U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUL 3 1 2014 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, (director) 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 IT and software development company. It seeks to permanently employ the beneficiary in the United States as a senior programmer/analyst. 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).[1]

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is September 7, 2012. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date. The director further found that the petitioner willfully misrepresented the beneficiary's experience by submitting fraudulent evidence.

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

The Minimum Requirements of the Offered Position

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor

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[1] Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees, whose services are sought by an employer in the United States.

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

may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS will not look beyond the plain language of the labor certification to determine the employer's claimed intent.

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

H.4. Education: Bachelor's degree in any field of study.
H.5. Training: None required.
H.6. Experience in the job offered: 60 months required.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: Employer will accept any suitable combination of education, training or experience consistent with H4 through H10 of this ETA 9089 form.

The record contains a copy of the Bachelor of Engineering diploma issued to the beneficiary by , in May 2004, as well as the beneficiary's college transcripts from . The petitioner submitted an evaluation of the beneficiary's academic credentials performed by and Consulting on February 9, 2011. The evaluator concluded that the beneficiary's Bachelor of Engineering degree was "equivalent of a Bachelor of Science degree in Electronics Engineering from an accredited institution of higher education in the United States."

The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury and stated that she qualifies for the offered position based on the following work experience:

- Work as a software developer for India, from February

18, 2002, through October 28, 2004;
- Work as an consultant for India, from November 1, 2004, until January 26, 2006;
- Work as an associate consultant for in Karnataka, India, from January 30, 2006, until September 30, 2008;
- Work as a software engineer for Ohio, from November 5, 2008, until June 7, 2010;
- Work as a programmer analyst for Michigan, from June 8, 2010, until January 6, 2011; and,
- Work as a system analyst for the petitioner from February 14, 2011, through August 30, 2012.

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

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

To corroborate the beneficiary's claimed work history, the petitioner submitted the following documentation:

- A letter dated May 15, 2012, on what purports to be letterhead, from who identified himself as the HR manager for This letter states that the beneficiary worked there full-time as a software developer from February 18, 2002, until October 28, 2004.
- A letter dated May 1, 2012, on what purports to be letterhead, from who identified himself as both the manager and the HR manager for This letter states that the beneficiary worked there full-time as an associate consultant from November 1, 2004, until January 26, 2006.
- A letter dated June 15, 2012, on what purports to be letterhead, from who identified herself as the HR manager for This letter states that the beneficiary worked there full-time as an associate consultant from January 30, 2006, until September 30, 2008.
- A letter dated June 21, 2012, on what purports to be letterhead, from who identified himself as the director for This letter states that the beneficiary worked there full-time as a software engineer from November 5, 2008, until June 7, 2010.
- A letter dated June 15, 2012, on what purports to be letterhead, from who identified himself as the HR manager for This letter states that the beneficiary worked there full-time as a programmer analyst from June 8, 2010, until January 6, 2011.

In a Request for Evidence (RFE) dated December 18, 2013, the director informed the petitioner that the documentation submitted to corroborate the beneficiary's claimed work history was insufficient to establish those claims. The director requested additional documentation. In response, former counsel for the petitioner resubmitted copies of the employment letters that had been submitted with the petition.

In a Notice of Intent to Deny (NOID) dated January 23, 2014, the director noted that the employment letters submitted by the petitioner were identically formatted and phrased and stated that, while the letters bore the company logos for the claimed employers, the letters were not on actual company letterhead. The director stated that , whose name appears as the claimed author of the June 15, 2012, letter attesting to the beneficiary's claimed employment for , informed USCIS on December 27, 2013, that "I have not issued this letter to ."

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho,* 19 I&N Dec. 582 (BIA 1988).

In response to the NOID, the petitioner submitted the following documentation:

- A letter dated January 30, 2014, on what purports to be letterhead, from who identified himself as the Manager – Human Resources for This letter states that the beneficiary worked there full-time as a programmer analyst from June 7, 2010, until January 6, 2011.
- A letter dated February 4, 2011, on what purports to be letterhead, from who identified himself as the Assistant Manager – Human Resources manager fo This letter states that the beneficiary worked there full-time as a programmer analyst from June 7, 2010, until January 6, 2011.
- Numerous pay-stubs purportedly issued to the beneficiary by from June 25, 2010, to January 25, 2011.
- A February 3, 2014, letter from who identified himself as the beneficiary's co-worker a , from June 2010 through May 2011.
- A printout of an email to the beneficiary from who identified himself as the assistant manager – recruiting for dated May 17, 2010, regarding the selection of the beneficiary for a position with Syntel, Inc.
- A May 17, 2010, "Offer Letter" from to the beneficiary purportedly signed by who identified himself as the Manager – Human Resources.
- A letter dated January 6, 2011, from who identified himself as the assistant manager – human resources, regarding the termination of the

beneficiary's employee benefits upon the end of her employment for on January 7, 2011.

