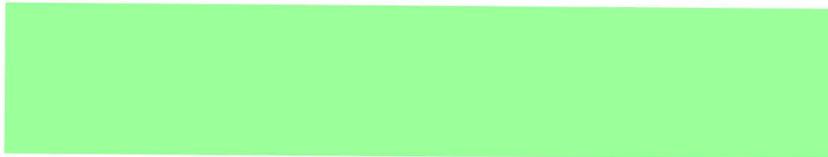




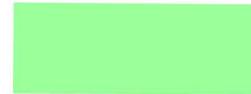
U.S. Citizenship
and Immigration
Services

(b)(6)

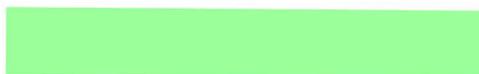


DATE: **JAN 03 2014** OFFICE: TEXAS SERVICE CENTER

FILE:

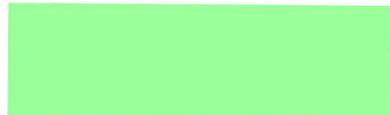


IN RE: Petitioner:
Beneficiary:



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)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(A)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn, and the petition will be remanded for further action, consideration, and the entry of a new decision pursuant to below.

The petitioner provides general contracting and construction management services. It seeks to permanently employ the beneficiary in the United States as a senior project manager. The petition requests classification of the beneficiary as a member of the professions holding an advanced degree pursuant to section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A).

The director found that the petition was not accompanied by a valid ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). Even if the labor certification had been valid, the director found that the petitioner failed to establish the beneficiary's educational and experience qualifications for the offered position stated on the labor certification and required for classification as an advanced degree professional. Accordingly, the director denied the petition on January 25, 2013.

On appeal, counsel argues that the director's decision ignores most of the evidence the petitioner submitted in response to the director's Request for Evidence (RFE), dated November 29, 2012. Counsel asserts that the petitioner's RFE response included copies of signed pages of its ETA Form 9089 rendering the labor certification valid, and evidence of the beneficiary's qualifications for the offered position and the requested classification.

The petitioner's appeal is properly filed and alleges an error in law or fact.¹ The record documents the procedural history of the case, which is incorporated into the record. The AAO will elaborate on the procedural history only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See, e.g., Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record.²

¹ The AAO exercises appellate jurisdiction over employment-based immigrant visa petitions, "except when the denial of the petition is based upon lack of a [labor] certification." 8 C.F.R. § 103.1(f)(3)(iii)(B) (2003); U.S. Dep't of Homeland Security Delegation No. 0150.1 (delegating to the AAO the authority to adjudicate appeals of the matters described at former 8 C.F.R. § 103.1(f)(3)(iii), effective March 1, 2003). The AAO interprets this exception to apply when a petition is filed without an ETA Form 9089 (or Form ETA 750 in the case of labor applications filed before March 24, 2005). In the instant case, an ETA Form 9089, certified by the DOL, accompanied the petition. The director found the labor certification invalid because the employer, the beneficiary, and counsel had not signed it. *See* 20 C.F.R. § 656.17(a)(1) ("[U.S. Citizenship and Immigration Services (USCIS)] will not process petitions unless they are supported by an original certified ETA Form 9089 that has been signed by the employer, alien, attorney and/or agent.") Because an ETA Form 9089 accompanied the petition, the AAO's jurisdiction over this appeal is not precluded.

When timely responding to a request for evidence, a petitioner may: submit all of the requested materials; submit a partial response and request a decision based on the record; or withdraw the petition. 8 C.F.R. § 103.2(b)(11).

All requested materials must be submitted together at one time, along with the original USCIS request for evidence or notice of intent to deny. Submission of only some of the requested evidence will be considered a request for a decision on the record.

8 C.F.R. § 103.2(b)(11).

The record shows that the director received only part of the petitioner's RFE response. The director considered the apparent partial response a request for a decision on the record pursuant to the regulation at 8 C.F.R. § 103.2(b)(11) and denied the petition.

The director's RFE, which was faxed to the petitioner, states that a response by either fax or mail is acceptable, but that "[r]esponse by facsimile is preferred." The RFE also states: "If reply is more than 25 pages, please fax in two parts."

On appeal, the petitioner provides copies of more than 60 pages it submitted in response to the RFE via facsimile on January 11, 2013. The documentation, which includes the USCIS RFE and copies of fax confirmation reports, shows that the petitioner, over a period of about 27 minutes, faxed its RFE response in three parts of 22 pages, 20 pages, and 21 pages, respectively. USCIS's file contains only the third, 21-page part of the submission. The cover sheets of all three parts state the petition's receipt number and the beneficiary's alien registration number. The cover sheets also identify the submissions as responses to an RFE and indicate that the total submission consists of three parts.

The record establishes that the director urged the petitioner to respond to the RFE by fax and represented his acceptance of faxed responses comprised of multiple parts of up to 25 pages each. Although the RFE did not specifically contemplate a faxed response of more than two parts, the petitioner substantially complied with the fax specifications stated on the RFE.

