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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

B6

PUBLIC COPY

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 24
LIN-04-142-51979

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for Alien Worker as an Other Worker 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.

Robert P. Wiemann, 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 health care facility for handicapped children. It seeks to employ the beneficiary permanently in the United States as a "Disability Recreational Therapist (DOT: OES . A Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the beneficiary had the training required to qualify as a skilled worker for the offered position, and 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 or seasonal 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 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.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158 (Comm. 1977). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is July 15, 2003.

The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

The I-140 petition was submitted on April 19, 2004. On the petition, in Part 2, Petition type, the petitioner checked box "g" for "any other worker (requiring less than two years of specialized training or experience)." (I-140 petition, Part 2). *See* Act, § 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii).

In Part 5 of the petition, Additional information about the petitioner, the petitioner claimed to have been established in 1975, to currently have 140 employees, to have a gross annual income of "+$20 Million," and to have a net annual income of "+$889,000." (I-140 petition, Part 5). With the petition, the petitioner submitted supporting evidence. With the petition, the petitioner also submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B, signed by the beneficiary on March 12, 2004, the beneficiary did not claim to have worked for the petitioner.

In a June 24, 2005 decision, the director determined that the offered position requires the services of a skilled worker and that the beneficiary lacked two years of education or training relevant to the offered position. The director accordingly denied the petition.

On appeal, counsel submits a brief and additional evidence consisting of a list of the petitioner's previously-approved petitions. Counsel also submits copies of three AAO decisions in petitions submitted previously by the

petitioner which had been certified by the director to the AAO. Those decisions are not evidentiary documents, but are submitted as legal authority in support of the instant appeal.

Counsel states on appeal that the beneficiary's post-secondary education is not relevant to the offered position under the standards of previous AAO decisions in petitions submitted by the petitioner. But counsel states that the AAO should defer to the judgment of the Department of Labor which certified the instant petition with job qualifications which did not require post-secondary education to be in any particular field. Counsel also states that the petitioner has a constitutionally protected property right in the employment of its workers. Counsel states that Citizenship and Immigration Services (CIS) has determined that the position offered to the beneficiary qualifies for no employment-based classification, and that such a determination is a violation of due process guaranteed to the employer and is not supported by applicable regulations.

Finally, counsel states that the petitioner and the beneficiary have relied on prior approvals by CIS of similar petitions and that under the guidelines in an April 23, 2004 memorandum by William R. Yates, the same analysis should be applied by CIS to the instant petition. Counsel states that the beneficiary is in the United States and that after receiving her employment authorization card she was given a six-week training course by the petitioner. Counsel states that the beneficiary is a diligent and hard-working employee who has been unnecessarily harmed by the "re-adjudication" of the position offered to the beneficiary. (I-290B Addendum, at 2).

The AAO reviews appeals on a *de novo* basis. *See Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

To determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, blocks 14 and 15, sets forth the minimum education, training and experience that an applicant must have for the position of Disability Recreational Therapist. On the ETA 750A submitted with the instant petition, blocks 14 and 15 describe the requirements of the offered position as follows:

14.	Education (number of years)	
	Grade School	8
	High School	4
	College	2
	College Degree Required	Associates **
	Major Field of Study	**Any field**
	Training - yrs	n/a
	Experience	

Job Offered	Yrs	0
Related Occupation	Yrs	0
Related Occupation (specify)		None

15. Other Special Requirements

None
** U.S. Assoc Degree -or- Foreign Academic Equivalent -or- Employer will accept a combination of education and/or work experience in lieu of formal education that has been evaluated to be equivalent to a U.S. Assoc degree.

