



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: JUN 25 2013 Office: TEXAS 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 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, Texas Service Center (the director), denied the employment-based immigrant visa petition. The director also dismissed a motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an IT rehabilitation and clinical staffing business. It seeks to employ the beneficiary permanently in the United States as an occupational therapist supervisor. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not meet the job qualifications stated on the labor certification. Specifically, the director determined that the labor certification required at a minimum a bachelor's degree in occupational therapy and five years of progressive post-baccalaureate experience. The director further determined that the petitioner submitted evidence to establish that the beneficiary had been awarded a bachelor's degree equivalent, but that the evidence failed to show that the beneficiary has the five years of progressive qualifying experience to show equivalence to an advanced degree.

On appeal, counsel asserts that the beneficiary meets the minimum experience required for the position in that her work experience and training has been progressive. The petitioner has submitted evidence to show that the beneficiary possesses a Bachelor of Science Degree in Occupational Therapy from the [REDACTED] in the Philippines on March 25, 2003. The petitioner has also submitted employment letters pertaining to the beneficiary's work experience.

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.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The issue in this case is whether the beneficiary's bachelor's degree and work experience constitute a U.S. advanced degree or a foreign degree equivalent and meet the requirements of the labor certification.

As noted above, the DOL certified the ETA Form 9089 in this matter. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified, and available and

whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. See *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the alien labor certification, nor may it impose additional requirements. See *Madany*, 696 F.2d at 1015. USCIS must examine “the language of the labor certification job requirements” in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in an alien labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. See *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the alien labor certification must involve reading and applying *the plain language* of the alien labor certification application form. See *id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the alien labor certification that the DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the alien labor certification.

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

- H.4. Education: Master’s Degree in Occupational Therapy.
- H.5. Training: None required.
- H.6. Experience in the job offered: None required.
- H.7. Alternate field of study: Yes.
- H.7-A Major field of alternate study: Occupational Therapy or related.
- H.8. Alternate combination of education and experience: Yes.
- H.8-A Alternate level of education required: Bachelor’s Degree.
- H.8-C Number of years of experience acceptable: Five years.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: Accepted.
- H.10-B Job title of the acceptable alternate occupation: Occupational Therapist or related
- H.14 Specific skills or other requirements: Must be eligible for PA OT licensure. Any suitable combination of education, experience, or training is acceptable.

As noted above, the beneficiary possesses a bachelor of science degree in occupational therapy from The University of [REDACTED] conferred on March 25, 2003, which is the foreign equivalent of the requisite bachelor's degree.¹

Line H.11 describes the job duties of the position in part as:

- **Supervision and Management 60%:** Supervise the delivery of occupational therapy programs to patients. Provide guidance and monitor the performance of the occupational therapy staff. Responsible for the direction and supervision of OT services as related to patient care and safety, and ensure clinical excellence. Use experience and judgment to plan and accomplish goals. Lead and directs the work of others. Direct therapists to help patients to eventually live in an independent, productive and satisfying manner.... Management and mentoring of field PT and OT staff, reviewing all clinical documentation, monitoring quality assurance, overall case management, along with involvement in recruiting of additional therapy staff. Managerial office-based role, with a requirement for a small caseload in the field to allow hands-on care and build relationships with clients. Provide training and supervision in therapy techniques and objectives for students and nurses and other medical staff.
- **Planning & Assessment 20%:** Assess, plan, organize, and participate in rehabilitative programs that help restore vocational, homemaking, and daily living skills, as well as general independence, to disabled persons. Complete and maintain necessary records. Evaluate patients' progress and prepare reports that detail progress.
- **Direct Patient Occupational Therapy Work 20%:** Test and evaluate patients' physical and mental abilities and analyze medical data to determine realistic rehabilitation goals for patients. Select activities that will help individuals learn work and life-management skills within limits of their mental and physical capabilities. Plan, organize, and conduct occupational therapy programs in hospital institutional, or community settings.... Recommend changes in patients' work or living environments, consistent with their needs and capabilities. Consult with rehabilitation team....

The beneficiary set forth her credentials on the labor certification 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 eliciting information of the beneficiary's five years of work experience in the job offered, she represented the following:

¹ The AAO notes that the record contains a copy of the beneficiary's diploma and transcript, as well as a credential evaluation concluding that the beneficiary possesses the foreign equivalent of a bachelor's degree in occupational therapy from a U.S. college or university.

- That she was employed by [REDACTED] as a staff occupational therapist from August 1, 2005 to December 31, 2006. The beneficiary described her job duties.
- That she was employed by [REDACTED] as a staff occupational therapist from January 1, 2007 to October 20, 2008. The beneficiary described her job duties.

