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: MAY 07 2015 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,

for Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. We will dismiss the appeal.

The petitioner[1] filed Form I-140, Immigrant Petition for Alien Worker, on June 29, 2012, seeking to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the sciences, the arts, or business. The petitioner, a manufacturer and distributor of recycled toner cartridges and inkjets, seeks to employ the beneficiary as a managing research and development technician. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director issued a notice of intent to deny the petition (NOID) on November 8, 2012. After considering the petitioner's response to the NOID, the director denied the petition on May 28, 2013. In the denial notice, the director found that the petitioner failed to establish that (1) the beneficiary qualifies for classification as an alien of exceptional ability and that (2) an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief and supporting exhibits.

I. Law

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

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (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.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

[1] The petitioner on appeal is the successor-in interest to the organization that filed the petition,

II. Exceptional Ability

The first issue in this proceeding is whether the beneficiary qualifies for classification as an alien of exceptional ability in the sciences. The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the following six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business:

> (A) 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;
>
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
>
> (C) A license to practice the profession or certification for a particular profession or occupation;
>
> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
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> (E) Evidence of membership in professional associations; and
>
> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility. 8 C.F.R. § 204.5(k)(3)(iii). The plain wording of this regulation permits the petitioner to rely on "comparable evidence" only "[i]f the above standards do not readily apply to the beneficiary's occupation." If the standards do readily apply to that occupation, the beneficiary's inability to meet those standards does not trigger the comparable evidence clause. As described further below, the petitioner has invoked this clause for three of the standards, saying that they are not required in the beneficiary's occupation. This is not the regulatory threshold, however. The issue is not whether they are required, but whether they are applicable. Indeed, any particular qualification or credential "required" for the occupation would have little value as evidence of exceptional ability, because every qualified worker would possess it, and therefore it would not distinguish exceptional workers from others or establish a degree of expertise significantly above that ordinarily encountered.

On Part 6, line 2 of Form I-140, the petitioner indicated that the beneficiary's occupation has a Standard Occupational Classification (SOC) code of 11-9041, corresponding to "Architectural and

Engineering Managers." It is against this standard that we must consider the petitioner's claim that the beneficiary has exceptional ability in his occupation.[2]

> *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.* 8 C.F.R. § 204.5(k)(3)(ii)(A)

In response to the NOID, chief executive officer of the petitioning company, claimed that "**no particular academic record is required for the [beneficiary's] occupation**. Accordingly . . . this criterion is inapplicable" (emphasis in original). The lack of a degree requirement, however, does not make the criterion inapplicable to the beneficiary's occupation. Rather, the criterion would be inapplicable if academic degrees were not available in fields relating to the occupation. Given the technical nature of the beneficiary's duties, a degree in a field such as mechanical engineering would relate to the occupation.

The petitioner has not satisfied this criterion or established that it does not readily apply to the beneficiary's occupation. The petitioner, on appeal, does not dispute the director's finding, and has therefore abandoned the claim. When an appellant fails to offer an argument on an issue, that issue is abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n.2 (11th Cir. 2005); *Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885, at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims abandoned when not raised on appeal to the AAO).

> *Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.* 8 C.F.R. § 204.5(k)(3)(ii)(B)

The director concluded that the petitioner had satisfied this criterion and we concur with that finding.

> *A license to practice the profession or certification for a particular profession or occupation.* 8 C.F.R. § 204.5(k)(3)(ii)(C)

in the petitioner's NOID response, claimed that "this criterion is inapplicable" because a "**license or certification is not required to perform the sponsored occupation**" (emphasis in original). However, the issue of applicability rests not on whether such credentials are required, but on whether they exist at all.

The petitioner has not claimed that the beneficiary meets this criterion, and has not established its inapplicability. On appeal, the petitioner does not dispute the director's finding, and has therefore abandoned the claim. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1228 n.2.

[2] In a previously filed petition filed on April 16, 2010), the petitioner sought classification of the beneficiary as an alien of exceptional ability, and a waiver of the job offer requirement, based on his position as "Senior R& D [Research and Development] Technician," with SOC code 17-3029, corresponding to "Engineering Technician."

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(D)

The petitioner's initial submission included no claim that the beneficiary met this criterion. The response to the NOID, however, included the claim that the beneficiary earns:

> a salary amount that is substantially above the prevailing wage for the sponsored occupation of inventor and researcher in the geographic area where the work is to be performed. . . . [The beneficiary's] combined remuneration in comparison to the prevailing wage determination of the U.S. Department of Labor is at a level demonstrating exceptional ability. This evidence confirms that [the beneficiary's] compensation for this year alone is **over 45% higher than the prevailing wage for others in the same occupation** at the area of **employment, thus establishing his exceptional ability**.