The beneficiary states his or her qualifications on Form ETA 750B. On the ETA 750B submitted with the instant petition, in block 11, for information on the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), the beneficiary states the following:

Schools, Colleges and Universities, etc.	Field of Study	From	To	Degrees or Certificates Received
New York, NY	Credential Evaluation	08/2003		U S Equivalent BS Elect&Com.Engr
The University of the East Manila, Philippines	Engineering	06/1977	03/1981	B.S. in Elect. & Comun. Engr.
Information Technical Institute Chicago, Illinois, USA	CNA	05/2003	06/2003	Basic Nursing Assistant

[remaining rows blank]

On the ETA 750B submitted with the instant petition, in block 15, for information on the beneficiary's work experience the beneficiary states the following:

Name and Address of Employer	Name of Job	From	To	Kind of Business
Unemployed		05/2002	Present	
Self-employed	Electronic Technician	05/1987	05/2002	

[remaining row blank]

The regulation at 8 C.F.R. § 204.5(l)(2) states in pertinent part:

> *Definitions.* As used in this part:
>
> *Skilled worker* means an alien who is capable, at the time of petitioning for this classification, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Relevant post-secondary education may be considered as training for the purposes of this provision.

Copies of three AAO decisions submitted on appeal discuss the portion of the regulatory definition of skilled worker which states, "Relevant post-secondary education may be considered as training for the purposes of this provision." 8 C.F.R. § 204.5(l)(2). Each of those decisions was issued on July 9, 2004. In those decisions, the AAO discusses the meaning of the word "relevant" in the foregoing definition and states, "for a beneficiary's post secondary education to be considered it must be logically related and have appreciable probative value as to the capacity of the beneficiary to perform the job duties on the basis of the educational qualifications alone." (AAO decision in LIN-03-110-55083, at 6). The AAO's reasoning was based on the definition of the term "relevant" found in Black's Law Dictionary, a definition which appears to address the meaning of that term as it relates to evidentiary questions. (AAO decision in LIN-03-110-55083, at 6, *quoting* Black's Law Dictionary 1293 (7th ed. 1999)).

None of the three cases submitted by the petitioner has been published as a precedent case. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Nonetheless, the analysis in the three decisions submitted by the petitioner of the skilled worker definition in the regulation at 8 C.F.R. § 204.5(l)(2) is reasonable.

Two of the decisions state that study "in various fields of health care" would be sufficient to qualify as relevant post-secondary education for the position of developmental disability specialist. (AAO decisions in LIN-03-067-51563, at 8, and in LIN-03-110-55083, at 8). The other AAO decision finds that the beneficiary's education in the field of medicine is sufficient for that occupation. (AAO decision in LIN-03-072-51157, at 7). The latter decision also states the following:

> The AAO is not suggesting that a post-secondary education other than a medical degree is not relevant as a number of other fields would have a substantial connection to the duties of a Developmental Disability Specialist as set forth in the ETA 750. Among the post secondary education likely to have such a connection would be areas of study involving teaching, various fields of health care, occupational training, or therapy.

(AAO decision in LIN-03-072-51157, at 8, fn. 5).

Concerning a suggestion by counsel that the classification of denied cases could be changed to that of unskilled workers, the AAO stated the following.

> The difficulty with accepting counsel's argument that [the] beneficiary should be considered as an "other worker" arises from the evidence already in the record with respect to the job duties and DOL's reliance upon that information in issuing the labor certifications.

> As noted previously, the petitioner is seeking to employ the beneficiary in the position of Developmental Disability Specialists (aka Teacher-Home Therapy). The Department of Labor, in the course of reviewing the offered position including the description of duties to be performed and the education, training, and experience required, classifies the position under the applicable Industry and Occupational Codes, and designates the appropriate Occupational Title. (See DOL endorsement on Part A of the ETA 750).
>
> As counsel has noted in the response submitted to the Service Center's Notice of Intent to Deny (NOID), the requirements specified for the position of DDS [Developmental Disability Specialist] were certified by the DOL indicating that those requirements were consistent with "those defined for the job in the Dictionary of Occupational Titles (DOT) including those for subclasses of jobs" citing 20 C.F.R. § 656.21(b)(2). Counsel further noted in her response that "[generally positions in the Labor Department's Dictionary of Occupational Titles with a Specific Vocational Preparation (SVP) code of seven or greater will be qualified as skilled" noting that the position of DDS has an SVP code of 7.

