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

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: APR 14 2009

SRC 06 127 52170

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petitioner's employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a charitable institution.[1] It seeks to employ the beneficiary permanently in the United States as a social welfare administrator. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established (1) that it had the continuing ability to pay the proffered wage, or (2) that the beneficiary was qualified for the proffered position. The director denied the petition accordingly.

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

A review of the record shows that the petition has not been properly filed. Therefore, there is no legitimate basis to continue with this proceeding, and the appeal will be dismissed for this reason.[2]

The regulation at 8 C.F.R. § 103.2(a)(2) requires that the petitioner sign the petition. In this

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[1] While the name of the petitioner is listed as Association for the Underaged, Inc. on Form I-140, the federal employment identification number (EIN) listed on Form I-140 belongs to Association for the [redacted] Additional evidence in the record suggests that Association for the Useful Aged, Inc. is the proper petitioner and that the petitioner's name listed on the Form I-140 may be a typographical error. The petitioning business in this matter, Association for the Useful Aged, Inc., was dissolved on October 1, 2004. *See* http://www.sunbiz.org/scripts/cordet.exe?action=DETFIL&inq_doc_number=721210&inq_came_from=NAMFWD&cor_web_names_seq_number=0000&names_name_ind=N&names_cor_number=&names_name_seq=&names_name_ind=&names_comp_name=[redacted]&names_filing_type= (accessed March 15, 2009). Where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. On July 15, 2008, the AAO sent the petitioner a Notice of Derogatory Information (NDI) regarding this issue, and gave the petitioner 30 days to respond with proof that the petitioning business has not been dissolved and is in active status. The petitioner failed to respond to the NDI, and the appeal will be dismissed for this additional reason.

[2] 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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

instance, no employee or officer of the petitioner signed Form I-140. Instead, the beneficiary signed the petition. However, the regulations do not permit a beneficiary, who is not an employee or officer of the petitioner, to sign Form I-140 on behalf of a United States employer.[3] The record does not establish that the beneficiary is an employee or officer of the petitioner.

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

> *Filing petition.* Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act. An alien, or any person in the alien's behalf, may file a petition for classification under section 203(b)(1)(A) or 203(b)(4) of the Act (as it relates to special immigrants under section 101(a)(27)(C) of the Act).

The regulation at 8 C.F.R. § 103.2(a)(2) states:

> *Signature.* An applicant or petitioner must sign his or her application or petition. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the application or petition, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the application or petition, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. Unless otherwise specified in this chapter, an acceptable signature on an application or petition that is being filed with the [United States Citizenship and Immigration Services (USCIS)] is one that is either handwritten or, for applications or petitions filed electronically as permitted by the instructions to the form, in electronic format.

The petition has not been properly filed because the petitioning United States employer did not sign the petition. Pursuant to 8 C.F.R. § 103.2(a)(7)(i), an application or petition which is not properly signed shall be rejected as improperly filed, and no receipt date can be assigned to an improperly filed petition. Accordingly, as the petition could not be approved even if the instant appeal had merit, the appeal is dismissed.

Nevertheless, the AAO will review the director's bases for denial. The director determined that the petitioner had not shown its continuing ability to pay the proffered wage beginning on the priority date. The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> ***Ability of prospective employer to pay wage.*** Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the

[3] In the NDI, the AAO asked the petitioner to provide proof that the job offer to the beneficiary is bona fide based on the fact that the beneficiary signed the Form I-140. The petitioner failed to respond to the NDI.

> priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the April 30, 2001 priority date. 8 C.F.R § 204.5(d). The proffered wage as stated on the Form ETA 750 is $15.00 per hour ($31,200.00 per year based on a 40 hour work week). On the petition, the petitioner claimed to have been established in 1971. On the Form ETA 750B, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 or subsequently.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The record before the director closed on March 16, 2006. The petitioner did not submit its IRS Form 990, Return of Organization Exempt from Income Tax, its audited financial statements or its annual reports for any relevant period. Therefore, this office cannot analyze the petitioner's net income for any relevant period.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the

difference between the petitioner's current assets and current liabilities.[4] If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner did not submit its audited financial statements or annual reports for any relevant period. Therefore, this office cannot analyze the petitioner's net current assets for any relevant period. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.[5]

Accordingly, the petitioner failed to establish that it had the continuing ability to pay the proffered wage, and the appeal will also be dismissed for this reason.

