



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **APR 10 2014** OFFICE: NEBRASKA SERVICE CENTER



IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (the 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 online food ordering service. It seeks to permanently employ the beneficiary in the United States as a computer and information scientist, research (CISR).¹ 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).

At issue in this case is whether the beneficiary possesses an advanced degree as required by the terms of the labor certification and the requested preference classification.

I. PROCEDURAL HISTORY

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).² The priority date of the petition is February 11, 2013.³

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

- H.4. Education: Bachelor's degree in computer engineering.
- H.5. Training: None required.
- H.6. Experience in the job offered: 60 months.
- H.7. Alternate field of study: Related field.
- 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: None.

Part J of the labor certification states that the beneficiary possesses a Bachelor's degree in computer engineering from [REDACTED] India, completed in 2003. The record contains a copy of the beneficiary's Bachelor of Technology degree in computer science and engineering diploma and transcripts from [REDACTED], India issued on March 6, 2006. The degree lists an examination date of January 2005.

The record contains an evaluation of the beneficiary's educational credentials prepared by Professor [REDACTED] on August 17, 2013. The evaluation states that the

¹ CISR also refers to job titles of "computer and information scientist" and "computer and information research scientist."

² See section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); see also 8 C.F.R. § 204.5(a)(2).

³ The priority date is the date the DOL accepted the labor certification for processing. See 8 C.F.R. § 204.5(d).

beneficiary's Bachelor of Technology degree, completed in January 2005, is equivalent to a Bachelor of Science degree in computer engineering in the United States.

The record also contains an expanded academic equivalency evaluation prepared [REDACTED] on October 7, 2013. The evaluation states that the beneficiary's Bachelor of Technology degree, attained in May 2003, is equivalent to a Bachelor of Science Degree in computer engineering in the United States.

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

- CISR with Information [REDACTED] India from June 2, 2003 to February 18, 2005.
- CISR with [REDACTED] India from March 1, 2005 to February 24, 2006.
- CISR with [REDACTED] India from March 2, 2006 to June 29, 2007.
- CISR with [REDACTED] India from July 2, 2007 to March 3, 2008.
- CISR with [REDACTED] ([REDACTED] New Jersey, from April 30, 2008 to May 9, 2009.
- SEO Analyst with the petitioner from May 11, 2009 to February 11, 2013, the date on which the ETA Form 9089 was submitted.

The record contains a February 12, 2005 experience letter from [REDACTED], executive mission director, on [REDACTED] letterhead stating that the company employed the beneficiary as a software engineer from October 20, 2003 to February 12, 2005. The record contains a November 13, 2012 experience letter from [REDACTED] employed the beneficiary as a CISR from June 2003 to February 2005. The record contains a September 26, 2013 experience letter from [REDACTED] project manager, on [REDACTED] letterhead stating that the company employed the beneficiary as a CISR from June 2, 2003 to February 18, 2005.

The record contains a November 27, 2012 experience letter from [REDACTED], vice president HR & operations for [REDACTED] employed the beneficiary as a [REDACTED] from March 2005 to February 2006. [REDACTED] states that he was general manager of [REDACTED] during the beneficiary's qualifying employment. The record contains a September 30, 2013 experience letter from [REDACTED] manager-operations, on [REDACTED] letterhead stating that the company employed the beneficiary as a CISR from February 2005 to February 2006.

The record contains a November 1, 2012 experience letter from [REDACTED] senior software engineer, on [REDACTED] letterhead stating that the company employed the beneficiary as a CISR from March 2006 to June 2007. The record contains a November 13, 2012 experience letter from [REDACTED] consultant, stating that [REDACTED] employed the beneficiary as a CISR from March 2006 to June 2007.

The record contains a November 15, 2012 experience letter from [REDACTED] manager of [REDACTED], stating that the company employed the beneficiary as a CISR from July 2007 to March 2008. The record contains a March 27, 2008 experience letter from [REDACTED] human

resources manager, on Fugro letterhead stating that the company employed the beneficiary as a CISR from July 2007 to March 2008.

