U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: SEP 2 6 2013 OFFICE: TEXAS SERVICE CENTER FILE: [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 (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, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a manufacturer of floor care products. It seeks to employ the beneficiary permanently in the United States as a computer software engineer. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum qualifications stated on the labor certification.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. 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.[1]

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, 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.

The director's decision denying the petition concludes that the petitioner did not submit evidence demonstrating that the beneficiary possessed the minimum experience required to perform the offered position by the priority date.

On appeal, counsel states: "It is not the Service's place to determine whether the beneficiary met the minimum requirements at the time the labor certification was filed, that is the purview of the Department of Labor: the Service must determine from the date of filing the Form I-140 whether the beneficiary was qualified for the position."

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. DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

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

> 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
> >
> > (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).[1] 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

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

> 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 beneficiary are eligible for the requested employment-based immigrant visa classification.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N

158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on June 20, 2008. The Immigrant Petition for Alien Worker (Form I-140) was filed on March 28, 2011.

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 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 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.
H.4-B Major field of study: Computer Science or Equivalent.
H.5. Training: None required.
H.6. Experience in the job offered: 24 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: Accepted.
H.8-A Alternate level of education required: Other.
H.8-B Alternate level of education required: See #14 below.
H.8-C Number of years experience acceptable in question 8: 14.
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 combination of training, experience and/or education that is equivalent to a Bachelor's degree in Computer Science from a regionally accredited institution of higher education in the U.S.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a Computer Software Engineer with the petitioner from November 26, 2001 to the date of the labor certification; self-employed as a consultant in Buenos Aires, Argentina from August 1,

1998 to October 31, 2001; and with [redacted] as a Senior Programmer/IT Director from November 2, 1993 to November 17, 1999. No other experience is listed. The beneficiary signed the labor certification on March 10, 2011 under a declaration that the contents are true and correct under penalty of perjury.

The petitioner states that the beneficiary does not possess a bachelor's degree and thus qualifies for the position based on his experience in excess of 14 years. The petitioner must thus demonstrate that the beneficiary has at least 14 years of experience in the offered position. The amount of qualifying experience listed on the ETA Form 9089 is less than the 14 years required.

Counsel asserts that the beneficiary's work with the petitioner should count towards the experience required by the terms of the labor certification. Representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the petitioner or experience in an alternate occupation cannot be used to qualify the beneficiary for the certified position.[2] In response to question J.21,

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[2] 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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> (4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and
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> > (i) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.
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> > (ii) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).
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> (1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.
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> (2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.
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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

which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?," the petitioner answered "no." The petitioner specifically indicates in response to question H.8-C that 14 years of experience in the job offered is required and in response to question H.10 that experience in an alternate occupation is not acceptable. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable[3] and the terms of the ETA Form 9089 at H.10 provide that applicants can

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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:

> (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.

(4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

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

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

[3] A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

5) For purposes of this paragraph (i):

> . . .
> (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.

qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.1. that his position with the petitioner was as a computer software engineer, and the job duties are the same duties as the position offered. Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as he/she was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. Additionally, as the terms of the labor certification supporting the instant Form I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary's experience with the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position.

In considering evidence of other former employment by the beneficiary, 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 petitioner initially submitted the following letters to verify the beneficiary's experience:

- A letter from Administration, on letterhead stating that the beneficiary served as an assistant in system developing from January 15, 1985 to March 1, 1986;
- A letter dated March 11, 1989 from manager and partner of stating that the beneficiary was in charge of the systems and programming department from May 1, 1986 and January 31, 1989;
- An October 13, 1993 letter from general manager of stating that the beneficiary worked from February 1, 1989 to July 31, 1993 starting as a junior programmer and ending as department manager;
- A letter dated January 3, 2000 from , partner manager of stating that the beneficiary worked from November 1993 through November 1999, first as a senior programmer and ending as director of technology;
- A May 2, 2000 letter from managing partner of stating that the beneficiary published several publications from August 10, 1998 to May 2, 2000;
- An August 8, 2006 letter from managing partner of stating that the beneficiary worked as an independent consultant from September 1997 through October 2005;
- A September 5, 2006 letter from owner of stating that the beneficiary worked for as an independent contractor in the capacity of software engineer between March 2000 and September 2001.