The director also determined that the petitioner had not established that the beneficiary was qualified for the proffered position. The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to 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 Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986); *see also*, *Mandany 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 Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the

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[4] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[5] On appeal, counsel asserts that the director's decision was based on information dated January 2002, and not on current information. On the Form I-290B, counsel indicated that he would be submitting a separate brief and/or evidence to the AAO within 30 days. On August 17, 2008, the AAO sent a fax to counsel indicating that this office has no record that any further evidence or brief was ever received with regard to this appeal and requesting that a copy of the additional evidence and/or brief be sent to the AAO by mail or fax within five business days, along with evidence of the date it was originally filed with this office. Counsel replied with a brief and additional evidence, but he did not submit additional evidence regarding the petitioner's continuing ability to pay the proffered wage.

position of administrator, social welfare. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	blank
	High School	blank
	College	blank
	College Degree Required	**Post** Graduate (M.A.)
	Major Field of Study	Social Work

The applicant must also have five years of training in family social services and five years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A. As this is a public record, the information will not be recited in this decision. Item 15 of Form ETA 750A requires the ability to develop social programs for senior citizens of South American origin.

The beneficiary set forth her credentials on Form ETA-750B and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information of the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), she represented that she received a degree in social work from U.C.V. Caracas after attending that university from January 1981 to December 1988, that she received a post-graduate degree in social work from U.C.V. Caracas after attending that university from March 1987 to March 1991,[6] and that she received a degree in psychology from Universidad Simon Bolivar after attending that university from January 1994 to January 1998. Further, on Part 15, eliciting information of the beneficiary's work experience, she represented that she worked 40 hours per week as a Social Worker II at Universidad Simon Bolivar from October 1991 to the date she signed the Form ETA-750B on April 20, 2001. She also represented that she worked as a social worker for Instituto Nacional Del Menor in Caracas, Venezuela, from March 1988 to October 1991. She does not provide any additional information concerning her employment background on that form.

The record of proceeding also contains a Form G-325, Biographic Information sheet signed by the beneficiary on August 24, 2002, and submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form under a section eliciting information about the beneficiary's last occupation abroad, she represented that she worked as a Social Worker at Universidad Simon Bolivar from October 1991 to July 2000.[7]

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[6] The petitioner does not explain how the beneficiary began her post-graduate work in March 1987 prior to completing her undergraduate work in December 1988.

[7] On Form ETA 750B, the beneficiary indicated that she worked as a social worker at Universidad Simon Bolivar through April 20, 2001. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The regulations define a third preference category professional as a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." *See* 8 C.F.R. § 204.5(l)(2). The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

> If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

The above regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

On appeal, counsel submits the beneficiary's Licentiate in Social Work issued by Universidad Central de Venezuela on November 30, 1988. Counsel also submits a diploma dated January 23, 1988 from Universidad Simon Bolivar indicating that the beneficiary has obtained the title of Specialist in Counseling Programs and Human Development. On appeal, counsel also submits a copy of an evaluation of the beneficiary's education and experience dated July 20, 2006 from First L.E.E.G.A.L. Institute of Florida indicating that the beneficiary's education and experience in Venezuela is equivalent to a Bachelor's degree in Science and Social Work from an accredited college or university in the United States. The evaluation is based on the beneficiary's education at Universidad Central de Venezuela and Universidad Simon Bolivar. Therefore, the evaluation does not establish that the beneficiary has the education required by the ETA 750, namely a Master of Arts degree in Social Work.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation—*
>
> (A) *General.* 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.

On appeal, counsel submits an affidavit dated December 4, 1997, from the Director of Human Resources at Universidad Simon Bolivar indicating that the beneficiary "has rendered her services in this institution since 10/07/1991 and currently holds the position of Social Worker II assigned to the

Direction of Student Development." The affidavit does not confirm that the beneficiary has five years of training in family social services and five years of experience in the job offered.

The AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary had the required education and experience from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position, and the appeal will be dismissed for this additional reason.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd.* 345 F.3d 683.

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.