(Emphasis in original.) offered further details:

> First, the Prevailing Wage Determination ("PWD") from the Department of Labor ("DOL") is $89,523.00 and [the beneficiary] earns a base salary of $110,000.00. Second, because of the Beneficiary's contributions to the R&D team and multiple patent inventions, he has earned bonuses – for January 1, 2012 through November 18, 2012, the Beneficiary's bonus pay totals $20,334.01.

The petitioner submitted a copy of a PWD issued by the DOL on February 21, 2012, indicating that the prevailing wage for "Architectural and Engineering Managers" was $89,523 per year.

In the denial notice, the director stated: "the evidence does not demonstrate that the beneficiary's remuneration is so high in relation to others in the field that it demonstrates exceptional ability."

The initial appellate statement includes the following assertion:

> The Director (a) mischaracterized and (b) disregarded evidence that the Beneficiary receives a salary, or other remunerations for services, which demonstrates exceptional ability, by acknowledging only the Beneficiary's base pay (which is by itself 19%) higher than the prevailing wage and failing to address discretionary bonuses paid to the Beneficiary for his exceptional contributions (which, when added to the base pay, these 'other remunerations' provide the Beneficiary with salary nearly 32% higher than the prevailing wage).

The subsequent appellate brief revised the above percentages, stating: "For the calendar year 2012, the Beneficiary received a base salary equal to 22.8% greater (and a total compensation package, including bonuses, of 48.9% greater) than the prevailing wage assigned to his position by the DOL."

The proper comparison is not between the prevailing wage and the beneficiary's base pay, but rather between the prevailing wage and the beneficiary's total compensation including bonuses. The latter comparison, however, would only be appropriate if the prevailing wage includes bonuses. The petitioner has not shown this to be the case.

The plain wording of 8 C.F.R. § 204.5(k)(3)(ii)(D) requires evidence that the beneficiary's compensation "demonstrates exceptional ability," defined at 8 C.F.R. § 204.5(k)(2) as "a degree of expertise significantly above that ordinarily encountered." Therefore, the petitioner's PWD information satisfies this requirement only if it shows that the beneficiary's compensation is above the level of pay ordinarily encountered in his occupation.

The PWD form submitted by the petitioner showed four possible wage levels, and specified that the stated prevailing wage figure applied to "Wage level I." The web site of the Foreign Labor Certification Data Center includes definitions of the four wage levels, excerpted below:

> **Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. . . . Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.
>
> **Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. . . .
>
> **Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. . . .
>
> **Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.[3]

[3] Source: Employment and Training Administration, *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs, available at http://www.flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf (printout added to record January 15, 2015).

The Level I prevailing wage reflects only the lower end of the pay scale "for beginning level employees who have only a basic understanding of the occupation." It excludes all more experienced (and thus higher-paid) workers in the field. The petitioner does not seek to employ the beneficiary in an entry-level or training position. Rather, the petitioner has indicated that the beneficiary has over 10 years of experience in the occupation, and the record reflects the beneficiary's supervisory duties and specialized knowledge in the field. The petitioner did not document the mean or median salary for the occupation as a whole, which would include higher-paid, more experienced workers, and therefore the prevailing wage information does not demonstrate exceptional ability.

On appeal, the petitioner cites an October 12, 2011, phantom stock agreement, indicating that the beneficiary would be entitled to "receive a payment or payments . . . by reason of a Company Sale." The appellate brief asserts that the beneficiary's "1% interest in [ ] upon the happening of any triggering event . . . is worth between $700,000 to $900,000," based on an assessment that "the Company has a fair market value today of between $70 million and $90 million." The agreement, however, does not grant the beneficiary one percent of the company's "fair market value." Rather, it entitles him to a maximum of one percent of the "net sale proceeds," defined as "the money and property other than money . . . that are actually received by the seller," not including liabilities, rollover equity, taxes, contributions to capital, and other considerations. The petitioner has not established that the "net sale proceeds" are equal or comparable to the "fair market value."

Furthermore, although the brief asserts that the beneficiary is now fully vested in the phantom stock agreement, the agreement includes additional conditions and requirements that the beneficiary must continue to meet in the future; there is no guarantee that the beneficiary will eventually receive the payment. In response to our NOID, the petitioner submitted evidence that was in fact purchased by the on July 18, 2014. The petitioner did not, however, submit evidence that the beneficiary received any payment under the phantom stock agreement. The agreement does not establish that the beneficiary has commanded remuneration for services which demonstrates exceptional ability.