In response to a Request for Evidence sent by the AAO on June 6, 2013, the petitioner submitted additional letters concerning the beneficiary's past experience:

- A July 5, 2013 letter from a former administrative assistant, stating that the beneficiary worked for from May 1986 to January 1989 as a programmer of the accounting and payroll systems;
- A July 9, 2013 letter from a former executive assistant, stating that the beneficiary worked for from February 1989 to July 1993 as a project manager;
- A July 3, 2013 letter from senior programmer, stating that the beneficiary worked as a senior programmer for two years and a director of technology thereafter during his employment with from November 1993 to November 1999.

The experience claimed with and was not listed 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. In the June 6, 2013 RFE, the AAO specifically noted *Leung* and specifically requested "independent, objective evidence of the beneficiary's employment with the various companies" for which letters were submitted to the director. The petitioner submitted no such evidence in response to the RFE.[4] Even if the experience listed was documented, the total amount of experience listed on the ETA Form 9089 is nine years instead of the required 14 years of experience deemed an acceptable equivalent to the bachelor's degree requirement. As a result, the experience claimed with these employers cannot be considered in determining whether the beneficiary had the 14 years of experience required by the terms of the labor certification.

In addition, the letters submitted in response to the AAO's RFE were not written by employers. 8 C.F.R. § 204.5(l)(3)(ii)(A) states that letters verifying employment must be submitted by employers. The letters submitted from identify those individuals as an administrative assistant and executive assistant, respectively, not the beneficiary's supervisor, a member of the human resources department in charge of employment, upper management, or another individual characterized as an "employer." Although the authors explained that the companies they used to work for were no longer operational, the individuals writing the letters did not assert a supervisory role over the petitioner or human resources knowledge as to employment. As a result, their letters may not be considered evidence of the beneficiary's former employment.

The letter from states that the beneficiary worked for from November 1993 through November 1999, first as Senior Programmer and later as Director of Technology. This letter does not include a specific description of the duties performed by the beneficiary and, as a result, is insufficient to document the beneficiary's claimed experience. *See* 8 C.F.R. § 204.5(g)(1)

[4] The RFE also requested evidence to demonstrate the petitioner's ability to pay the proffered wage from the priority date onwards and evidence of its intent as expressed to potential U.S. workers concerning the equivalency to a bachelor's degree stated on the labor certification. The response from the petitioner resolved these issues and neither forms the basis of this decision.

and (l)(3)(ii)(A). The petitioner also submitted a letter from reiterating the years of employment and titles held by the beneficiary at however, identifies himself as a senior programmer from April 1996 to November 2001. As a result, he is claiming personal knowledge of the beneficiary's employment for more than two years prior to his having begun employment with and he is not an employer pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(A). As a result, these letters are insufficient to document the claimed experience with

The letters submitted also create doubt as to the beneficiary's actual employment due to an overlapping of dates that the beneficiary claims to have worked at different companies. Specifically, the labor certification states that he began a full-time position with the petitioner on November 26, 2001, however, the August 8, 2006 letter from states that the beneficiary worked as an independent consultant for from September 1997 through October 2005. The time stated by of employment by also overlaps the time that the beneficiary, state that the beneficiary was working for It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent, objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

On appeal, the petitioner states that *Matter of Leung* should not apply to the instant case. Counsel cites the different factual situation presented in *Matter of Leung* where fraud had been established concerning claimed previous employment as opposed to the instant case where no fraud has been demonstrated or alleged. While the facts of *Leung* may not match the instant proceeding, the principles of law continue to apply. The instruction on Part K. of the labor certification states "list any . . . experience that qualifies the alien for the job opportunity for which the employer is seeking certification." An inconsistency then arises when a petitioner submits evidence of experience not on the list as the instruction states that the list should be exhaustive. Under *Matter of Ho,* the petitioner must submit independent, objective evidence to overcome that inconsistency. *Matter of Leung* recognizes this inconsistency explicitly as one that needs to be addressed; the facts of the individual case do not bear upon this principle of law. The petitioner did not submit evidence to overcome the inconsistency and thereby failed to demonstrate that the beneficiary had the experience required by the terms of the 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 a professional or skilled worker under section 203(b)(3)(A) of the Act.

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.