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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 2 6 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner describes itself as a jewelry manufacturing and exporting business. It seeks to permanently employ the beneficiary in the United States as a diamond setter. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[1]

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).[2] The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is March 14, 2003. *See* 8 C.F.R. § 204.5(d).

The director revoked the approval of the I-140 petition after issuing a notice of intent to revoke dated October 24, 2008 (NOIR) based on a lack of credible documentation to establish that the beneficiary was qualified to perform the duties of the offered position. The petitioner submitted a response to the NOIR. In a Notice of Revocation dated December 16, 2008 (NOR), the director determined that the response did not substantiate the beneficiary's qualifications and revoked the petition's approval. The director's decision revoking the petition's approval concludes that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date.

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

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

[2] This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). The filing of the instant petition on June 19, 2006 predates the final rule.

[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor 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).

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

EDUCATION
Grade School: C
High School: C
College: N/A
College Degree Required: N/A
Major Field of Study: N/A
TRAINING: None Required.
EXPERIENCE: Two (2) years in the job offered.
OTHER SPECIAL REQUIREMENTS: None.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a diamond setter with from March 1999 to November 2002. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

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

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

The record contains an experience letter dated April 4, 2006 from Davit Hovhannisyan, Owner of stating that the company employed the beneficiary as a diamond setter from March 1, 1999 to November 29, 2002.

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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).

As noted in the NOIR, during the review and interview process, U.S. Embassy officials at Yerevan, Armenia did not find the documentation regarding the beneficiary's experience to be credible. And, although requested, the beneficiary could not provide any additional, credible documents, legal or otherwise, showing that the beneficiary ever practiced the proffered profession. The NOIR stated that the petitioner must provide "business licenses, tax records, lease agreements, contracts and any other pertinent evidence to satisfy all work experience assertions."

The NOR stated that the petitioner did not provide any documents that showed ad ever been incorporated or what the company did. The NOR noted that the U.S. Embassy repeatedly asked the beneficiary to provide evidence that showed had been incorporated and was doing business, as well as his individual tax documents to show income received as a diamond setter. The beneficiary never provided the requested documents.

On appeal, counsel states that how much the beneficiary made as a diamond setter is irrelevant to the merits of this case. However, the beneficiary's earnings as a diamond setter from March 1, 1999 to November 29, 2002 are relevant to the determination of whether the beneficiary has the required experience for the proffered job.

On August 29, 2012, the AAO sent the petitioner a Notice of Intent to Dismiss and Request for Evidence (NOID) which stated, in part:

> The labor certification indicates that the beneficiary qualifies for the proposed employment based on experience gained while employed with n March 1999 to November 2002 as a diamond setter.
>
> The beneficiary's consulate interview in Armenia revealed that operated out of the basement of home and that is also a friend of the beneficiary. The beneficiary and were the only employees of the company and no longer works in the diamond trade.
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> At the initial consulate interview on April 18, 2008, the beneficiary presented an experience letter from written by The consulate officer asked for additional evidence to establish that the beneficiary was employed by Specifically, the beneficiary was asked to provide a business license for
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> The beneficiary returned to the consulate a second time on May 8, 2008 but did not provide any documents to show that Nuraz had ever been incorporated or what did. The consular officer asked the beneficiary again to provide business documents for to show that the company had been in business and what the company did.

The beneficiary returned to the consulate a third time on May 15, 2008 but did not provide any additional documents to show that had been incorporated or what the business did.

The beneficiary returned to the consulate a fourth time at the end of June 2008 and indicated that he was unable to supply any of the documents requested.

The beneficiary's inability to provide any evidence upon request to substantiate his experience letter casts doubt on the beneficiary's experience. No explanation was provided to explain why evidence could not be provided to substantiate the experience letter from The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Further, *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states:

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.

The AAO requests additional information from your company to establish the beneficiary's experience with Specifically you are requested to provide the following evidence:

- Evidence of wages paid to the beneficiary by Nuraz from March 1999 to November 2002. This evidence should include payroll documents or copies of paychecks issued to the beneficiary, and yearly tax documents to show income earned and taxes paid by the beneficiary on that income. Please be sure this evidence shows the name of the entity that paid the beneficiary;
- Evidence of incorporation and/or business license for and
- Evidence of doing business from March 1999 to November 2002. This evidence should include documentation to show the type of work performed by Nuraz.

In response to the NOID, the petitioner submitted a Certificate dated September 24, 2012 issued by the State Revenue Committee at the Government of the Republic of Armenia certifying that the liabilities on income of ' 'are up to" certain amounts listed in the certificate.[4] However, the Certificate does not establish that paid any wages to the beneficiary from March 1999 to November 2002. Counsel asserts that the beneficiary does not have any copies of his payroll

[4] The Certificate shows that ' incurred a total of 941 in "back taxes," and that there were no penalties or fines assessed. The Certificate does not state when the back taxes were incurred and/or assessed.

documents or paychecks, and that in 1999, 2000, 2001 and 2002, people in Armenia received their salaries in cash and there was no practice to pay an employee with a paycheck.[5] It is not clear based on counsel's statements whether paychecks were actually issued to the beneficiary or whether he was paid in cash. Regardless, the non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).[6] The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

In response to the NOID, the petitioner also submitted a Reference dated September 14, 2012 issued by the Ministry of Justice State Register of Legal Entities in Armenia, showing that Liability Company (LLC) was registered on October 12, 2000, was owned solely by Davit Hovhannisyan and was in the action of dissolution. The Reference establishes that Nuraz LLC was organized on October 12, 2000, but it does not establish the type of business Nuraz LLC conducted and it does not establish that Nuraz did any business prior to October 12, 2000.

In response to the NOID, the petitioner also submitted a Statement dated September 24, 2012 from Davit Hovhannisyan stating that from 1998 to 2003, he was involved in jewelry manufacturing; that he was initially working as an individual and doing business as Nuraz Co.; that he hired the beneficiary in March of 1999; that his business started to produce more income after he hired the beneficiary so he decided to incorporate his "dba" to a limited liability company; and that the beneficiary worked with Nuraz LLC until November 2002. However, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).[7] The petitioner submitted no evidence to support Davit Hovhannisyan's statements regarding the operation of Nuraz prior its incorporation. Further, the record contains no independent, objective evidence documenting the type of work performed by Nuraz.

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[5] The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

[6] Counsel requests USCIS to obtain tax documents from a governmental archive in Armenia. However, in visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

[7] The AAO notes that the beneficiary stated on the labor certification that he worked for Nuraz Ltd. from March 1999 to November 2002. He did not state that he worked for Davit Hovhannisyan dba Nuraz Co. from March 1999 to October 2000, and that he worked for Nuraz LLC from October 2000 to November 2002. The experience letter dated April 4, 2006 from Davit Hovhannisyan also refers to the business as Nuraz Ltd., instead of Davit Hovhannisyan dba Nuraz Co. and Nuraz LLC. The petitioner has not resolved the inconsistencies with independent, objective evidence of the beneficiary's employment with Nuraz.

Thus, 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