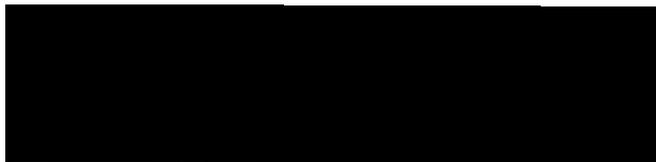


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



B6

FILE: [REDACTED]
SRC 07 065 51913

Office: TEXAS SERVICE CENTER

Date: MAR 05 2009

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

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

The petitioner is a transportation and tourism firm. It seeks to employ the beneficiary permanently in the United States as a tour guide. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director concluded that the petitioner had failed to demonstrate that the beneficiary possessed the requisite qualifying experience as of the visa priority date, and denied the petition accordingly.

On appeal, the petitioner, through counsel, provides additional evidence and maintains that the petitioner has demonstrated that the beneficiary's work experience meets the requirements of the approved labor certification.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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.

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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least

two years of training or experience.

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the ETA Form 9089 is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on August 24, 2005.

Part 5 of the Immigrant Petition for Alien Worker (I-140), which was filed on January 5, 2007 indicates that the petitioner was established on March 27, 2000, and employs two workers. It is noted that the beneficiary signed the ETA Form 9089 on January 2, 2007. In Part K under "Alien Work Experience," the beneficiary states that his current employer is "[REDACTED]." The address is listed as "[REDACTED]" in Orlando, FL 32821. He states that this business is a customized embroidery business and that he began working for it on February 2, 2002. He claims that his job title is "manager" and that he works 40 hours per week. Part K-9 describes the beneficiary's current duties as being responsible for all the company's management including cash register, payroll, employee scheduling, hiring and training staff, inventory control, banking, shipping merchandise and contact with suppliers.

It is noted that on Part C of the ETA Form 9089, the petitioner is identified as "[REDACTED]" in Vista, FL 32830-234. The federal employer identification number (FEIN) is "[REDACTED]". The corresponding 2005 federal income tax return found in the record with the same FEIN number was filed by "[REDACTED]" at the same address as that given for the employer on the ETA Form 9089. However, Schedule B-2 of the 2005 tax return does not describe the business activity as a transportation and tourism firm, but a retail trade business and describes the product or service as a "misc store retailer." It is further noted that almost all copies of multiple advertisements and advertisement proposals relating to a tourism business are either undated or dated in December 2006 and refer to 2006 or 2007. The only exceptions appearing in the record is the September 15, 2006 local licensing tax of \$30.00 paid in the name of "[REDACTED]" and "[REDACTED]" and a copy of an e-mail generated on May 27, 2005 by "[REDACTED]". This is all noted by this office, because it raises a question as to whether the flurry of advertising and licensing activity in late 2006 was associated with DOL's signing of the labor certification on December 13, 2006 and whether the travel and tourism business is or has been a going concern such that would support the beneficiary's or (petitioner's) intent to hire a tour guide at the proffered wage of \$9.71 per hour (annualized to \$20,196.80), away from his present job. When and if future proceedings may be pursued, further investigation should be conducted.

Part H of the ETA Form 9089 describes the education, training and experience that an applicant for the certified position must have. In this matter, Part H states that the only requirements for the

certified position of tour guide is 24 months of work experience in the job offered as a tour guide.¹ The duties of the certified position are described in Part H-11. It states that the applicant must be responsible for arranging transportation and other accommodations for tour groups and individual travelers, maily (sic) from Brazil. Accompanies and escorts on major tourist sites. Part H-14 lists a specific skill or other requirement as "must speak Portuguese."

Part B of the ETA 750 was signed by the beneficiary on May 17, 2002. Item 15 of Part B relates to the beneficiary's job experience. It instructs the alien to "list all jobs held during the last three (3) years. Also, list any other jobs related to the occupation for which the alien is seeking certification as indicated in item 9."

