(b)(6)

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

DATE: MAY 2 9 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:

SELF-REPRESENTED

INSTRUCTIONS:

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

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

Thank you,

Elizabeth McCormack

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a systems integration and related services company. It seeks to permanently employ the beneficiary in the United States as a software developer. 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 (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 26, 2012. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess the specific skills or other requirements found in H.14 of the approved labor certification.

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 term "advanced degree" 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

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

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

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

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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.

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.

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

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

H.4. Education: Master's degree in CS, CIS, BUS, ENGINEERING, SCI OR MATH.
H.5. Training: None required.
H.6. Experience in the job offered: None 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: m.Soft Techs Java, .net, ASP.net, ADO.net, Oracle & SQL Server, Oracle, PL/SQL, DWH, Discoverer. Test Director, Winrunner, SecurityTech & Firewalls.

Part J of the labor certification states that the beneficiary possesses a Master of Computer Applications from Hyderabad, Andhra Pradesh, India, completed in 2004. The record contains a copy of the beneficiary's Master of Computer Applications diploma and transcripts from India, from 2001-2004. The record also contains a copy of the beneficiary's Bachelor of Science diploma and transcripts from India, issued in 2000.

The record also contains an evaluation of the beneficiary's educational credentials prepared by of on April 17, 2013. The evaluation states that the beneficiary has the equivalent of a Master of Science Degree in Computer Information Systems from an accredited institution of higher education in the United States. The record also contains an undated letter from Mr. concluding that the Master of Computer Applications is also the equivalent of a Master of Science Degree in Computer Science.

Part K of the labor certification states that the beneficiary worked for [redacted] Ltd. as a Programmer Analyst in Arlington Heights, IL from December 19, 2007 through April 26, 2012. No other experience is listed on the Form ETA 9089.

The director's decision denying the petition states that the beneficiary does not have the qualifications required by the labor certification, as the petitioner has not established that the beneficiary has the special skills listed on the Form ETA 9089 at H.14. The director also states that the beneficiary's Master of Computer Applications is not one of the degrees required by the labor certification, which are listed at Part H.4 of the Form 9089 as Computer Science, Computer Information Systems, Business, Engineering, Science or Math. On appeal, the AAO identified an additional ground for denial, that the petitioner has not established the ability to pay the proffered wage.

On appeal, the petitioner states that the skills listed at Part H.14 are not a prerequisite for the position. The petitioner argues that the fact that the labor certification requires no work experience means that work related skills such as those listed at Part H.14 cannot be required. The petitioner states that the beneficiary does, nevertheless, have the requisite skills. The petitioner states that it has established its ability to pay the proffered wage to all of its beneficiaries.

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.[2] The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3] 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.[4]

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[2] *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).

[3] 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).

[4] *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).

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-
>
> > (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
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

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).[5] 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

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

> 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 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).
>
> 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 petitioner must establish that the beneficiary possessed all the education, training, and

experience specified on the labor certification as of 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 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to 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* 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).

In the instant case, the labor certification states that the offered position requires a Master of Computer Science, Computer Information Systems, Business, Engineering, Sciences or Math. On the labor certification, the beneficiary claims to qualify for the offered position based on a Master of Computer Applications degree from India, completed in 2004. The record contains a copy of the beneficiary's master of computer applications diploma, his bachelor of science diploma, and transcripts from

As noted above, of states in an evaluation dated April 17, 2013 that the beneficiary has the equivalent of a Master of Science Degree in Computer Information Systems from an accredited institution of higher education in the United States. In an undated letter Mr. says that the beneficiary's Master of Computer Applications is also the equivalent of a Master of Science Degree in Computer Science. The evaluator does not specify the reasons for the two different conclusions. USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.,* 19 I&N Dec. 817 (Comm'r 1988).

We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, www.aacrao.org, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." http://www.aacrao.org/About-AACRAO.aspx (accessed May 28, 2014). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." http://edge.aacrao.org/info.php (accessed May 28, 2014). Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[6] If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire

[6] *See An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx.

Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[7]

AACRAO EDGE has found an Indian MCA degree to "[represent] attainment of a level of education comparable to a master's degree in the United States," but that this degree is "[c]omparable to a degree in computer application, not computer science." The petitioner's evaluation takes exception to the conclusion of AACRAO EDGE that a Master of Computer Applications in India is not the equivalent to a Master of Computer Science from an accredited university in the United States. The AAO acknowledges the findings of the evaluation and subsequent letter. Mr. does not explain why the Master of Computer Applications is equivalent to both a Master of Computer Science and a Master of Computer Information Systems. The Master of Computer Applications is only available in India. Nevertheless, the record does not develop the similarities and/or the differences between the Indian Master of Computer Applications and the variety of degrees listed by the petitioner as acceptable for the position. As such, the record does not establish that the beneficiary's MCA is the foreign equivalent of a Master's degree in Computer Science, Computer Information Systems, Business, Engineering, Science or Math issued by a regionally accredited U.S. college or university. The record does not demonstrate that the beneficiary had the education required by the labor certification as of the March 27, 2012 priority date.

The evidence in the record does not establish that the beneficiary possessed the required education set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is eligible for classification as a member of the professions holding an advanced degree under section 203(b)(2) of the Act.

The Minimum Requirements of the Offered Position

The petitioner must also 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).

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[7] In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

In evaluating the beneficiary's qualifications, USCIS must look to 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). USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate that the beneficiary has to be found qualified for the position. *Madany*, 696 F.2d at 1015. USCIS interprets the meaning of terms used to describe the requirements of a job in a labor certification by "examin[ing] 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]" even if the employer may have intended different requirements than those stated on the form. *Id.* at 834 (emphasis added).

In the instant case, the Form ETA 9089 labor certification states at Part H.14 that the offered position requires the following skills: m.Soft Techs Java, .net, ASP.net, ADO.net, Oracle & SQL Server, Oracle, PL/SQL, DWH, Discoverer. Test Director, Winrunner, SecurityTech & Firewalls.

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

The record contains an experience letter dated August 28, 2013 from Team Lead – Human Resources, LTD., indicating that the beneficiary worked as a software engineer from June 25, 2005 through May 9, 2007. The letter listed the duties of the beneficiary, and the technical environment, which included the following:

> IBM ISeries (AS/400), RPG ILE, RPG FREE, RPG IV, RPG III, CLLE, CL/400, SQLRPGLE, SQL/400, Query/400, COBOL ILE, COBOL/400, Java, J2EE, Oracle, Aldon, Implementer, Turnover, LINOMA Software, RPG ToolBox, Stored Procedures, SQL Functions, SQL Tables, DB2/400, RLU, SDA, Hawkeye, DBU, TL Ashford and other IBM ISeries related technologies.

The record also includes a letter dated August 26, 2013 from General Manager – Human Resources, Ltd. indicating that the beneficiary was employed as a software engineer from May 14, 2007 through November 16, 2007. The letter states that the beneficiary used ILE RPG, CLLE, RPB/400, COBOL/400, CL400, RPGIV, RPG Free, embedded SQL, SYNON, HAWKEYE, AS400 in the performance of his duties. Neither of the employment letters documents the beneficiary's experience with .Net, ASP.Net, ADO.Net, DWH, Discoverer, Test Director, Winrunner, SecurityTech & Firewalls.

The record contains an affidavit from dated July 2, 2013, who states that he was a co-worker of the beneficiary at The record contains and affidavit from dated July 5, 2013, who states that he was a team

lead and worked with the beneficiary at Neither of these affidavits satisfies the regulation at 8 C.F.R. § 204.5(g)(1), as neither of the affidavits are written by the beneficiary's previous employer. Further, as noted by the director, the beneficiary failed to list any work experience other than with the petitioner on the Form ETA 9089. In *Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. The petitioner has not adequately documented the unavailability of primary evidence to allow secondary evidence such as the affidavits of two former coworkers to establish the beneficiary's qualifications. *See,* 8 C.F.R. § 103.2(b)(2). The AAO does not accept the two affidavits as probative evidence of the beneficiary's work experience.

On appeal, the petitioner states that the job opportunity does not require any work experience, and that skills listed under H.14 are not a prerequisite for the proffered job. The petitioner states that during the prevailing wage determination, the petitioner clearly demonstrated that it intended the skills listed in H.14 to be the technical environment within which the job would be performed, and not as a prerequisite of the position offered. The petitioner has submitted a copy of its Application for Prevailing Wage Determination (ETA Form 9141), internal and external job postings.

Question 5.b. of the ETA Form 9141 specifically asks the petitioner to provide, "Special Requirements – List specific skills, licenses/certificates/certifications, and requirements of the job opportunity. In response, the petitioner stated on question b.5. "Job requirements; Env-Tech m.Soft Techs Java, .net, ASP.net, ADO.net, Oracle & SQL Server, Oracle, PL/SQL, DWH, Discoverer. Test Director, Winrunner, SecurityTech & Firewalls".

