

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

B6

FILE:

Office: NEBRASKA SERVICE CENTER

Date: OCT 29 2010

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must 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, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed.

The petitioner claims to be a gas station and convenience store. It seeks to permanently employ the beneficiary in the United States as a management trainee. The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).<sup>1</sup>

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is December 6, 2006, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

As set forth in the director's May 6, 2008 denial, the primary issue in this case is whether the beneficiary can be classified as a skilled worker. The AAO will also consider whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.<sup>2</sup>

The AAO maintains plenary power to review each appeal on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

The petitioner appealed the decision on June 9, 2008. On Part 2 of Form I-290B, Notice of Appeal or Motion, the petitioner indicated that a brief and/or additional evidence would be submitted to the AAO within 30 days. To date, the AAO has not received any brief or additional evidence. Part 3 of Form I-290B, the space allotted to identify any erroneous conclusions of law or fact in the decision, states: "A letter of Business Necessity will be submitted to show justification of educational/experience requirement." This statement does not provide a statement explaining any erroneous conclusion of law or fact. A business necessity letter is relevant to the DOL's labor certification process and does not address the grounds of the denial.

---

<sup>1</sup> Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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.

<sup>2</sup> 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 (9<sup>th</sup> 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 regulation at 8 C.F.R. § 103.3(a)(1)(v) states that the AAO "shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal." Inasmuch as the petitioner has failed to identify specifically an erroneous conclusion of law or a statement of fact in this proceeding, the appeal must be summarily dismissed.

Even if the AAO did not summarily dismiss the appeal, the appeal would have been dismissed on the merits. The instant petition requests classification of the beneficiary as a skilled worker. An unskilled worker is an alien who is capable of performing labor requiring less than two years training or experience. 8 C.F.R. § 204.5(l)(2). A skilled worker is an alien who is capable of performing labor requiring at least two years of training or experience. *Id.* The determination of whether a beneficiary is properly classified as a skilled worker or unskilled worker is based on the training and/or experience requirements of the offered position as set forth in the labor certification. 8 C.F.R. § 204.5(l)(4). The regulations also state that "[r]elevant post-secondary education may be considered as training for the purposes of this provision." 8 C.F.R. § 204.5(l)(2).

In the instant case, the labor certification states that the offered position requires one year of college education in any field of study, or, in the alternative, one year of college education in any field of study and one year of experience. Since an individual can qualify for the offered position with only one year of college education, the training and/or experience requirements of the offered position as set forth in the labor certification does not require a skilled worker.<sup>3</sup>

The petition would also have been denied for the petitioner's failure to establish its continuing ability to pay the proffered wage from the priority date. In order for the petition to be approved, the petitioner must establish that its job offer to the beneficiary is a realistic one. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). The regulation 8 C.F.R. § 204.5(g)(2) states:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

---

<sup>3</sup> Further, the one year requirement of college education in any field of study does not count towards the required two years of training and/or experience for skilled workers. The regulation at 8 C.F.R. § 204.5(l)(2) states that *relevant* post-secondary education may be considered as training. The regulations do not state that *any* post-secondary education may be considered as training. Post-secondary education in "any field" of study is not related to a management trainee position with a gas station and convenience store.

Therefore, the petitioner must establish that it has possessed the continuing ability to pay the proffered wage beginning on the priority date.

The proffered wage stated on the labor certification is \$15.28 per hour (\$31,782.40 per year). On the petition, the petitioner claimed to have been established in 1972, and to employ 13 workers. According to the tax returns in the record, the petitioner is structured as a C corporation with a fiscal year from October 1 to September 30.

The instant petition was filed on May 6, 2008. The record contains the petitioner's 2004 tax return, which covers a period from October 1, 2004 to September 30, 2005. This tax return predates the December 6, 2006 priority date by over a year. The regulation 8 C.F.R. § 204.5(g)(2) states that the petitioner must demonstrate its ability to pay the proffered wage "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence," and that the evidence of ability to pay "*shall* be in the form of copies of annual reports, federal tax returns, or audited financial statements." (Emphasis added.). The petitioner's failure to provide this evidence is, by itself, sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Thus, the evidence in the record does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petitioner has not specifically addressed the reasons stated for denial and has not provided any additional evidence. The appeal must therefore be summarily dismissed.

**ORDER:** The appeal is summarily dismissed.