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

(b)(6)

[redacted]

DATE: JAN 3 1 2013

OFFICE: TEXAS SERVICE CENTER

[redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as an advertising agency. It seeks to permanently employ the beneficiary in the United States as an International Marketing Manager. The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[1]

The petition is accompanied by a 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 March 28, 2008. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess the minimum education or experience required by the certified labor certification by the priority date.

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 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)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

[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 Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also 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 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 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.

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

H.4. Education: Bachelor's degree in marketing.
H.5. Training: None required.
H.6. Experience in the job offered: Twelve months experience in the proffered position.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: The petitioner checked "yes."
H.8.A. If yes, specify the alternate level of education required: "other."
H.8.B. If other is indicated in question 8-A, indicate the alternate level of education required: "See [H]14 below."

> The employer will accept any combination of training, experience and/or education that is equivalent to a baccalaureate degree in marketing from a regionally accredited institution of higher education in the United States. The experience also must include [one] year [of] experience in International Marketing Management or International Brand Management plus experience in developing broadcast television commercials by liaising with client, TV producers, directors, and creative directors in order to produce and air TV ads for national and international markets.
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> The labor certification states in H.8(C) that 13 years of experience in the proffered profession or alternate occupation would be accepted in lieu of a bachelor's degree.

H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: Twelve months of experience in International Brand Management.

H.14. Specific skills or other requirements: Set forth in H.8 above.

The labor certification also states that the beneficiary qualifies for the offered position based on the following listed experience:

- (the present petitioner) - International Marketing Manager from March 24, 2006 to the date of the labor certification signature (June 1, 2010).[3]

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[3] Based on representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, the beneficiary's experience with the petitioner cannot be used to qualify the beneficiary for the certified position.

20 C.F.R. § 656.17 states:

> (h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation
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> . . . . .
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> (3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:
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> > (i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
> > (ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.
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> . . . .
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> (5) For purposes of this paragraph (i):
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> > (i) The term ''employer'' means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.
> > (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

- [redacted] - Director of International Brand Management from February 1, 2005 until March 1, 2006.
- [redacted] Marketing Manager from October 25, 2004 until January 31, 2005.

No other experience is listed. The beneficiary signed the labor certification on June 1, 2010 under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

> Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The following experience letters were submitted in attempt to establish that the beneficiary meets the education/experience requirements of the ETA Form 9089:

- [redacted] Client Services Director, [redacted] - The letter is undated and states that the beneficiary was employed by that organization from "1994 – 1999." The letter states that the beneficiary was initially employed as an Account Manager and then promoted to Account Director. The letter lists the beneficiary's duties in each position.

  The letter does not comply with the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A) as it does not provide the specific dates of employment and it cannot, therefore, be determined how much experience the beneficiary actually has. The letter does not state that the beneficiary was continuously employed from 1994 through 1999 and does not state that the employment was on a full-time basis.

- [redacted] Managing Director, [redacted] - The letter is dated February 2004 and states that the beneficiary was employed by that organization "between 1999 and 2001" as "Account Director on the Honda Account."

  The letter does not comply with the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A) as it does not provide the specific dates of employment and it cannot, therefore, be determined how much experience the beneficiary actually has. The letter does not state that the beneficiary was

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> descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

continuously employed from 1999 through 2001 and does not state that the employment was on a full-time basis.

- [redacted], Chief Executive Officer, [redacted] - The letter is dated February 20, 2004 and states that the beneficiary was employed by that organization as Business Director from "2001 – 2002."

  The letter does not comply with the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A) as it does not provide the specific dates of employment and it cannot, therefore, be determined how much experience the beneficiary actually has. The letter does not state that the beneficiary was continuously employed from 2001 through 2002 and does not state that the employment was on a full-time basis.

- [redacted] Director, [redacted] - The letter is undated and states that the beneficiary was employed by that organization "from the end of December 2002 until late 2003 as Sponsorship Director.