The record contains an external job posting with dated December 22, 2011 and under the section, "Specific Skill Requirements and Essential Job Functions" the petitioner indicated that, "Env-Tech m.Soft Techs Java, .net, ASP.net, ADO.net, Oracle & SQL Server, Oracle, PL/SQL, DWH, Discoverer. Test Director, Winrunner, SecurityTech & Firewalls" were skills and essential job functions of the offered position.

The record also contains another external job posting listed with the dated January 17, 2012. In the job description the petitioner sought, "…experience with Microsoft Techs .Net, ASP.Net, ADO.Net, Content Management, Documentation, Share Point, JAVA, J2EE, JSP, Servlets, Struts and Springs, Oracle & SQL Server, Oracle, PL/SQL, DataWareHousing, Informatica, Cognos, Business Objects, Discoverer. Test Director, Winrunner, SecurityTech & Firewalls."

The record contains an internal job posting in which special skills in Env-Tech m.Soft Techs Java, .net, ASP.net, ADO.net, Oracle & SQL Server, Oracle, PL/SQL, DWH, Discoverer. Test Director, Winrunner, SecurityTech & Firewalls are not a requirement of the job opportunity.

The recruitment materials submitted do not support the petitioner's contention that the skills listed only name the environment within which the beneficiary will work, and are not prerequisites for the job offer. The skills are clearly required on the Form 9089 on Part. H.14 and are listed as the skills environment within which the beneficiary will perform the duties of the position on the prevailing

wage determination as well as on postings. The record does not distinguish between what is required when the worker must have the specific skills, and what is required when the worker will be working within the named skills environments. The record does not demonstrate that requiring a worker to know how to work in the skills environment with "m.Soft Techs Java, .net, ASP.net, ADO.net, Oracle & SQL Server, Oracle, PL/SQL, DWH, Discoverer. Test Director, Winrunner, SecurityTech & Firewalls" may be satisfied by a worker without actually having such skills. The record does not contain any evidence establishing that the petitioner did not require its proposed recruits to have knowledge of such skills. The petitioner may not narrow the pool of workers eligible to apply for the position by listing the specific skills required, and offer the position to someone who does not have such skill.

The record does not establish that the beneficiary has the required specific skills listed in the approved labor certification, "m.Soft Techs Java, .net, ASP.net, ADO.net, Oracle & SQL Server, Oracle, PL/SQL, DWH, Discoverer. Test Director, Winrunner, SecurityTech & Firewalls". Therefore the petitioner has not established that the beneficiary possesses all of the job requirements outlined in the approved labor certification.

The AAO affirms 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 as of the priority date. Therefore, the beneficiary does not qualify for classification 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). Accordingly, the petition must also be denied for this reason.

Beyond the decision of the director, we requested in a Notice of Intent to Dismiss/Request for Evidence (NOID/RFE) dated March 6, 2014 that the petitioner establish its continuing ability to pay the proffered wage to the instant beneficiary and to its other sponsored workers as of the priority date. *See* 8 C.F.R. § 204.5(g)(2). According to USCIS records, the petitioner has filed multiple I-140 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 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).

In the NOID/RFE we sought evidence of the petitioner's ability to pay the proffered wage to the beneficiaries all of its immigrant visas pending as of the priority date for the instant beneficiary. The petitioner responded with evidence of its sponsorship of 25 beneficiaries, documenting the priority date, proffered wage, wages paid to each beneficiary, and whether any of the other petitions have been withdrawn, revoked, or denied, and whether any of the other beneficiaries have obtained lawful permanent residence.

We have reviewed the evidence submitted by the petitioner. The Internal Revenue Service (IRS) Forms W-2 submitted into the record reflect that the petitioner paid the beneficiary in excess of the proffered wage in 2012 and 2013. As such, the petitioner does not need to establish the ability to pay other beneficiaries in 2012 and 2013. The petitioner's 2012 Form 1120 has been filed in the

record. Thus the petitioner has established the ability to pay.[8]

III. CONCLUSION

In summary, the petitioner failed to establish that the beneficiary possessed an advanced degree as required by the terms of the labor certification and the requested preference classification. 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.

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.

[8] The petitioner's ability to pay for 2013 will be not be adjudicated until such time as the petitioner's Form 1120 tax return may be submitted.