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: APR 2 8 2014 OFFICE: NEBRASKA SERVICE CENTER FILE:

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,

for
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 an interactive advertising agency. It seeks to permanently employ the beneficiary in the United States as a "Senior Designer." The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The director's decision denying the petition concludes that the petitioner has not established that the beneficiary meets the educational and experience requirements of the labor certification.

At issue in this matter is whether the beneficiary meets the educational and experience requirements of the labor certification.

I. PROCEDURAL HISTORY

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).[1] The priority date of the petition is September 5, 2012.[2]

Part H of the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Bachelor's degree in Graphic Design.
H.5. Training: None required.
H.6. Experience in the job offered: 60 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: Accepted.
H.8-A. If Yes, specify the alternate level of education required: Master's degree.
H.8-B. If Other is indicated in question 8-A, indicate the alternate level of education required: [Blank.]
H.8-C. If applicable, indicate the number of years experience acceptable in question 8: "3."
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: Professional experience must include: Photoshop, Illustrator, Indesign, After Effects; HTML; Knowledge of graphic/web/visual design aesthetic; Design for mobile, smartphone and tablet devices and advanced functional design principles and process of web development. In lieu of a Bachelor's degree, or foreign equivalent, in Graphic Design, followed by 5 years of post-baccalaureate progressive

[1] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).
[2] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

experience in job offered [Graphic Design], employer will accept a Master's degree, or foreign equivalent, in Graphic Design and 3 years of professional experience in job offered [Graphic Design]. *Employer will accept any suitable combination of education, training, or experience.

Part J of the labor certification states that the beneficiary possesses a Master's degree in Advertising from the completed in 2006. The record contains a copy of the beneficiary's Master's degree in Advertising and transcripts from the issued in 2006. The record also contains a copy of the beneficiary's Bachelor's degree in Art from issued in 2004.

Part K of the labor certification states that the beneficiary possesses the following employment experience:

- As a senior designer for the petitioner beginning on November 11, 2011.
- As a graphic designer with the petitioner from May 17, 2010 until October 31, 2011.
- As an art director/designer for LLC in Santa Monica, California from October 1, 2008 until May 15, 2010.
- As a graphic designer for LLC in Los Angeles, California from October 1, 2007 until August 29, 2008.

The record contains an experience letter from the CFO of LLC stating that the company employed the beneficiary in the position of art director from October 1, 2008 until May 15, 2010. The record also contains an experience letter from the CEO of LLC stating that the beneficiary worked there full-time as a graphic designer from October 2007 until August 29, 2008.

On appeal, counsel for the petitioner states that the beneficiary meets the minimum requirements of the labor certification by holding a master of arts degree and at least three years of directly related experience. Counsel states that the beneficiary's master of arts degree is from the Creative Advertising Program of the which is directed toward graphic designers and has alumni who have won "the most prestigious design awards from Clio, Cannes Lions, One Show, and more."

On February 11, 2014, the AAO sent the petitioner a notice of intent to dismiss (NOID) and request for evidence, requesting that the petitioner provide evidence of the recruitment report for the position offered to demonstrate that potentially qualified U.S. workers were put on notice that the petitioner would accept a Master's degree in Advertising even though the ETA Form 9089 states that this degree must be in Graphic Design. This NOID also noted several discrepancies regarding the beneficiary's experience letters in the record.

On March 27, 2013, the petitioner responded to the AAO's NOID and provided its recruitment report with all advertisements, the job order, the posted notice of the filing of the labor certification, and all resumes received in response to the recruitment efforts. The petitioner also provided

evidence establishing its continuing ability to pay the proffered wage as well as experience letters, which will be addressed further below, from LLC in Santa Monica, California and from LLC in Los Angeles, California.

The petitioner's appeal is properly filed and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis.[3] The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[4] A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision.[5]

II. LAW AND ANALYSIS

The Roles of the DOL and USCIS in the Immigrant Visa Process

At the outset, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
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> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
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> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

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[3] *See* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g.*, *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

[4] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, 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).

[5] *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[6] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> . . .
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and

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[6] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

> whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating:

> The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
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> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and the beneficiary are eligible for the requested employment-based immigrant visa classification.

Eligibility for the Classification Sought

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

(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.

The evidence in the record demonstrates that the beneficiary's Master's degree in Advertising would qualify her for classification as an advanced degree professional under section 203(b)(2) of the Act. However, the petitioner must also demonstrate that the beneficiary meets the required terms of the labor certification.

The Minimum Requirements of the Offered Position

The petitioner must establish that the beneficiary satisfied all of the educational, training, experience and any other requirements of the offered position by the priority date. 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 job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise clearly 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 cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification. Even though the labor certification may be prepared with the beneficiary in mind, USCIS has an independent role in determining whether the beneficiary meets the labor certification requirements. *See Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 *7 (D. Or. Nov. 30, 2006).

In the instant case, the labor certification states that the offered position requires a Master's degree in Graphic Design and three years of experience in the job offered or a Bachelor's degree in Graphic Design and 60 months of experience in the job offered, as a senior designer. In response to the AAO's NOID, the petitioner submitted its recruitment report for the position offered, including the advertisements for the job offered, the posted notice of the job opportunity, the job order, and all resumes received from the recruitment. Each of these documents advertising the position offered states that it requires a Master's degree in Graphic Design plus three years of experience or a Bachelor's degree in Graphic Design plus five years of experience. No alternate field of education is listed in any of the recruitment. This demonstrates that the petitioner did not apprise potential U.S. applicants that they could qualify for the position offered with a Master's degree in Advertising, which is the degree the beneficiary possesses, coupled with three years of experience.