- A letter from the beneficiary describing her employment for , and a printout of email correspondence between the beneficiary and ' ' regarding the beneficiary's attempts to gather more documentation of her claimed employment at
- Copies of paystubs purportedly issued to the beneficiary by , for work performed between January 1, 2010, and April 30, 2010.
- A February 4, 2014, letter from who identified himself as the beneficiary's co-worker at from November 2008 through June 2010.
- Printouts of pay-stubs purportedly issued to the beneficiary by between August 1, 2008, and September 30, 2009.
- An undated letter from who identified himself as the beneficiary's co-worker at from November 2004 to January 2006.
- A January 31, 2014, letter from who identified himself as the beneficiary's supervisor at , from February 2002, until October 2004.

The director concluded that the evidence submitted in response to the NOID did not overcome the derogatory evidence in this case. Specifically, the director stated, "the letter from was not written by the claimed author and is determined to be fraudulent." The director determined that the petitioner had willfully misrepresented a material fact (the beneficiary's work experience) and issued a finding of fraud. The director also determined that the petitioner had failed to establish that the beneficiary satisfied the experience requirements stated on the labor certification as of the priority date.

On appeal, counsel re-submits copies of the evidence submitted with the petition and in response to the NOID. Counsel explains that the employment letters submitted by the petitioner were similarly phrased and formatted because they had been created by the beneficiary and presented to her claimed employers for signature.

Counsel asserts that "the fact that the experience letters are identically formatted and phrased does not indicate that they are fraudulent." However, counsel misstates the director's basis for the finding of fraud. While the director notes the similarities between the employment letters submitted by the petitioner, and in his decision refers to these letters as "suspicious," the director's decision does not cite the questions regarding the employment letters as a basis for the finding of fraud. Rather, the director stated, "the letter from was not written by the claimed author and is determined to be fraudulent."

Counsel asserts on appeal that the employment letter that was disavowed by was received by the beneficiary from and that counsel believes that it bears Mr. "digital signature." Counsel states that this explains why Mr. denied issuing the letter. However, the petitioner submitted letters from two other individuals who claimed to be representatives of and neither of these individuals made reference to the company's use

of "digital signatures," and neither of these individuals corroborated counsel's assertion that himself does not actually sign any employment letters, but that his digital signature is used to sign the letters on his behalf." 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).

The petitioner has failed to submit any objective evidence to explain or justify the submission of an employment letter that was disavowed by the claimed author. While the disavowal of the letter has not been explained, we do not agree that the other experience letters in the record are "suspicious and fraudulent." Further, we do not agree that the petitioner willfully misrepresented a material fact.

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

- A May 17, 2010, "Offer Letter" from to the beneficiary purportedly signed by who identified himself as the Manager – Human Resources;
- An email from Assistant Manager-Recruitment, to the beneficiary dated May 17, 2010, welcoming her to and providing an attached offer letter, employment agreement, and "New Hire Docket 2010";
- Copies of paystubs issued to the beneficiary by for work performed between June 1, 2010, and January 15, 2011;
- A letter dated January 6, 2011, from Assistant Manager-Human Resources, on letterhead to the beneficiary stating that she is no longer employed as of January 7, 2011;
- Copies of 2010 and 2011 Forms W-2 issued by to the beneficiary;
- A copy of a 2010 Form W-2 issued by to the beneficiary;
- Copies of time sheets on letterhead for the periods May 1, 2010, through May 31, 2010, and June 1, 2010 through June 4, 2010, listing the beneficiary as a "Resource" and the client as
- Copies of paystubs purportedly issued to the beneficiary by for work performed between January 1, 2010, and April 30, 2010; and,
- Copies of emails and paystubs issued to the beneficiary by for work performed from August 1, 2008, through October 31, 2008.

The contemporaneous evidence establishes that the beneficiary was more likely than not employed by from June 2010 to January 2011. As this matches the dates claimed by the petitioner on the ETA Form 9089, it cannot be determined that the petitioner misrepresented the beneficiary's work experience. Therefore, this finding by the director is withdrawn.

While none of the contemporaneous evidence verifies the beneficiary's job title or duties, the contemporaneous evidence, when viewed together with the experience letters and affidavits in the

record, reflects seven months of experience in the job offered with and three months of experience in the job offered with for a total of ten months of experience in the job offered.