The record contains a November 16, 2012 experience letter from [REDACTED] stating that [REDACTED] employed the beneficiary as a CISR from April 2008 to May 2009. The record contains a September 30, 2011 experience letter from [REDACTED] associated vice president-human resources, on [REDACTED] letterhead stating that the company employed the beneficiary as a CISR from April 2008 to May 2009.

The director's decision denying the petition found that the beneficiary did not possess five years of progressive, post-bachelor's degree experience, as the beneficiary's bachelor's degree was completed in January 2005.

On appeal, counsel contends that the beneficiary completed his Bachelor of Technology degree in May 2003, not in January 2005, and thereby, possesses at least five years of progressive, post-bachelor's degree experience.

The petitioner's 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.⁴ The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁵ 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.⁶

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:

⁴ 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).

⁵ 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).

⁶ 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).

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).⁷ *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.

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

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

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining

⁷ Based on revisions to the Act, the current citation is section 212(a)(5)(A).

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.

In the instant case, the petitioner claims that the beneficiary may be classified as an advanced degree professional based on a foreign equivalent degree to a U.S. bachelor's followed by at least five years of progressive experience in the specialty.

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.*

As discussed above, the record contains eleven experience letters regarding the beneficiary's experience from 2003 through 2009. None of the letters, except the [REDACTED] letter discussed below, provides the beneficiary's specific employment dates with the various qualifying employers. Further, the experience letters from [REDACTED] do not provide required information regarding how the signatories are aware of the beneficiary's employment and job duties with the qualifying employers and/or the signatory's title with the qualifying employer.

The February 12, 2005 experience letter stating that [REDACTED] employed the beneficiary as a software engineer from October 20, 2003 through February 12, 2005, is inconsistent with the labor certification and the November 13, 2012 and September 26, 2013 experience letters regarding the beneficiary's job title and employment dates. The labor certification and November 13, 2012 experience letter state that [REDACTED] employed the beneficiary as a CISR from June 2003 through February 2005. 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).

The September 30, 2013 experience letter stating that [REDACTED] employed the beneficiary from February 2005 to February 2006 is inconsistent with the labor certification and the November 27, 2012 experience letter regarding the beneficiary's dates of employment. The labor certification and the November 27, 2012 experience letter state that Focal3 employed the beneficiary from March 2005 to February 2006. *Matter of Ho*, 19 I&N Dec. at 591-92.

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 cannot be used to qualify the beneficiary for the certified position.⁸ In response to question

⁸ 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

.....

(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

(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.

J.21, 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.” 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 comparable⁹ and

(ii) *Actual minimum requirements.* DOL will evaluate the employer’s actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer’s actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

(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:

(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.

⁹ A definition of “substantially comparable” is found at 20 C.F.R. § 656.17:

the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the record indicates that the beneficiary's employment with the petitioner has been in a position other than the position offered. Section H.10 does not provide that applicants can qualify through an alternate occupation. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position.

Therefore, the submitted experience letters do not establish that the beneficiary possessed five years of post-baccalaureate experience in the specialty.

Even if the inconsistencies noted above were resolved and all the letters met all of the requirements of 8 C.F.R. § 204.5(g)(1), the beneficiary could not meet the requirements of the labor certification because his experience prior to attainment of his bachelor's degree cannot be used to meet the five years of post-baccalaureate experience.

On appeal, counsel contends that the beneficiary's Bachelor of Technology degree was completed in May 2003. In support of these contentions counsel submits an opinion letter from [REDACTED]

[REDACTED]¹⁰ While these letters state that the beneficiary completed the Bachelor of Technology degree in May 2003, both these letters and the expanded credentials evaluation letter referenced above rely upon a transcript reflecting the beneficiary's passage of the May 2003 VIII semester examinations. Counsel contends that the issuance of the beneficiary's diploma degree was delayed by non-academic processing, such as protracted administrative processing or the failure of the student to complete all of the necessary forms or pay all of the required fees. However, the transcripts clearly reflect that the issuance of the beneficiary's diploma degree was not delayed due to any of these administrative reasons. Rather, the beneficiary failed several classes in semesters I, II, III, IV, V and VI and was required to retake and pass those failed classes in order to complete his degree. While an August 22, 2003 [REDACTED] memorandum of marks reflects that the beneficiary passed all of the semester VIII exams, the consolidated marks section is marked out, indicating that the beneficiary had failed to complete all of the required exams for

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.