(AAO decision in LIN-03-110-55083, at 10).

The AAO then discussed an explanation of SVP code 7 in Appendix C of the Dictionary of Occupational Titles and stated the following:

> The appendix goes on to note that a position which has been assigned an SVP code of 7 is one which requires "over 2 years up to and including 4 years." Counsel also attached the Dictionary of Occupational Titles description corresponding to the DDT [sic] position which clearly provides an SVP code of 7.
>
> . . .
>
> The fact that the position, as contemplated by DOL through its classification process, is one that requires a certain amount of vocational preparation, leads us to conclude that it cannot at one time be a position for which there are requirements that lead DOL to assign it a fairly high SVP code of 7, yet can simultaneously be considered ones requiring no skills or training – and presumably a low SVP rating. Counsel herself acknowledges this when she states in response to the NOID, "we assert that the position of Developmental Disability Specialist is most appropriately classified as a 203(A)(b)(3)(i) skilled worker." Counsel's desire to have the petition considered under the unskilled worker category results not from an assessment that this is the correct petition category, but out of an understandable desire to address the client's needs. However, having made certain representations regarding the type of position and its requirements, counsel cannot now modify those representations. Furthermore, CIS has the obligation to ensure that the position is filled with a qualified worker. Because we conclude that the position's requirements corresponds [sic] to a skilled worker, and the beneficiaries do not have the necessary qualifications, the unskilled worker category cannot be used to accomplish the outcome that is otherwise unavailable.

(AAO decision in LIN-03-110-55083, at 10-11).

In the instant I-140 petition, the ETA 750 specifies the following duties for the position of Disability Recreational Therapist:

> Organize and direct medically approved recreation program for patients in pediatric mental retardation facility. Direct and organize activities to implement a continuous active treatment program for mentally and physically handicapped resident children to enable each individual to function as independently as possible and prevent skill regression. Regulate content of programs in accordance with patients' capabilities, needs and interests. Prepare progress charts and periodic reports to keep other members of the treatment staff fully apprized of patients developmental history.

(ETA 750, Part A, block 13).

In her June 24, 2005 decision, the director determined that the offered position requires the services of a skilled worker and that the petitioner had not established that the beneficiary had the training required to qualify as a skilled worker for the offered position, and denied the petition accordingly.

Based on the evidence in the record, the director's decision to deny the petition was correct.

The job duties described in the ETA 750 for the position of Disability Recreational Therapist are those of a skilled worker. The ETA 750 was certified by the Department of Labor with those job duties. The Department of Labor's job title for the occupation is "Recreational Therapist." The public Internet Web site of the Occupational Information Network contains information developed in coordination with the U.S. Department of Labor. The summary report for the job category "29-1125.00 – Recreational Therapists" classifies this job category as "Job Zone Four: Considerable Preparation Needed." The report states the following requirements for overall experience: "A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations." The report states the following requirements for job training: Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training." The report states a Specific Vocational Preparation (SVP)Range of "7.0 to <8.0." Occupational Information Network, *O*Net OnLine, Summary Report for : 29-1125.00 – Recreational Therapists*, http://online.onetcenter.org/link/summary/29-1125.00 (accessed November 21, 2006). The minimum SVP of 7.0 is the same as that for the position of developmental disability specialist, which is discussed above in the decision of the AAO in LIN-03-110-55083, which states that an SVP of 7 corresponds to a job which requires from two to four years of experience. (AAO decision in LIN-03-110-55083, at 10).