The beneficiary listed two jobs. The first one is discussed above. The only other job claimed by the beneficiary in Part K-9 of the ETA Form 9089 is as a tour guide for a travel agency in Brazil specified as [REDACTED]. Its address is [REDACTED] Ceara, Brazil. The beneficiary claims 40 hours per week employment with this employer beginning on May 10, 1992 and ending on July 5, 1998. His responsibilities in this job include responsibility for receiving passengers, transporting passengers with luggage to hotel destination and guiding them through various tourist places. These places are stated as fan tours, conventions, theme parks, coastal excursions, city tours, malls, and sightseeing.

Because this case relates to conflicting employment claims as appearing on Part B of a previously filed Form ETA 750² with a priority date of April 30, 2001 and signed by the beneficiary on April 27, 2001, it is useful to summarize his job history as claimed on this form. He lists three jobs. They are summarized as follows:

1. Employer; [REDACTED] located at [REDACTED] Ceara, Brazil; job title was tour guide; Hours Worked -40 hours per week; Dates of employment; From May 1992 to June 1998; Job duties described as "I used to travel back and fourth [sic] from Brazil to USA, sightseeing receiving people at the airport, showing around the theme parks, etc."
2. Employer; [REDACTED] located at [REDACTED] Pernambuco, Brazil.; job title was tour guide; Hours worked - 40 per week; Dates of employment; From August 1993 to October 1999; Job duties described as "I used to fly back and fourth [sic] with travel agencies from [REDACTED] agencies in Brazil and show them around Florida and theme parks."
3. Employer; [REDACTED] Fortaleza, Brazil; job title was English teacher; Hours worked - 40 per week; Dates of employment; From February 1995 to

¹ We accept this as the equivalent of two years experience as a tour guide.

² The employer identified on the Form 750 was [REDACTED]

May 1998; Job duties described as "I used to teach back in Brazil, teach English as a foreign language in high school and English courses."

On January 19, 2007, the director requested additional clarification from the petitioner. She explained that a letter from [REDACTED] and a letter from [REDACTED] had indicated that the beneficiary was employed 40 hours per week simultaneously for both companies in Brazil and Miami, Florida because the employment dates overlapped; with [REDACTED] as being from May 10, 1992 to July 5, 1998 and [REDACTED] as being from August 1993 to October 1999. Additionally, the director noted that the beneficiary's employment with [REDACTED] in Fortaleza, Brazil was claimed as 40 hours per week from February 1995 to May 1998 and asked the petitioner to explain how the beneficiary worked 120 hours per week (representing all three jobs) between February 1995 and May 1998.

At the outset, in support of the beneficiary's qualifying employment, the petitioner provided copies of employment verification letters to the underlying record. They may be summarized as follows:

1. From [REDACTED], of Fortaleza, Brazil; a letter, dated February 28, 2005, signed by [REDACTED], who does not designate her title. The letter states that the beneficiary was "employed by our agency as a tour guide from the period of May 10, 1992 to July 5, 1998." She describes the beneficiary's job duties as including everything from receiving passengers at the airport, transportation of passengers and luggage to hotel, guiding them through pre-paid packages that were purchased, including such destinations as theme parks, coastal excursions, sightseeing, shopping centers, conventions and fan tours. Ms. [REDACTED] adds that when he left, his gross monthly income was equivalent to \$1,200 per month, including tips, commissions and overtime.
2. In response to the director's request for evidence, [REDACTED] submits another letter, dated January 30, 2007, and identifies herself as a travel agent. She states that the beneficiary was [REDACTED]'s full-time employee (40) hours. He worked as a tour guide from May 10, 1992 until July 5, 1998. The job duties and compensation were also reiterated as in the February 28, 2005, letter. Ms. [REDACTED] adds that "[REDACTED] (among many others) was our legal American representative responsible for receiving the beneficiary and our groups in the event of seasonal trips to the United States. These trips normally were scheduled during December/January and July/August."
3. From [REDACTED] in Miami Florida; an undated letter from [REDACTED] as Tour Operator/Owner. He states that the beneficiary began with his company in August 1993 and departed in October 1999. His duties upon departure were "to include but not limited to a VIP escort for travel agencies from [REDACTED] to United States bound destinations, mostly to include trips to Florida, New York and Los Angeles."

