(b)(6)

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

DATE: NOV 0 3 2012 OFFICE: TEXAS 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,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a martial arts training and instructional facility. It seeks to employ the beneficiary permanently in the United States as a Tae Kwon Do Master. As required by statute, the petition is accompanied by labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the petition requires at least two years of training or experience and, therefore, that the beneficiary cannot be found qualified for classification as a skilled worker. The director denied the petition accordingly.

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 June 2, 2009 denial, at issue in this case is whether or not the petitioner has established that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

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)(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.

The regulation at 8 C.F.R. § 204.5(l) provides in pertinent part:

> (4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

Here, the Form I-140 was filed on August 17, 2007. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional or a skilled worker.

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.[1]

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-

On appeal, counsel correctly asserts that the director erred in failing to consider all of the requirements set forth on the labor certification. In his June 2, 2009 decision, the director notes that the six month experience requirement set forth in Part H6 of the ETA Form 9089 falls short of meeting the requirement that a skilled worker petition require at least two years of training or experience. Part H4 of the labor certification requires "Other education" in the form of "attainment of 4th degree 'dan' or black belt." In his decision, the director failed to discuss the education requirement. Counsel asserts that this requirement set forth in part H4 satisfies the provisions of the skilled worker classification. In support of his assertions on appeal, counsel submits a letter from the beneficiary's former taekwondo instructor and information regarding the attainment of taekwondo levels of achievement. Also submitted is evidence to establish that the beneficiary achieved the 4th *dan* level on April 6, 1997.

The August 3, 2007 letter from President of states the following in pertinent part:

> *From March 10, 1994 until April 6, 1997, was educated, under my instruction and supervision, for approximately three hours per day, five days a week, in order to obtain his 4th dan in Tae Kwon Do, which he earned in April 1997. Please be advised that the standard time to devote to dan education and instruction is one to three hours per day, five days a week.*

Also on appeal, counsel submits information from Kukkiwon, the "World Taekwondo Headquarters" found on www.kukkiwon.or. The submitted information states that the time required to be promoted from third to fourth *dan,* is three years, and that one must be either 21 or 18 years old and above, depending on whether one is starting the training as a *dan* (black belt) or as a *poom* (junior black belt).

Counsel also submits print outs of the "Taekwondo" and "World Taekwondo Federation" entries from Wikipedia.org, the online encyclopedia. Counsel highlights the sections of the articles that deal with promotions between *dans*. The "Taekwondo" article states that, "…promotion from one *dan* to the next can take years." However, the article also states that, "Taewkondo organizations have their own rules and standards when it comes to ranks and the titles that go with them."

290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case 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).

[2] ETA Form 9089 signed by the beneficiary on September 6, 2006 states that he studied for the 4th *dan* at rather than at It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Additionally, the article states that, "Many of the older and more traditional schools will often take longer to earn rank [than in] newer, more contemporary schools[,] as they may not have standard testing intervals."

While the submitted evidence indicates that it can take three years for a promotion to fourth *dan*, a "year" is not specifically defined. The beneficiary's instructor, indicates that for the beneficiary, the training received was between 5 and 15 hours per week, or between 260 and 780 hours per year. In comparison, a 40 hour work week equals 2080 hours per year.

It is also noted that the submitted printout from Kukkiwon, "Article 17: Privileges" and "Article 18: Permission of Similar Dan certificates and Jump-up Promotion," lists circumstances in which promotion from one *dan* to the next may be accelerated, such as a university major in Taekwondo, or an "Explanatory recommendation by the president of the Member National Association."

Further, Part F of the ETA Form 9089 indicates that the DOL assigned the occupational code of 39-9031.00 and title 'Fitness Trainers & Aerobics Instructors' to the proffered position. The DOL's occupational codes are assigned based on normalized occupational standards. The occupational classification of the offered position is determined by the DOL (or applicable State Workforce Agency) during the labor certification process, and the applicable occupational classification code is noted on the labor certification form. O*NET is the current occupational classification system used by the DOL. Located online at http://online.onetcenter.org, O*NET is described as "the nation's primary source of occupational information, providing comprehensive information on key attributes and characteristics of workers and occupations." O*NET incorporates the Standard Occupational Classification (SOC) system, which is designed to cover all occupations in the United States.[3] The O*NET online database states that this occupation falls within Job Zone 3. According to the DOL, one or two years of training involving both on-the-job experience and informal training with experienced workers are needed for Job Zone 3 occupations. The DOL assigns a standard vocational preparation (SVP) of 6 to Job Zone 3 occupations, which means "[m]ost occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree. http://www.onetonline.org/link/summary/39-9031.00 (accessed October 29, 2012). Thus, the occupation does not require at least two years of training or experience based on normalized occupational standards that DOL assigned to the labor certification in the instant case.

