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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: AUG 1 4 2014 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for 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.

Thank you,

for
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was initially approved by the Director, Nebraska Service Center. On further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. The director served the petitioner with a Notice of Intent to Revoke (NOIR) the approval of the preference visa petition. The director subsequently revoked approval of the petition. The director also dismissed the petitioner's motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for further investigation and review.

The petitioner describes itself as an IT Solutions Provider. It seeks to employ the beneficiary permanently in the United States as a senior programmer analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to aliens of exceptional ability[1] and members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, an ETA Form 9089 Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition.[2]

The Form I-140, Immigrant Petition for Alien Worker was filed on March 17, 2011. It was initially approved on March 24, 2011. Upon further investigation, the director issued a NOIR detailing, *inter alia,* evidence in the record that raised discrepancies related to the advanced degree visa classification selected on the Form I-140 as supported by the ETA Form 9089, as well as the beneficiary's job experience required by the ETA Form 9089 and the petitioner's ability to pay the proffered wage of $125,445. The director subsequently revoked the petition's approval on April 2, 2013. He determined that the petitioner had not established that the beneficiary possessed the required 60 months of experience, and that the job offered on the labor certification did not require a member of the professions holding an advanced degree as indicated on the Form I-140, Immigrant Petition for Alien Worker.

On motion and on appeal, the petitioner, through counsel, asserts that the terms of the ETA Form 9089 are consistent with the second preference visa classification requested on the Form I-140 and that the beneficiary has the necessary experience described in the labor certification.

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[1]There is no indication in this case that the petitioner is requesting a visa based on the beneficiary as an alien of exceptional ability. Further, the ETA Form 9089 replaced the Form ETA 750 after new DOL regulations went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

[2]The petitioner must demonstrate that the beneficiary possesses the qualifications as certified on the ETA Form 9089 by the DOL and submitted with the instant petition. The beneficiary must possess the qualifications beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). In this case, the priority date is December 22, 2010.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).[3]

Section 205 of the Act, states: "[t] he Attorney General [now Secretary, Department of Homeland Security] may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may constitute good cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988)

Requested Visa Classification

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
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> (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as follows:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate 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 degree or a foreign equivalent degree.

The regulation at 8 C.F.R. § 204.5(k)(4) additionally provides the following:

> (i) *General*. Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A

[3]The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary. We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.

> designation or to establish that the alien's occupation is within the Labor Market 656.1(a)Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification**, Schedule A application, or Pilot Program application **must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability**.

(Bold emphasis added.)

Thus, it must be determined whether the labor certification requires an advanced degree professional and whether the beneficiary possesses an advanced degree. In this case, it is the first part of this inquiry that is at issue.

The job qualifications are found on Part H of the ETA Form 9089. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered.

In this matter, Part H reflects the following minimum requirements:

H.4.	Education:	Minimum level required: Bachelor's.
4-B.	Major Field Study:	Computer Science, Engineering, Math or equiv.
7.	Is there an alternate field of study that is acceptable? The petitioner checked "no" to this question.	
8.	Is there an alternate combination of education and experience that is acceptable? The petitioner checked "no" to this question.	
9.	Is a foreign educational equivalent acceptable? The petitioner listed "yes" that a foreign educational equivalent would be accepted.	
6. 10.	Experience:	60 months in the position offered, or 60 months in the alternate occupation of Programmer Analyst, Progmr [sic], Systems Analyst, Tech Consultant, Applicati[4]

[4] This word was not completed on the ETA Form 9089.

14. Specific skills or other requirements:

> Experience in Oracle, SQL Server, PL/SQL, C. C++, Windows NT, UNIX, Linux, Forms, Reports, Developer 2000 Toolkit, TOAD, SQL Developer, SQL Navigator, Pro*C, SQL*Loader and ERP/CRM. Must have experience in designing, developing and implementing applications. Relocation and travel to unanticipated locations within USA Possible. Note 1: Employer will accept suitable combination of education, training or experience. **Note 2: Employer will accept an equivalency evaluation of foreign degrees from a college professor authorized to grant college level credits.**

(Bold emphasis added).

Counsel asserts that the requirements are consistent with the request for an advanced degree professional visa classification and cites DOL regulations at 20 C.F.R. §§656.17(g)(2), 656.24(b)(2)(i).

It is noted that, although DOL certified the ETA Form 9089, its role is limited to determining whether there are sufficient workers who are able, willing qualified and available, and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).[5]

An advanced degree professional visa classification must be required on the labor certification. Part H.4 of the labor certification requires a Master's degree; however, the director determined that the employer modified this requirement in H.14 in permitting an equivalency evaluation of foreign degrees from a college professor authorized to grant college level credits. The director determined that this modification altered the labor certification to the extent that it would potentially permit an applicant with less than an advanced degree to qualify for the offered position.

An advanced degree is an academic or professional degree or a foreign equivalent degree above that of baccalaureate. In this case, Part H.8 of the labor certification bars an applicant with an alternate combination of education and experience to be considered in lieu of a Bachelor's degree and 60

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[5] In *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] 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.*

months of experience. Counsel indicates that the language refers to "degrees" not just education and does not contradict the requirement of a Bachelor's degree in H.4. Counsel asserts that the language in H.14 does not suggest that the petitioner will accept experience in lieu of education.[6]

On remand, the director may wish to review the job advertisements and recruitment completed in connection with the labor certification to elucidate whether the language in H.14 of the labor certification is read to allow a foreign candidate to demonstrate the foreign equivalent to a U.S. Bachelor's degree and 60 months of experience only, or whether, given the totality, the language allows for something other than an actual Bachelor's degree in Computer Science, Engineering, Math or equivalent and 60 months of experience.