The beneficiary indicated at K.9 Job1 of the labor certification that she was employed by the petitioner as an occupational therapist from October 21, 2008 to the present and that her job duties consisted of the following:

- Conducts screening and evaluation to students upon referral - 12%.
- Select a screening/evaluation method that is appropriate to the student's age and developmental level - 10%.
- Accepts referrals for assessment or assessment with intervention in performance areas, performance components or performance context - 3%.
- Provides school-based Occupational therapy interventions - 40%.
- Consults to teachers regarding student's classroom accommodations and strategic techniques - 5%.
- Documents student's progress, re-evaluation and individualized educational program - 20%.
- Attends and participates to team meetings, parent and staff meeting - 5%.
- Recommends home programs to parents - 5%.

The petitioner submitted a letter dated July 29, 2011 from its vice president who specified the beneficiary's job duties with the petitioner as noted above.

In response to question J.21, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested," the petitioner answered "no." The petitioner specifically indicates in response to question H.8-C that five years of progressive work experience in the job offered or in a related field is required. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable² and the terms of

² A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

5) For purposes of this paragraph (i):

- ...
- (ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation.

The beneficiary indicated that her position with the petitioner was as an occupational therapist and inferred that her job duties were not substantially comparable to the proffered position of occupational therapy supervisor. Although the beneficiary indicated on the labor certification the percentage of time she spent performing each job duty for the petitioner, the record of proceeding contains a copy of the beneficiary's resume in which she indicated that she was employed by the petitioner since October 2008, and was outsourced by the petitioner to eight different client locations from 2008 to the present. Therefore, it does not appear that the beneficiary directly performed any job duties for the petitioner. The petitioner submitted an employment letter from [REDACTED] vice president of the petitioner, who stated that the petitioner employed the beneficiary as an occupational therapist since October 21, 2008, and that the company intends to promote the beneficiary to occupational therapist supervisor upon her receipt of her green card. The petitioner also submitted an employment letter dated March 6, 2012 from [REDACTED], vice president of the petitioner, who stated that the beneficiary has provided occupational therapy services to the company since December 22, 2008 and that her supervisory position will not be substantially compatible to the position she currently holds.

In addition, the record is devoid of independent objective evidence specifically detailing the beneficiary's job duties at each of the eight work sites or that she performed the same job duties the same percentage of the time at each client site. Therefore, in the absence of specified job duties or experience gained by the beneficiary while outsourced by the petitioner, it cannot be determined whether the experience gained by the beneficiary is in the position offered and is not substantially comparable. Accordingly, the AAO finds that the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position.

In support of the beneficiary's other claimed experience, the petitioner submitted the following evidence:

- A letter dated May 23, 2011 from the owner of [REDACTED] who stated that the company employed the beneficiary as an occupational therapist (OT) from January 22, 2007 to October 17, 2008. The declarant described the beneficiary's job duties in part as: evaluating and treating patients; helping patients improve their ability to perform tasks; using treatment to develop, recover, or maintain the daily living and work skills of patient; helping clients improve basic motor functions and reasoning abilities and to compensate for permanent loss; and supervising COTAs every certain number of visits to ensure implementation of treatment plan of patients. The AAO notes that the dates of employment provided on the letter are inconsistent with the dates of employment listed by the beneficiary on the ETA Form 9089 which were January 1, 2007 to October 20, 2008.
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- An undated letter from [REDACTED] who stated that he was the president of the [REDACTED] and that the company employed the beneficiary as an occupational therapist from November 7, 2005 to December 26, 2006. The declarant stated in part that the beneficiary was responsible for evaluating and assessing clients with physical neurological dysfunction; providing intervention to help clients improve their capacity with ADL task performance; educate clients with various techniques for occupational; performance deficits; provided work hardening to prepare for return to work; collaborate with team members to assure proper plan of treatment was being implemented; and performed direct monitoring/supervision of OT students/ level 1 fieldwork OT. This letter is inconsistent with the letters written by [REDACTED] on two other letters in the record dated June 27, 2011 and January 28, 2011 which are discussed below. Further, the dates are inconsistent with the dates of employment listed by the beneficiary on the ETA Form 9089 which were August 1, 2005 to December 31, 2005.
- A copy of a certification letter dated June 27, 2011 from [REDACTED] who indicates that he is a department head for the [REDACTED], and that the beneficiary served as a volunteer occupational therapist at the [REDACTED] from August 2005 to October 2005. This letter is inconsistent with [REDACTED] letters as noted above. This letter also fails to comply with 8 C.F.R. § 204.5(g)(1) in that it is not on company letterhead, it is not on company letterhead, it is not signed, it does not specify the beneficiary's dates of employment, and it does not contain a description of the beneficiary's job duties. Furthermore, the beneficiary indicated on her resume that she was employed by [REDACTED] as a "staff occupational therapist" from August 2005 to December 2006; and under penalty of perjury stated on the ETA Form 9089 that she was employed as a "staff occupational therapist" from August 1, 2005 to December 31, 2006. Lastly, there is no evidence in the record to demonstrate whether the beneficiary volunteered on a full-time or part-time basis, whether she sought outside employment to compensate her while she served as a volunteer, or the nature of her work experience as a volunteer.
- A copy of a certification letter dated January 28, 2011 from [REDACTED] who stated that he is the president of the [REDACTED]; and that the beneficiary was employed by the company as staff occupational therapist from November 7, 2005 to December 26, 2006. This letter is inconsistent with Mr. [REDACTED] other letters as noted above. This letter also fails to comply with 8 C.F.R. § 204.5(g)(1) in that it is not on company letterhead, it does not contain a company address, and it does not contain a description of the beneficiary's job duties. The declarant's statement is also inconsistent with the beneficiary's statement made under penalty of perjury on the ETA Form 9089 where she stated that she was employed as a "staff occupational therapist" from August 1, 2005 to December