Given all of the above, the evidence submitted on appeal indicates that the requirements for achievement of a 4th *dan* ranking are not consistent or standardized. Furthermore, the definition of a year spent in training appears to represent only 12.5% to 37.5% of a standard work year. Finally, the occupation does not require at least two years of training or experience based on normalized occupational standards. Thus, the evidence submitted does not establish that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

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[3] *See* http://www.bls.gov/soc/socguide.htm.

Evidence of the Beneficiary's Qualifications

Beyond the decision of the director, the petitioner has not established that the beneficiary possessed the six months of experience by the priority date as required by the terms of the labor certification. The petitioner must demonstrate that the beneficiary possessed all of the requirements stated on the labor certification as of the August 14, 2006 priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

The labor certification states that the offered position requires six months of experience as a Tae Kwon Do Master. Part K of the labor certification states that the beneficiary qualifies for the offered position based on experience as a Tae Kwon Do Master with from April 2, 2001 to April 30, 2003.

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.

The record contains an experience letter from President, on letterhead, stating that the company employed the beneficiary as a Tae Kwon Do Master from April 2001 until April 2003.

However, according to the letter, was not affiliated with at the time the beneficiary was employed there. Additionally, the letter does not indicate how many hours per week the beneficiary worked.

Furthermore, Form G-325 Biographic Information, signed by the beneficiary on August 16, 2007, states that he began working at in August 2002, not April 2001. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not resolved these inconsistencies in the record.

Therefore, the evidence in the record does not establish that the beneficiary possessed the six months of experience by the priority date as required by the terms of the labor certification.

Beneficiary's Relationship to the Petitioner

In addition, it appears from the evidence in the record that the beneficiary of the petition is the petitioner's shareholder. The petitioner's 2006 Form 1120, U.S. Corporation Income Tax Return, states at Schedule K, Statement 5, that the shareholders of the petitioner are and the beneficiary, The beneficiary's IRS Form W-2 for 2006 indicates that the petitioner paid him $22,400. The petitioner's 2006 Form 1120 indicates that the cost of goods sold was $0, salaries and wages paid was $0, costs of labor was $0, and compensation of officers was $25,000. Schedule E, Compensation of Officers, was left blank. Therefore, it appears that the beneficiary was also paid as an officer of the petitioner in 2006.

Under 20 C.F.R. § 626.20(c)(8) and §656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000).

The ETA Form 9089 specifically asks in Section C9: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" If the petitioner's owner or corporate officer is related to the beneficiary, or if the beneficiary owns a share of the petitioner, the petitioner should have indicated, "yes" to this question. Instead, the petitioner checked "no" to this question.

The PERM regulation specifically addresses this issue at 20 C.F.R. § 656.17(l) that states in pertinent part:

> (l) Alien influence and control over job opportunity. If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation:
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> (1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
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> (2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;
>
> (3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and

(4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.

(5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

If the petitioner failed to check the appropriate box on ETA Form 9089, DOL would not be allowed an opportunity to audit and assess the nature of the beneficiary's relationship to the petitioner and the extent of the alien's influence and control over job opportunity. Therefore, a material issue in the case is whether the petitioner failed to disclose the beneficiary's ownership of the petitioner.

The failure to disclose the beneficiary's ownership of the petitioner constitutes willful misrepresentation. Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. *See* Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

A material issue in this case is whether the petitioning entity disclosed any relationship between the petitioning entity and the beneficiary. Failure to notify DOL amounts to a willful effort to procure a benefit ultimately leading to permanent residence under the Act. *See Kungys v. U.S.*, 485 U.S. 759 (1988), ("materiality is a legal question of whether "misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect the official decision.") Here, the omission of the beneficiary's status as a shareholder in a small corporation would constitute a willful misrepresentation that would have adversely impacted DOL's adjudication of the ETA Form 9089.

Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon 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). If the petitioner wishes to pursue this matter further, the beneficiary's ownership of the petitioner must be addressed.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.