For the reasons outlined above, the petitioner has not satisfied this criterion.

Evidence of membership in professional associations. 8 C.F.R. § 204.5(k)(3)(ii)(E)

The petitioner's initial submission did not address this criterion. In response to the NOID, stated that the petitioner knew of "**no relevant professional association allowing membership by similarly situated individuals employed in the sponsored occupation within the laser printer green technology industry**. Moreover, **a membership in a professional association is not required to perform the job offered**" (emphasis in original). The lack of mandatory membership does not mean that the criterion does not readily apply to the beneficiary's occupation. There may exist no professional association that is narrowly focused on "the laser printer green technology industry," but this does not mean that there is no organization with a broader reach that

encompasses the beneficiary's occupation among others. presented as an expert in the beneficiary's area of work, identified himself as "a If the admits members employed in "the laser printer green technology industry," then the criterion readily applies to the beneficiary's occupation. Furthermore, if some classes of membership are more exclusive than others, then one's membership under such an exclusive class would help to establish a claim of exceptional ability, while ineligibility for that class of membership would tend to undermine it.

On appeal, the petitioner submits a July 26, 2013, letter from Executive Director of the which the petitioner describes as states that has offered the beneficiary a position as a "trainer," who will train other manufacturers in the use of testing standards. also states that the petitioning company is a The petitioner acknowledges that it did not previously provide evidence to meet this criterion, but asserts that the letter from satisfies the requirements of 8 C.F.R. § 204.5(k)(3)(ii)(E). However, as letter indicates that the petitioning organization, rather than the beneficiary himself, is it does not meet the plain language of 8 C.F.R. § 204.5(k)(3)(ii)(E).

Furthermore, as the petitioner has not established that this criterion is not applicable to the beneficiary's occupation, we will not consider whether the beneficiary's position as a "trainer" for is comparable to membership in professional associations. For these reasons, the petitioner has not satisfied this criterion.

> *Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.* 8 C.F.R. § 204.5(k)(3)(ii)(F)

The petitioner's initial submission included the assertion that the beneficiary's patents and pending patent applications are "evidence of [the beneficiary's] original scientific contributions to the field." The petitioner also submitted a copy of an article, that the beneficiary wrote for magazine in 2012, and a copy of a company press release, which quoted the beneficiary regarding the development of the petitioner's product.

The petitioner documented U.S. patents naming the beneficiary as an inventor. The petitioner submitted a letter from patent attorney attesting that the beneficiary's "invention history in the green technology industry . . . reveals [the beneficiary] to be a professional of exceptional ability and far superior to his peers." asserted that the beneficiary's "unique invention track record substantially exceeds the patent activity of a normally productive researcher."

is the president and chief executive officer of which has had "a contractual vendor relationship" with the petitioner since stated:

> It is [the beneficiary] who determines how each cartridge will be remanufactured, which initiates the entire process; he is at the heart of [the petitioner's] remanufacturing. . . .
>
> Additionally, [the beneficiary] is responsible for benchmarking the particle size of toner, improving the print quality and yield of print jobs, while minimizing waste. . . .
>
> For his laudable work, [the beneficiary] accepted the Award for in 2006 on behalf of [the petitioner, which] chose [the beneficiary] to accept this award on behalf of the company because the award was received due to his hard work. Moreover, he has been pivotal in helping [the petitioner] to achieve numerous other awards from

The petitioner submitted additional letters from managers and executives at other companies in the industry. The letters include general praise for the beneficiary's skills, and statements that the number of patents awarded to the beneficiary is unusually high for an individual in his field.

We find that the above evidence sufficiently establishes recognition for the beneficiary's achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations. We withdraw the director's determination to the contrary.

However, because the beneficiary has not satisfied at least two other criteria, as discussed above, satisfaction of this criterion does not establish eligibility. Therefore, the petitioner has not set forth a *prima facie* claim of exceptional ability.

III. National Interest Waiver

The other stated ground for denial is that the petitioner has not established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest. As the beneficiary cannot qualify for the waiver without first qualifying for classification as an alien of exceptional ability, we do not need to reach the issue of whether the petitioner has established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

IV. Conclusion

The petitioner has not established that the beneficiary qualifies for classification as an alien of exceptional ability in the sciences, the arts, or business, and he is therefore ineligible for a waiver of the job offer requirement.

We will dismiss the appeal 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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.