31, 2006. It is also inconsistent with the statement that she made on her resume as noted above. There has been no explanation given for these inconsistencies.

- A copy of the beneficiary's Occupational Therapy license issued by the Department of State in Pennsylvania on [REDACTED] 2008, with an expiration date of June 30, 2013.
- A copy of a certificate from The National Board for Certification in Occupational Therapy, Inc. (NBCOT) that states that the beneficiary has satisfied the Certification Renewal Requirements for the Credential of Occupational Therapist Registered OTR and that the certificate is valid through March 31, 2014.
- A copy of a certificate from NBCOT that states that the beneficiary is being awarded the VISA Credential Verification Certificate for the Occupational Therapist and that the certificate is valid through April 14, 2016.

On appeal the petitioner submitted the following evidence:

- A letter dated July 29, 2011 from [REDACTED], vice president of the petitioner, who stated that in her capacity, the beneficiary was responsible for: 12% - conducts screening and evaluation to students upon referral, 10% - selects a screening/evaluation method that is appropriate to the students age and developmental level, 3% - accepts referrals for assessment or assessment with intervention in performance areas, performance components or performance context, 40% - provides school-based occupational therapy interventions, 5% - consults to teachers regarding students classroom accommodations and strategic techniques, 20% - documents student's progress, re-evaluation and individualized educational program, 5% - attends and participates to team meeting, parent and staff meeting, and 5% recommends home programs to parents.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is March 17, 2011. *See Matter of Wing's Tea House*, 16 I&N Dec. 158. The information provided in the employment statements contradict each other and conflict with the beneficiary's statements on the ETA Form 9089 and Form G-325A. The job duties, job titles, and periods of time during which the beneficiary held certain positions change from one letter to the next. Crucially, the beneficiary is not credibly described as having performed the job duties of the proffered position or a related occupation. In addition, there has been no plausible explanation given for the blatant inconsistencies and contradictions contained in the statements made by [REDACTED]. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg'l Comm'r

1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

Moreover, as discussed above, the description of the beneficiary's work experience in all of the letters from [REDACTED] is too vague to establish that she has the required work experience in the job offered or in a related field. 8 C.F.R § 204.5(g)(1). 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. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is January 9, 2008. *See Matter of Wing's Tea House*, 16 I&N Dec. 158. There has been no plausible explanation given for the multiple inconsistencies and contradictions found in the record pertaining to the beneficiary's alleged employment with [REDACTED].

In addition, the petitioner has failed to demonstrate that the beneficiary's job duties while employed as an outsourced worker were not substantially compatible to the job duties of the proffered position. Based upon the multiple inconsistencies and contradictions in the record, the AAO is unable to determine whether the beneficiary's work experience was progressive in nature.

Accordingly, it has not been established that the beneficiary has the requisite five years of progressive post-baccalaureate experience in the job offered or that she is qualified to perform the duties of the proffered position. 8 C.F.R § 204.5(g)(1).

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).

Beyond the decision of the director, USCIS records indicate that the petitioner has filed over 430 immigrant and nonimmigrant petitions since the petitioner's establishment in 1996. Therefore, the petitioner must establish that it had sufficient funds to pay all the wages of all beneficiaries from the priority date and continuing to the present. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of his ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful

permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 750 job offer, the predecessor to the ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). Accordingly, even if the instant record established that the beneficiary possessed the required work experience specified on the labor certification, which it does not, the fact that there are multiple petitions would further call into question the petitioner's eligibility for the benefit sought.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.