Research Machines were also involved. Thus, while the article confirms that the project would cost a total £12 million, BT's portion would be necessarily less than that. As stated above, a letter on behalf of [redacted] acknowledges the petitioner's efforts towards securing the deal for BT but does not discuss his exact role. Thus, the petitioner has not documented his role with this project. Moreover, the petitioner has not documented the ultimate success of the project.

In light of the above, the record does not, in fact, document the petitioner's track record of success with some degree of influence over the field as a whole in Great Britain.

As stated above, the record contains correspondence from t the In his first letter, ates: "It has been a pleasure working with your company and exploring the many programs available in New Jersey that may assist in recruiting, training and retaining I.T. professionals in New Jersey." Providing a list of available programs to a company seeking to create jobs does not suggest that the company has already proved successful. As stated above, in his May 8, 2009 email opines that the petitioner's project sounds exciting and new and offers assistance "if it proves successful." Thus, as of May 8, 2009, seven months after filing the petition, the petitioner's had yet to prove successful.

a Labor Services Representative at the New York Department of Labor, states that, in response to the petitioner's request, she is advising that could provide "underemployed, under qualified or minimally qualified persons for your request for 100 IT job openings." The email, dated May 11, 2009, does not establish that the petitioner had a track record of success training employees for GRID positions as of the date of filing.

A purported letter from Education at the New Jersey Institute of Technology, confirms that the institute would be pleased to help the petitioner train or retrain employees. As did not sign the letter, it has no evidentiary value.

The record contains a letter dated January 29, 2010 from asserting that Inc. would begin training a in Philadelphia under a $250,000 grant from the U.S. Department of Labor. The record contains a January 21, 2010 email from with the confirming to the petitioner that the center had received a DOL grant to work with Inc. This evidence postdates the filing of the petition by almost two years and cannot be considered evidence of the petitioner's success prior to that date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. at 49. Moreover, as stated above, the petitioner's project in Philadelphia is not an expansion of his work in New Jersey; rather, he moved the project from New Jersey to Philadelphia.

praises the petitioner's professional attitude and characterizes the petitioner as a "trusted subject matter expert in this technology field." does not confirm that was or would be a client of Forean, Inc.

provides a lengthy letter in support of the petition. explains his own expertise and provides background information on GridGain. confirms becoming familiar with the petitioner's computing solution in the summer of 2008. asserts that the petitioner prepared a o demonstrate to Citigroup in August of 2008.

asserts that was interested but would not commit unless the petitioner becomes a lawful permanent resident. Finally, confirms that would assist providing GRID training for under employed or unemployed individuals. does not explain how the petitioner has already developed a track record of success developing solutions that have been applied successfully by clients.

The record also contains general letters. confirms that he has known and worked with the petitioner since 2002. concludes that the petitioner's implementation of Catbird's security solution with the petitioner's GRID computing solution "demonstrates an understanding of GRID computing which is significantly above others in the computing industry with comparable academic or professional experience." does not explain how the petitioner's implementation of Catbird's technology to the petitioner's computing is an achievement in or contribution to the industry or field as a whole. The petitioner also submitted a similar letter from which merely asserts that the petitioner has skills above the average for the holder of a baccalaureate.

The Board of Immigration Appeals (the Board) 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 Board also held, however: "[w]e 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).

The opinions of experts in the field are not without weight and have been considered above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also 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)).

The letters considered above primarily contain bare assertions of how the petitioner's program may have potential benefits, without specifically identify innovations and providing specific examples of how those innovations have influenced the field. Merely repeating the legal standards does not

satisfy the petitioner's burden of proof.[5] The petitioner also failed to submit corroborating evidence in existence prior to the preparation of the petition, which could have bolstered the weight of the reference letters.

Ultimately, the petitioner worked on an Intranet project for a school district in the late 1990's and has documented no subsequent achievements. While the petitioner's proposal, if successful, would no doubt be of value, it would be far too speculative to waive the alien employment certification process for every proposal from an alien with no proven track record of successfully completing a similar proposal.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.

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[5] *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States*, 745 F. Supp. 9, 15 (D.C. Dist. 1990).