  The letter does not comply with the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A) as it does not provide the specific dates of employment and it cannot, therefore, be determined how much experience the beneficiary actually has. The letter does not state that the beneficiary was continuously employed throughout all of 2003 or the exact end date of this employment and does not state that the employment was on a full-time basis.

- [redacted] Founding Partner, [redacted] - The letter is dated March 31, 2004 and states that the beneficiary is presently employed and "was employed with [redacted] in 2003."

  The letter does not comply with the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A) as it does not provide the specific dates of employment and it cannot, therefore, be determined how much experience the beneficiary actually has. The letter does not state from when the beneficiary was employed and until what date he was employed and does not state that the employment was on a full-time basis.

- [redacted] Principal, [redacted] - The letter is dated January 2, 2007 and states that the beneficiary worked with that organization as Director of International Brand Management from February 1, 2005 to March 1, 2006.

  The letter does not comply with the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A) as it does not state that the beneficiary worked continuously on a full-time basis during the stated dates of employment. The letter also fails to specifically detail the beneficiary's duties while employed.

For the reasons stated above, the letters presented do not establish that the beneficiary has the 13 years of experience necessary for the proffered position as required by the ETA Form 9089. The letters are further not deemed acceptable because only one of those employers [redacted]

is listed in the experience section of the ETA Form 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. Instructions on the ETA Form 9089 clearly state in Section K, "Alien Work Experience" to "list all the jobs the alien has held during the past 3 years. Also list any other experience that qualifies the alien for the job opportunity for which the employer is seeking certification." As the letters submitted would represent experience relevant to the position, the experience should have been listed. Absent correction of the deficiencies above, as well as independent objective evidence to verify the employment, the letters are insufficient.

Based on the foregoing, the petitioner has not established that the beneficiary has 13 years of experience which could be used in lieu of a bachelor's degree. The petitioner has also not established that the beneficiary has either a Bachelor's degree in marketing or an equivalent to a Bachelor's degree in marketing.

The petitioner submitted an education and experiential evaluation from The copy of the evaluaton is barely legible. The evaluator states that he has examined the beneficiary's work history, "which is presumably verifiable," and considers "about ten years of cocumented experience," although the dates of such experience is not listed. The evaluator opines that based upon the beneficiary's education[4] and work experience (using a "three-for-one INS formula) the beneficiary has the equivalent of a Bachelor's Degree in Marketing. The evaluation will not be accepted by the AAO to establish that the beneficiary holds a Bachelor's Degree in Marketing. First, as set forth above, many of the letters fail to state exact dates of employment to calculate the beneficiary's total length of employment and there is no evidence that the evaluator verified the claimed experience, and the experience letters submitted with the evaluation were not from employers listed on the ETA Form 9089. As noted above, failure to list that employment brings into question the credibility of the stated experience. *Matter of Leung.* Second, the experiential evaluation used the three-for-one rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5). The beneficiary was required to have a bachelor's degree on the ETA Form 9089, or 13 years of verifiable experience. Neither the submitted evaluation, or the record as a whole, establishes that the beneficiary has the education or work experience required by the ETA Form 9089. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International,* 19 I&N Dec. 791 (Comm'r 1988); *Matter of Sea, Inc.,* 19 I&N Dec. 817 (Comm'r 1988). *See also Matter of D-R-,* 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

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[4] The experiential evaluation states that the beneficiary has foreign education which is equivalent to one year of university study in business administration from an accredited institution of higher education in the United States.

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 a skilled worker under section 203(b)(3)(A) of the Act.[5]

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

ORDER: The appeal is dismissed.

[5] Counsel argues at length on appeal that although the petitioner failed to advertise the petitioner's alternate requirements listed on the certified labor certification, that: 1. This is an issue for the DOL to determine; and 2. That the petitioner was not required to advertise every requirement. As the advertisements appear so substantially lacking compared to the certified requirements, in any further filings, the AAO may seek to consult with DOL regarding this issue, and the validity of the labor certification.