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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

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 31 2010

LIN 08 191 51254

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a residential care facility for the elderly. It seeks to employ the beneficiary permanently in the United States as a caregiver. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. The director determined that the petitioner has been debarred pursuant to §§ 212(n)(2)(C)(i) and (ii) of the Immigration and Nationality Act (the Act) and that, as a result, United States Citizenship and Immigration Services (USCIS) may not approve a nonimmigrant or immigrant petition with respect to the petitioner during the two-year debarment period from August 1, 2008 through July 31, 2010.

The record shows that the appeal is properly filed, timely 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.

As set forth in the director's October 27, 2008 denial, the primary issue in this case is whether or not the petitioner is eligible to file an immigrant petition during the period of its debarment.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

On appeal, counsel asserts that the petitioner's debarment included only H-1B nonimmigrant petitions, and that the petitioner is not precluded from filing immigrant petitions during the debarment period.[1]

However, despite counsel's assertion, the petition may not be approved pursuant to a May 11, 2009, Memorandum from [redacted], listing the petitioner as a debarred entity. Pursuant to [redacted], no immigrant visa petitions and no

[1] Counsel provides a one-sentence excerpt from the petitioner's Joint Motion for Approval of Settlement (Settlement Agreement) with DOL. The excerpt relates to the petitioner's debarment with respect to H-1B nonimmigrant petitions. However, the petitioner did not provide the entire Settlement Agreement and, therefore, the petitioner has not established based on the one-sentence excerpt from the Settlement Agreement that the petitioner's debarment solely relates to the filing of H-1B nonimmigrant petitions. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

H, L, O, or P-1 nonimmigrant visa petitions filed with respect to the petitioner shall be approved for a period of two years, commencing on August 1, 2008, and ending on July 31, 2010.[2]

The petitioner in this case was the subject of an investigation by the DOL in accordance with the H-1B provisions of the Act. *See generally* 20 C.F.R. § 655 related to Temporary Employment of Aliens in the United States; and 8 C.F.R. § 214.2(h) provisions related to H-1B nonimmigrants. The DOL determined that the petitioner was a willful violator of the H-1B program.[3] The Act mandates that USCIS shall not approve petitions filed with respect to the petitioner under sections 204 or 214(c) of the Act (8 U.S.C. §§ 1154 or 1184(c)) for a period of two years.[4]

Further, beyond the decision of the director,[5] the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position with a high school education. The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor

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[2] *See* http://www.uscis.gov/files/nativedocuments/organizations_ineligible_11may09.pdf (accessed March 11, 2010).

[3] *See* http://www.dol.gov/whd/immigration/H1BDebarment.htm (accessed March 11, 2010).

[4] Sections 212(n)(2)(C)(i) and (ii) of the Act, 8 U.S.C. §§1182(n)(2)(C)(i) and(ii). We note that certain statutes that preclude USCIS from approving applications effectively require that USCIS deny the application. For instance, the language of Sections 204(c), (d), and (g) of the Act all similarly provide that "notwithstanding [the relevant applicable subsections] . . . no petition shall be approved if [the following facts are present]." Further, on October 21, 1998, President Clinton signed into law the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, which incorporated several immigration-related provisions, including the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). ACWIA mandated new requirements for petitioners filing for H-1B beneficiaries. Pursuant to ACWIA, penalties were established for H-1B violations on a three tier system: (1) the first tier would encompass non-willful conduct, or less substantial violations such as failure to meet strike, lockout or layoff attestations; failure to meet notice or recruitment attestations; or misrepresentation of a material fact on a labor condition application, and would result in fines of not more than $1,000 per violation and result in the mandatory debarment of at least one year. *See* ACWIA § 413(a) incorporated at § 212(n)(2)(C)(i) of the Act; (2) willful violations, such as willful failure to meet any attestation condition; willful misrepresentation; or actions taken in retaliation against whistleblowers, which would result in a fine of not more than $5,000 per violation, and mandatory debarment of two years. *See* ACWIA § 413(a) incorporated at § 212(n)(2)(C)(ii) of the Act; and (3) willful violations that result in layoffs, such as a violation of the attestation, or misrepresentation of a material fact in the course where an employer displaces a U.S. worker, which would result in a fine not to exceed $35,000 per violation, and mandatory debarment of at least three years. *See* ACWIA § 413(a) incorporated at § 212(n)(2)(C)(iii) of the Act.

[5] 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).

certification application, 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). According to the plain terms of the labor certification application, the applicant must have completed high school.

The beneficiary set forth her credentials on the labor certification application and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification application eliciting information of the beneficiary's education, she represented that she completed high school at Notredame of Cotabato Girls Department in the Philippines in 1974.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of a unskilled worker that:

> (D) Other workers. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The petitioner failed to submit any evidence of the beneficiary's high school education, such as transcripts, a high school diploma or school registration documentation. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.[6] 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.

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[6] 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.