4. From ██████████ in Orlando Florida; an undated letter signed by ██████████ who affirms the beneficiary's expertise as a tour guide but indicates that he never employed him.
5. From ██████████ the human resources director of ██████████ a letter, dated February 9, 2007, in response to the director's request for evidence. She states that the beneficiary worked as a "full-time teacher from February 1995 to May 1998." When he left, ██████████ states that he was making the equivalent of \$1,300 per month. She then indicates that the beneficiary was "employed by our language department giving English classes at night and on Saturdays."

The director denied the petition on March 19, 2007. Determining at most, the evidence suggested that the beneficiary had acquired experience performing the job offered from May 10, 1992 to August 1993, a total of 15 months. She additionally stated that the six months from July 6, 1998 and October 1999 could be counted. The director also noted that on Part B-11 of the previously certified Form 750, relating to schools, colleges and universities attended, the beneficiary had claimed that he had studied tourism at ██████████ from May 1992 to June 1997 and that he had received a certificate. He also claimed studying at Oxford University from October 10, 1993 to October 10, 1994.³ The director noted that conflict between the beneficiary's educational pursuits and the claimed employment. She additionally stated that the initial evidence suggested that during the period from August 1993 and July 5, 1998, the beneficiary worked 80 hours a week as both a tour guide in Brazil and as a tour guide ferrying clients from Brazil and the United States. The director also found that the evidence further suggested that between February 1995 and May 1998, the beneficiary worked an additional 40 hours per week as an English teacher at a high school in Brazil.

The director further observed that counsel's letter provided in response to the request for evidence, as well as the 2007 letter from ██████████ explained that the work for ██████████ was actually seasonal, four months per year, December/January and July/August. However, the director observed that this was inconsistent with the claim of full-time continuous employment as indicated on the employment/experience verification letter and on the previously certified ETA 750. The director also concluded that this did not explain how the beneficiary was a full-time English teacher in Brazil and also lead tour groups four months of the year in the United States. Based on the beneficiary's claims of full-time employment as an English teacher on nights and weekends plus an additional 40 hours per week working for ██████████, the director concluded that any evidence of the beneficiary's work experience from February 1995 to May 1998 lacks credibility.

On appeal, counsel submits copies of previously provided employment verification letters and additionally provides copies of photos, a copy of a certificate from Oxford University Press reflecting that the beneficiary attended a course in "thinking about reading" in Fortaleza. The

³ The current ETA Form 9089 contains no claim to formal education at Oxford or Mundialtur.

certificate is dated October 14, 1993. A copy of a certificate from [REDACTED] indicates that from May 18 to June 30, 1996, the beneficiary participated in a tourism course.

Counsel submits another letter, undated, from [REDACTED] as president of [REDACTED]. He states that he completed the labor certification and signed it on behalf of the beneficiary. Mr. [REDACTED] further states that "at the time" we did not have an agent (lawyer) and filled out the form ETA-750 based on the best of our knowledge and accuracy." He apologizes for the mistakes relating to the beneficiary's work experience and listing of trainings and seminars in the part reserved for colleges and universities.

Counsel relies on this explanation from [REDACTED], as well as his interpretation of the employment verification letters, previously submitted, in an attempt to explain their intent. He asserts that none of the employment verification letters, either from [REDACTED] or [REDACTED] states that the experience gained by the beneficiary was based on continuous employment and offers a chart purportedly to explain which months of continuous employment in which years were performed in Brazil.