¹⁰ Counsel is incorrect in stating that the letter was issued by [REDACTED] as the letterhead does not belong to [REDACTED] and the letter states that the college of engineering is only affiliated to [REDACTED]. Further, the statement that the beneficiary's Bachelor of Technology degree was issued by "our University" calls into question whether the beneficiary's diploma was issued by [REDACTED] or College of Engineering, Co. [REDACTED] which is not reflected on the diploma and transcripts contained in the record.

completion of the Bachelor of Technology degree.¹¹ A May 23, 2005 [REDACTED] memorandum of marks reflects the beneficiary's semester VIII marks and lists his consolidated marks. The May 23, 2005 [REDACTED] memorandum explicitly states that the beneficiary is eligible for the award of the Bachelor of Technology degree by clearing the VI semester examination in January 2005. Therefore, the beneficiary completed his Bachelor of Technology degree in January 2005, the date on which the beneficiary cleared the examination, even though the actual diploma was not issued until March 6, 2006. As such, it would have been impossible for the beneficiary to accrue five years of post-baccalaureate experience in the proffered position from January 2005 until May 9, 2009.

After reviewing all of the evidence in the record, it is concluded that the petitioner has failed to establish that the beneficiary possessed at least 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. Therefore, the beneficiary does not qualify for classification as an advanced degree professional 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)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Even though the labor certification may be prepared with the beneficiary in mind, USCIS has an independent role in determining whether the beneficiary meets the labor certification requirements. See *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 7 (D. Or. Nov. 30, 2006).

In the instant case, the labor certification states that the offered position requires a bachelor's degree in computer engineering or a related field, plus five years of progressive post-baccalaureate experience in the proffered position.

For the reasons explained above, the petitioner has failed to establish that the beneficiary possesses the required experience for the offered position.

The petitioner failed to establish that the beneficiary possessed the minimum requirements of the offered position set forth on the labor certification by the priority date. Accordingly, the petition must also be denied for this reason.

¹¹ The memorandum does not explicitly state thereon that the beneficiary is eligible for the award of the Bachelor of Technology degree.

The Ability to Pay the Proffered Wage

Beyond the decision of the director,¹² the petitioner has also failed to establish its ability to pay the proffered wage. According to USCIS records, the petitioner has filed at least one other I-140 immigrant petition on behalf of another beneficiary. 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).

The evidence in the record does not document the priority date, proffered wage or wages paid to the other beneficiary, whether the other petition has been withdrawn, revoked, or denied, or whether the other beneficiary has 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 petitions. In any future filings, the petitioner should also submit evidence of payment of the proffered wage or partial payment of the proffered wage to the instant beneficiary.

Further, USCIS has reviewed the evidence the petitioner provided at the time of filing and has attempted to validate the petitioner, [REDACTED], in its [REDACTED]. [REDACTED] uses commercially available data to validate basic information about companies and organizations petitioning to employ alien workers. For more information about this program, please visit USCIS's website at: www.uscis.gov/VIBE.

On the Form I-140 immigrant petition, the petitioner described itself as an online food ordering service and stated that it was established in on January 1, 1999, employs 300+ workers and has gross income greater than \$61 million. However, USCIS's VIBE indicates that the petitioner employs 40 workers and has gross sales of \$29,100,000.00. *Matter of Ho*, 19 I&N Dec. at 591-92. In any future filings the petitioner must provide additional documentation to explain these discrepancies.

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. Beyond the decision of the director, the petitioner also failed to establish its ability to pay the proffered wage.

¹² 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).

(b)(6)

NON-PRECEDENT DECISION

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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.