Experience

The director also revoked the petition's approval upon his determination that the beneficiary lacked 60 months of experience in the job offered or in an acceptable alternate position gained as of the priority date of December 22, 2010.

As set forth on the ETA Form 9089, the beneficiary's qualifying experience is stated as: a programmer analyst/business intelligence for from December 16, 2010 to the present; a computer programmer/analyst for from May 26, 2005 to December 15, 2010; a system analyst /programmer for from August 6, 2002 to July 30 2004 (part-time); a system analyst for from August 29, 2000 to January 24, 2002. No other experience is listed. The beneficiary signed the labor certification on January 24, 2011, declaring that the contents were true and correct under penalty of perjury.

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

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and

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[6] Although such equivalencies are permitted in non-immigrant regulations, in this case, they would not be consistent with 8 C.F.R. § 204.5(k)(4) or with the petitioner's requirement set forth in H.8. Moreover, for this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(A) requires the submission of an "official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." Additionally, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Cf.* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

> title of the writer, and a specific description of the duties performed by the alien or of the training received.

The record includes a letter from that is dated December 16, 2009, but affirms the beneficiary's employment to December 2010; a letter from dated August 3, 2004, which describes the beneficiary's part-time employment; a letter from that describes the beneficiary's employment from August 29, 2000 to January 24, 2002; an April 19, 2013 letter from , a staffing agency, describing the beneficiary's services provided by to its end-client located in Indiana during the period of May 2005 to May 2009; an April 18, 2013 letter from , describing the beneficiary's services provided to it by that were performed at its end-client located in Indiana during the period of June 2009 to June 2010; a letter from describing the beneficiary's services provided to its end client pursuant to contract with the petitioner but asserting the same period of time as the beneficiary's claimed employment with and a letter from describing the beneficiary's services provided to its end client pursuant to contract with the petitioner but asserting the same period of time covering the first three months of beneficiary's claimed employment with The overlap in the dates that the beneficiary claimed on the ETA Form 9089 to have worked for and the dates claimed in the letters from that the beneficiary provided services through a contract with raises doubts about the beneficiary's actual experience. The inconsistent date on the letter verifying the beneficiary's end date of employment one year before it occurred raises additional doubt about the beneficiary's actual experience. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

On remand, the director may wish to further examine these letters, as well as the other evidence in the record in order to determine whether the petitioner has resolved the inconsistencies relevant to the beneficiary's claimed experience and is able to establish that the beneficiary meets the experience required by the certified labor certification..

The director determined that of Iowa and California, as well as the petitioner, shared common ownership. Counsel asserts that the petitioner is the successor-in-interest to California and that the companies should be considered separately. On remand, the director may wish to further examine these claims to determine the relationship and connections of

the companies, and whether the claimed experience, based on the discrepancies set forth, can be reasonably considered.[7]

Further, the employer must offer full-time, permanent employment and not be seeking to subcontract. *See* 20 C.F.R. § 656.3. We note that the record also raises the question whether the petitioner intends to be the direct U.S. employer of the beneficiary, which the director may consider on remand.

Additionally, although not a basis for the revocation of the employment-based petition, and despite the petitioner's assets reflected on its tax returns and salaries, it is not clear that the petitioner established its ability to pay the proffered wage for this beneficiary in that USCIS electronic records indicate that the petitioner has filed at least 160 employment-based petitions, including 118 non-immigrant petitions and 40 immigrant petitions. Where a petitioner files I-140 petitions for multiple beneficiaries, it is incumbent on the petitioner to establish its continuing financial ability to pay all proposed wage offers as of the respective priority date of each pending petition. Each petition must conform to the requirements of 8 C.F.R. § 204.5(g)(2) and be supported by pertinent financial documentation.

The petitioner also asserts that it is the successor-in-interest to of California. If the petitioner assumed the immigration related liabilities of then it is not clear that all of those remaining sponsored workers transferred to the petitioner have been accounted for in the petitioner's chart submitted in response to the director's NOIR. Any sponsored workers and transferred workers from any intervening entity may also need to be accounted for in the petitioner's ability to pay the proffered wage if part of the full successorship chain.[8] In the response to the director's NOIR, counsel also states that workers who obtained permanent residency were not included in this chart, but does not identify the beneficiaries, the dates of permanent residency obtained, and whether any of those wages would be relevant in the year of the beneficiary's priority date (2010) or subsequent to the priority date. On remand, the petitioner should fully address all sponsored beneficiaries and provide all pertinent tax returns and financial information.

In addition, the director's NOIR requested certified tax returns. Counsel indicates that certified tax returns cannot be obtained, but that tax transcripts could be obtained. The record does not contain the petitioner's certified taxes (transcripts) requested. The director may request such on remand.[9]

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[7] Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

[8] USCIS has not issued regulations governing successors-in-interest. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986.

[9] Internal Revenue Service (IRS) form(s) 4506 and 4506T are available to obtain tax return information.

In view of the foregoing, we remand the petition for further investigation and review.[10] The director may request, and the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision.

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[10] Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).