We do not find counsel's assertions on appeal to be persuasive. To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, United States Citizenship and Immigration Services (USCIS) is bound to follow the pertinent regulatory guidelines pursuant to 203(b)(3)(A)(i) of the Act. USCIS jurisdiction includes the authority to examine an alien's qualifications for preference status and to investigate the petition under section 204(b) of the Act, 8 U.S.C. § 1154(b). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by the DOL. *Madany 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 v. Coomey*, 662 F.2d 1 (1st Cir. 1981); *Denver v. Tofu Co. v. INS*, 525 F. Supp. 254 (D. Colo. 1981); *Chi-FengChang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989). 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 Dragon Restaurant*; 19 I&N Dec. 401, 406 (Comm. 1986).

In this case, it is noted that the beneficiary signed both the previous ETA 750 B and the current ETA Form 9089 under penalty of perjury. On the prior ETA 750 B, he claimed three past jobs that were full-time, 40 hours per week, with three Brazilian-located employers; [REDACTED], [REDACTED] and [REDACTED]. None of the jobs were stated to be intermittent or part-time. All of the dates of full-time employment overlapped. Dates of educational study related to schools, colleges or universities attended were significantly exaggerated, such as the representation that the beneficiary studied tourism for almost five years. The Form ETA 9089 similarly represents the beneficiary's job with [REDACTED] to be full-time from May 10, 1992 to July 5, 1998 and does not mention that it involves duties in the U.S. or with another employer. The initial employment verification letter from [REDACTED] is signed by a person who is not identified as a trainer or employer pursuant to the requirements set forth at 8. C.F.R. § 204.5(l)(3). Ms. [REDACTED], who also submitted the first letter, also fails to explain until her second

letter that the beneficiary's experience was not the result of continuous employment but was subject to intermittent trips to the United States "normally scheduled during December/January and July/August." We find that continuous employment with [REDACTED] was clearly implied on both the prior ETA 750 B and the ETA Form 9089 where the beneficiary claimed full-time employment from either May 1992 until June 1998 (ETA 750) or from either May 10, 1992 until July 5, 1998 (ETA Form 9089).

Regarding the undated letter from [REDACTED] in Miami, Florida, it is noted that [REDACTED] letter fails to acknowledge any legal relationship with Mundialtur or to confirm whether the beneficiary's employment was full-time, part-time or seasonal with his company.

Finally, the letter from [REDACTED] in Brazil adds an additional layer of conflicting employment dates where she states that the beneficiary taught English full-time from February 1995 to May 1998, but then states that he worked at night and on Saturdays. This raises a question as to whether this was actually 40 hours a week as implied by the professor and claimed by the beneficiary on the prior ETA 750 B, or whether it was actually a part-time job. The petitioner also fails to answer how the beneficiary managed this employment along with the beneficiary's tour guide trips to the United States, which were claimed during the same period and as observed by the director.

Based on the above, the AAO finds none of these employment verification letters to be reliable or probative of the beneficiary's claimed full-time work experience as a tour guide, in view of the beneficiary's claims on the prior ETA 750 B in contrast to those set forth on the ETA Form 9089, as well as the discrepancies discussed above. Counsel's assertions in this regard do not constitute evidence. *See Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). It is noted that 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. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Given the lack of reliable documentation, provided to corroborate the beneficiary's qualifying employment, this office concurs with the director's assessment that the petitioner has not established that the beneficiary possessed the requisite work experience as of the priority date.

Beyond the decision of the director, it is noted that the regulation at 8 C.F.R. 204.5(g)(2) requires a petitioner to establish its *continuing* ability to pay the proffered wage as of the priority date. In this case, the petition was filed on January 5, 2007. The priority date of August 24, 2005 was established by the ETA Form 9089. The only financial documentation provided is a copy of the petitioner's 2005 federal tax return. The record contains no evidence related to 2006. As the record currently stands, the petition is not eligible for approval on this basis.

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 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.