Arguably, the submission of a multiple-part fax violates the regulation at 8 C.F.R. § 103.2(b)(11), which requires a petitioner to submit all requested materials "together at one time." However, in the instant case, even if a multiple-part fax violates the regulation at 8 C.F.R. § 103.2(b)(11), the RFE effectively urged the petitioner to fax a multiple-part response. Dismissal of the appeal based on a regulatory violation that USCIS urged the petitioner to commit would be manifestly unfair. *See Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies

² The instructions to Form I-290B, Notice of Appeal or Motion, which 8 C.F.R. § 103.2(a)(1) incorporates into the regulations, allow for the submission of evidence on appeal. In the instant case, the record provides no reason to preclude the petitioner's evidence on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1998).

to follow their own procedures.”); *Montilla v. INS*, 926 F.2d 162, 167 (2d Cir. 1991) (failure of immigration agencies to follow their own procedures constituted “reversible error”).

Because the record shows that the RFE urged the petitioner to fax a multiple-part response and the director did not review all parts of the petitioner’s response, the AAO will withdraw the director’s decision.

However, the record does not establish that the petition is approvable.

A petition for an advanced degree professional must be accompanied by “an official academic record” showing that the alien has at least a U.S. master’s degree or a foreign equivalent degree, or a U.S. bachelor’s degree or a foreign equivalent degree followed by 5 years of progressive experience in the specialty. 8 C.F.R. 204.5(k)(3)(i). When the Service proposed these regulations, it stated that a “baccalaureate means a bachelor’s degree received *from a college or university*, or an equivalent degree.” 56 Fed. Reg. 30703, 30706 (July 5, 1991) (emphasis added); *cf.* 8 C.F.R. § 204.5(k)(3)(ii)(A) (aliens of exceptional ability must submit “an official academic record showing that the alien has a degree, diploma, certificate or similar award from a college, university, school or other institution of learning relating to the area of exceptional ability”).

For a professional petition in the third preference category, evidence of a baccalaureate degree must be in the form of “an official *college or university* record.” 8 C.F.R. 204.5(l)(3)(ii)(C) (emphasis added). USCIS cannot conclude that professional workers in a lower preference category than advanced degree professionals enjoy lesser requirements without violating Congress’ immigration preference scheme.

In the instant case, the petitioner and the beneficiary claim that he attended 4 years of post-secondary studies at [REDACTED]. But the beneficiary’s diploma-certificate states that it was issued by [REDACTED] an apparent professional organization. The record therefore does not establish that a college or university issued the beneficiary’s diploma-certificate.

Also, the record contains letters from [REDACTED] identifying the beneficiary by the first name of ‘[REDACTED]’ Other materials in the record - including the petition, the beneficiary’s application form for adjustment of status, and a copy of his birth certificate accompanying the adjustment application - identify his first name as “[REDACTED]’ The record contains no explanation for the discrepancies in the beneficiary’s name. The record therefore does not establish the beneficiary’s educational qualifications for the offered position or the requested classification.

In addition, the record contains letters from the beneficiary, a brochure about a company he founded, and letters from officials at other companies regarding his claimed 10 years of self-employment experience in Ireland. The brochure and the beneficiary’s letters indicate that he prepared these materials himself, raising questions about the independence, objectivity, and reliability of this evidence.

The record also contains a letter from a purported former employer of the beneficiary. The former employer's letter states that the beneficiary began employment there in December 1993, conflicting with the January 1, 1993 start date that the beneficiary states on the labor certification. The record therefore does not establish that the beneficiary possesses at least 5 years of experience in the job offered as stated on the labor certification, or at least 5 years of progressive, post-baccalaureate experience in the specialty as required for classification as an advanced degree professional.

Finally, a petitioner must demonstrate its continuing ability to pay the beneficiary's proffered wage from the petition's priority date until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2).

The record contains letters from the petitioner's chief financial officer, stating that the company has more than 100 employees and possesses the continuing ability to pay the beneficiary's annual proffered wage of \$167,856. *See* 8 C.F.R. § 204.5(g)(2) (allowing a director to accept a statement from a financial officer establishing a company's ability to pay where it employs 100 or more workers).

However, USCIS records show that the petitioner has filed at least 11 I-140 petitions for other beneficiaries since 2006. The petitioner must therefore demonstrate its ability to pay the combined proffered wages of the instant beneficiary and the beneficiaries of any other petitions that were pending from the priority date of the instant petition onward. *See* 8 C.F.R. § 204.5(g)(2); *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg'l Comm'r 1977).

The record does not identify the proffered wages of the other beneficiaries, the priority dates of the other petitions, or whether the petitioner paid the beneficiaries wages during the relevant years. The record also does not indicate whether any of the other petitions were withdrawn or denied without appeal, and whether any of the other beneficiaries have obtained lawful permanent residence. Therefore, the record does not establish the petitioner's continuing ability to pay the beneficiary's proffered wage from the petition's priority date onward.

Because the record does not establish the petition's approvability, the AAO will remand this matter for further consideration. The director should consider the issues mentioned above, and any other relevant issues he identifies. The director should afford the petitioner an opportunity to respond to any issues or evidence that USCIS has not previously identified.

ORDER: The director's decision of January 25, 2013 is withdrawn, and the petition is remanded for further action, consideration, and the entry of a new decision.