On appeal, counsel for the petitioner asserts that the beneficiary's Master's degree in Advertising is from the Creative Advertising Program of the Counsel states that this degree is directed toward graphic designers and that the has alumni who have won "the most prestigious design awards from Clio, Cannes Lions, One Show, and more." In support of the assertion, counsel provides a printout of the Creative website. The website states that " Creative students are exposed to all sides of the business, including media planning, account planning, digital media, public relations, research methods, ethics, account management, and campaign development." Nothing in the printout supports counsel's assertion that the beneficiary's graduate program, or even her individual coursework, is geared specifically toward graphic design. In fact, the offers a separate graduate degree in design through its College of Fine Arts, rather than through the Creative program in the Department of Advertising. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

While the AAO acknowledges the petitioner's assertions regarding the prestigious nature of the beneficiary's Master's degree in Advertising, the terms of the ETA Form 9089 specifically require a Master's degree in Graphic Design. As stated above, in conducting recruitment for the position offered, the petitioner did not notify potential U.S. workers that they may qualify for the position offered with a Master's degree in Advertising or any other field. In Part H.7, the petitioner specifically stated that no alternate field of study is acceptable. Therefore, the petitioner has failed to establish that the beneficiary meets the educational requirements of the ETA Form 9089 by possessing a Master's degree in Graphic Design.

Additionally, the petitioner has failed to establish that the petitioner possesses the required experience for the offered position. The ETA Form 9089 states that the beneficiary gained employment experience with the following employers:

- As a senior designer for the petitioner beginning on November 11, 2011.
- As a graphic designer with the petitioner from until October 31, 2011.
- As an art director/designer for , LLC in Santa Monica, California from October 1, 2008 until May 15, 2010.
- As a graphic designer for LLC in Los Angeles, California from October 1, 2007 until August 29, 2008.

First, the beneficiary's experience with the petitioner does not constitute qualifying experience for the job offered. The beneficiary's experience with the petitioner may only constitute qualifying experience if the petitioner demonstrates that the beneficiary's position was not substantially comparable to the position offered and if the labor certification allows for experience in an alternate occupation. A definition of "substantially comparable" is found at 20 C.F.R. § 656.17(i)(5)(ii):

> (5) For purposes of this paragraph (i):
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> . . .
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> (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.

Here, the petitioner indicates in response to Part K.1 that it employed the beneficiary as a senior designer, the same position as is offered on the labor certification, beginning on November 11, 2011, and as a graphic designer from May 17, 2010 until October 31, 2011. In response to the AAO's NOID, the petitioner states that the beneficiary's position with the petitioner as a graphic designer was not substantially comparable to the position offered, senior designer, because it was a lower level position and the beneficiary was paid over $20,000.00 more as a senior designer than as a graphic designer. Part K of the ETA Form 9089 states the job duties of the senior designer and graphic designer positions with the petitioner. The beneficiary's duties in the position as senior designer are as follows:

> Perform conceptualization and visual design to create engaging digital experience. Specific responsibilities include: Supporting team members within the Creative department to define product direction; designing intuitive solutions of genuine value by understanding how people behave in the digital space; crafting design that is in compliance with client style guidelines and standards; applying expert proficiency with design-related applications interfacing closely with Art Directors and Creative Director; communicating creative recommendations to internal and external audience with variable levels of understanding; and following core values of Quality, Innovation, Service and Thought through the creative process.

The beneficiary's duties in the position as graphic designer for the petitioner are as follows:

> Reporting to more senior-level designers, brainstormed, concepted, and collaborated on overall campaign ideas with Creative Team utilizing industry tools such as, Adobe Photoshop, Illustrator, and other design programs. Learned best design and technology practices to provide cohesive support of overall creative strategies. Interfaced closely with photographers, illustrators, producers, sound designers, directors, and outside vendors as needed. Under the supervision of senior-level Creatives, ensured that the creative product reaches the client on time, conforming to standards and customer messaging style. Generated innovative and exciting visual concepts, and implemented primary design direction. Assisted in the creation of storyboards that communicate how interactivity and animation will be executed. Demonstrated understanding of design aesthetic, variations on styles and awareness of design trends and innovation.
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> Utilized knowledge and gained professional work experience in the following: Photoshop, Illustrator, Indesign, After Effects; HTML; knowledge of graphic/web/visual design aesthetic; Design for mobile, smartphone and tablet devices and advanced functional design principles and process of web development.

Both of these positions include the conceptualization, digital design and establishment of a creative product. However, the petitioner has not demonstrated what percentage of time was spent in the duties as a senior designer that are different from her position as graphic designer, which was specifically requested in the AAO's NOID. The regulation cited above, 20 C.F.R. § 656.17(i)(5)(ii), states that a "substantially comparable" job "can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records." The petitioner has not provided this evidence. Therefore, the petitioner has not established that the experience the beneficiary gained as a graphic designer with the petitioner was in a position that is not "substantially comparable" to her position in the job offered.

Second, the petitioner has not established that the beneficiary had the required three years of professional experience in graphic design required by the ETA Form 9089. In response to the

AAO's NOID, the petitioner submitted an experience letter from the Chief Financial Officer of LLC, which states that there was "strong overlap between art direction and graphic design" in the beneficiary's employment there. This letter documents the beneficiary's experience from October 1, 2008 until May 15, 2010 [19.5 months]. The record also reflects that the beneficiary gained qualifying experience with from October 1, 2007 until August 29, 2008 [11 months]. The record reflects that the beneficiary's experience with LLC and LLC together constitute a period of 30.5 months, which is less than the experience requirement stated on ETA Form 9089 when combined with a master's degree. Therefore, the petitioner has not established that the beneficiary met the experience requirements of the labor certification.

III. CONCLUSION

In summary, the petitioner failed to establish that the beneficiary met the educational and experience requirements of the labor certification by the priority date.

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.