The offered position in the instant petition is not developmental disability specialist, but rather disability recreational therapist. Nonetheless, the job duties for the two positions contain many similarities. The position of developmental disability specialist includes the following duties, among others: "To develop and implement a continuous active treatment program for each profoundly mentally and physically handicapped resident to enable each individual to function as independently as possible and prevent skill regression." (AAO decision in LIN-03-110-55083, at 5, *quoting* ETA 750 in that petition). The position of disability recreational therapist includes the following duties, among others: "Organize and direct medically approved recreation program for patients in pediatric mental retardation facility. Direct and organize activities to implement a continuous active treatment program for mentally and physically handicapped resident children to enable each individual to function as independently as possible and prevent skill regression." (ETA 750 in the instant petition, block 13.)

The instant petition was filed under the "other worker" visa preference classification, rather than under the classification for skilled workers and professionals. The petition therefore has been filed under the incorrect classification, and must be denied.

The prior decisions of the AAO discussed above indicate that counsel had asserted that if the job qualifications stated on its Form ETA 750's were not sufficient to satisfy the regulatory definition of a skilled worker, then the offered positions with those job qualifications must qualify as "other worker" positions. Although that assertion by counsel may seem logical, it fails to place the employment-based immigrant visa process within the larger context of a program to grant visas to aliens for full-time permanent positions in the United States for which qualified United States workers cannot be found.

In the instant petition, the stated job requirements on the ETA 750 of an Associate's degree in "Any field" if taken literally would allow for study in fields with no reasonable connection to the duties of a disability recreational therapist. Such an interpretation of the petitioner's job requirements has been rejected by the AAO in its previous decisions, as discussed above.

Counsel states that policies applicable to non-immigrant visas, as set forth in a memorandum of April 23, 2004 by William R. Yates, Associate Director for Operations, CIS, should also be followed for immigrant visas. The April 23, 2004 memorandum advises CIS officers adjudicating petitions for extensions of non-immigrant status to defer to the approval decisions made on the original non-immigrant visa petitions, absent material error in the previous decisions or a substantial change in the circumstances affecting the alien's non-immigrant status. Nothing in that memorandum pertains to immigrant visas, nor is the reasoning of that memorandum inconsistent with the approach taken by the director in the instant petition. Therefore, the April 23, 2004 memorandum by William R. Yates provides no support for the petitioner's position in the instant appeal.

Counsel also states that CIS has approved other petitions that had been previously filed on behalf of other beneficiaries. If previous immigrant petitions were approved based on similar evidence that is found in the current record, the approvals would constitute error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the immigrant petitions on behalf of other beneficiaries, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*. 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

In her decision, the director evaluated the qualifications of the beneficiary and found that those qualifications failed to establish that the beneficiary was a skilled worker qualified for the offered position of Disability Recreational Therapist. The analysis of the director on the issued of qualifications for a skilled worker position was correct, because the regulations require that education must be relevant to the duties of the offered position where the petition is for a skilled worker. Although the analysis by the director was correct on that issue, such an analysis was unnecessary in the instant petition, since the petition was filed under the incorrect preference classification as an "other worker." Nonetheless, the decision of the director to deny the petition was correct. For the reasons discussed above, the assertions of counsel on appeal fail to overcome the decision of the director.

In summary, the evidence indicates that the petition was filed under the incorrect visa preference category for an "other worker," for an unskilled worker, rather than under the preference category for a skilled worker. The petition therefore must be denied.

Beyond the decision of the director, the record in the instant petition lacks acceptable evidence of the petitioner's ability to pay the proffered wage. 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*, 299 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).

The record contains a copy of a Certificate of Solvency on the petitioner's letterhead, signed by Certified Public Accountant. However, that certificate does not state that Mr. is a financial officer of the petitioner, as required by the regulation at 8 C.F.R. § 204.5(g)(2). Other petitions submitted by the same petitioner have included copies of audited financial reports, which constitute an acceptable form of evidence. *See* 8 C.F.R. § 204.5(g)(2). However, no audited financial reports or other acceptable form of evidence pertaining to the petitioner's ability to pay the proffered wage has been submitted in the instant petition.

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