The beneficiary claimed to have worked for Ohio, from November 5, 2008, until June 7, 2010. However, USCIS records reflect that the beneficiary was outside the U.S. for more than four months in 2009. It is unclear whether the beneficiary continued to work for during her absence from the U.S. or whether the beneficiary was on leave from her employment. The contemporaneous evidence submitted in the form of paystubs and a Form W-2 only relate to employment for in 2010. This casts doubt on whether the beneficiary was employed full-time for the entire period claimed on the ETA Form 9089 and in the experience letters. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, the ETA Form 9089 states that the position offered requires 60 months of experience in the job offered, as a senior programmer/analyst. The ETA Form 9089 does not allow for experience in any alternate occupation. The occupation of the offered position is determined by the DOL and its classification code is notated on the labor certification. O*NET is the current occupational classification system in use by the DOL.[3] In the instant case, the DOL categorized the offered position under 11-3021 of the O*NET, which falls under the occupation of Computer and Information Systems Managers. The job duties for the beneficiary's positions with as a software engineer[4] and with as a software developer[5] do not appear to be those of a senior programmer/analyst, the offered position. The job duties for the beneficiary's positions as software engineer and software developer do not include managing, planning, directing or coordinating activities, which are key components of the offered position of senior programmer/analyst[6] and the O*NET classification of Computer and Information Systems

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[3] http://www.o (accessed July 25, 2014).

[4] On the labor certification the beneficiary listed her duties with as "Worked with Sales and Distribution, Material management, HP QC. Responsible for analyzing designing, developing operational procedures to automate processing and to develop new systems to improve nvironments and platforms. Client server testing, various ERP modules leading test teams, web based testing learnt the client business processes, warehouse management, Sales and distribution specific to the client location."

[5] On the labor certification the beneficiary listed her duties with as "Implementing and supporting the Super User fo Module, working platform Implemented and documented training to the new enhancements for the business growth. Order processing and preparation of manufacturing schedule based on delivery required by customer. ERP modules like liaison with production and marketing for smooth execution of customer order and creating the Delivery Advice for generating the Billing Documents."

[6] Part H.11 of the labor certification describes the duties of the offered position as: "**Manage** backup, security and user help systems, **direct** daily operations of department, **assign and review**

Managers.[7] Therefore, the petitioner has not established that the beneficiary's experience with was in the proffered position, as required by the labor certification.

We affirm the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification, which states that the position requires 60 months of experience in the offered position as of the priority date. Therefore, the beneficiary does not qualify for classification under section 203(b)(2) of the Act.

Ability to Pay the Proffered Wage

Beyond the decision of the director,[8] the petitioner has failed to establish its continuing ability to pay the proffered wage as of the priority date. *See* 8 C.F.R. § 204.5(g)(2).

The Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, issued to the beneficiary by the petitioner states that the beneficiary was paid $57,804.61 in 2012, which is less than the

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the work of systems analysts, programmers, develop computer information resources. **Review and approve** all systems charts and programs prior to their implementation. **Evaluate** the organizations technology use and needs and recommend improvements, **meet with department heads** to solicit cooperation and resolve problems.experience in WM, MM, APO, EWM with in depth knowledge of configuring modules, guiding ABAP Programmers, Gap Analysis and writing functional specifications or detailed Netweaver Technology, Extensive configuration knowledge and development of Netweaver portal, knowledge management and collaboration. Expertise in troubleshooting, administration and performance tuning as well as Portal design specification, documentation, development, configuration, testing, troubleshooting, experience in R3 with multiple experience in analysis, design, system development, unit testing, system testing, documentation, implementation, client interaction, capturing user requirements, reviewing design documents." (emphasis added)

[7] **Review** project plans to plan and coordinate project activity. **Manage** backup, security and user help systems. **Develop and interpret organizational goals, policies, and procedures**. Develop computer information resources, providing for data security and control, strategic computing, and disaster recovery. Consult with users, management, vendors, and technicians to assess computing needs and system requirements. Stay abreast of advances in technology. **Meet with department heads, managers, supervisors, vendors, and others** to solicit cooperation and resolve problems. Provide users with technical support for computer problems. **Recruit, hire, train and supervise staff, or participate in staffing decisions.** Evaluate the data processing proposals to assess project feasibility and requirements." (emphasis added)

[8] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

$147,098.00 proffered wage. The petitioner's 2012 IRS Form 1120, U.S. Corporation Income Tax Return, shows that the petitioner claimed net income in excess of the difference between the proffered wage and the wage actually paid to the beneficiary. However, according to USCIS records, the petitioner has filed multiple petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary of each Form I-140 petition pending from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other Form I-140 petitions.[9]

Conclusion

In summary, the petitioner failed to establish that the beneficiary satisfies the requirements stated on the labor certification. The petitioner also failed to establish the ability to pay the proffered wage. Therefore, the beneficiary does not qualify for classification as a member of the professions holding an advanced degree under section 203(b)(2) of the Act. The director's decision denying the petition is affirmed. However, the director's finding that the petitioner willfully misrepresented a material fact is withdrawn.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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, and the petition remains denied.

[9] It is noted that the petitioner stated in Part 5, Line 2c of the Form I-140 that it currently employed 150 workers. However, as stated above, USCIS records reveal that the petitioner has filed more than 1,000 employment-based petitions on behalf of foreign workers. While this discrepancy will not form a basis for denial in this case, the issue must be addressed in any future proceedings.