

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., NW, MS 2090
Washington DC 20529-2090

PUBLIC COPY



U.S. Citizenship
and Immigration
Services

[REDACTED]

B6

DATE: **MAY 19 2011** Office: NEBRASKA SERVICE CENTER FILE: [REDACTED]

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:

SELF-REPRESENTED

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, with a fee of \$630. 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 employment based 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 home health company. It seeks to employ the beneficiary permanently in the United States as a human resources specialist. As required by statute, an ETA Form 9089, Application for Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that the requirements set forth on the approved labor certification were consistent with the visa classification sought. The director denied the petition on March 25, 2008.

On appeal, the petitioner asserts that the director must have evaluated the wrong petition as the director misidentified the position offered as a cook and not a human resources specialist, and used the wrong date as the date the DOL approved the labor certification.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).¹ 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.

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 Soltane v. DOJ*, 381 F.3d 143 at 145 (AAO's *de novo* authority is well-recognized.).

For the reasons set forth below, the AAO concurs with the director's decision and further notes that the petition was not eligible for approval because the labor certification submitted with the petition was not signed by the alien and the petitioner failed to demonstrate that the beneficiary possessed the requisite three months of experience in the job offered.²

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988

² Although we acknowledge that the copies of the 2006 state quarterly wage and withholding report indicates that the petitioner is paying the beneficiary in excess of the proffered wage, copies of the regulatorily prescribed evidence of federal tax returns, audited financial statements or annual reports should also be included in any future filings in order to demonstrate the continuing ability to pay the proffered wage. *See* 8 C.F.R. § 204.5(g)(2).

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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other 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.

At the outset, it is noted that this petition was not eligible for approval at filing because it was not accompanied by a valid labor certification. The regulation at 20 C.F.R. § 656.17 describing the basic labor certification process provides in pertinent part:

(a) Filing applications.

- (1) Applications filed and certified electronically must, upon receipt of the labor certification, be signed immediately by the employer in order to be valid. Applications submitted by mail must contain the original signature of the employer, alien, attorney, and/or agent when they are received by the application processing center. DHS 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.³

Although an ETA Form 9089, approved by the Department of Labor (DOL), accompanied the petition, it was not signed by the alien. As such, the preference petition should have been rejected. 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, Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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

³ Similar instructions are found on page 8 of the ETA Form 9089.

(4) *Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

Part 5 of the Immigrant Petition for Alien Worker, (I-140), filed on February 1, 2007, indicates that the petitioner was established in 1996, employs forty workers and reports a gross annual income of \$3,400,000 and a net annual income of \$190,000. The petitioner sought visa classification (Part 2, paragraph e of I-140) of the beneficiary as a professional (at a minimum, possessing a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree) or skilled worker (requiring at least two years of training or experience) under section 203(b)(3)(A)(i) of the Act.

Part H, 4 - 6 of ETA Form 9089, however, submitted in support of the visa classification required only a high school education and three months of experience in the job offered as a human resources specialist.

Citing 8 C.F.R. § 204.5(l), and as mentioned above, the director observed that the certified position described on the ETA Form 9089 required a high school education and three months of work experience in the job offered. As noted by the petitioner, however, the director identified the certified position as a "cook" not as a human resources specialist. The director found, however, as the visa classification sought on the I-140 petition designated the skilled worker category (paragraph e), the I-140 petition was not approvable because it was not supported by the appropriate ETA Form 9089. In order to be classified as a skilled worker, the ETA Form 9089 must require at least two years of training or experience. The director denied the petition on this basis because the petitioner did not demonstrate that the position required at least two years of training or experience.

On appeal, the petitioner emphasizes that the director mistakenly referred to an approval date of the ETA Form 9089 as December 8, 2006 and that the director had erroneously referred to the certified position as that for a cook. The petitioner also submits documentation of its recruitment efforts for a human resources specialist. The AAO finds that insofar as the director's errors were made referring to the job as a cook and the priority date as the approval date of the labor certification, the petitioner was correct. It is noted that the petitioner must demonstrate that a beneficiary has the necessary education, training, experience and other specific credentials as required on the labor certification as of the day the ETA Form 9089 was accepted for processing by any office within DOL's employment system, which establishes the priority date. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the priority date as set forth on the ETA Form 9089 (not the approval date) is December 8, 2006.

Further, regardless of the director's errors, the AAO concurs with the director's basis of denial of the petition. The regulation at 8 C.F.R. § 103.2(b)(8), clearly allows the denial of an application or petition, notwithstanding any lack of required initial evidence, "if there is evidence of ineligibility in the record." It is noted that neither the law nor the regulations require the director to consider other classifications if the petition is not approvable under the classification

requested. We cannot conclude that the director committed reversible error by adjudicating the petition under the classification requested by the petitioner which, as noted above.

The regulation at 8 C.F.R. § 204.5(l)(3) further 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.

Although financial documentation indicated that the petitioner employed the beneficiary in 2006, no other evidence was submitted in the form required by the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) that confirmed the nature of the beneficiary's employment and a description of her experience that would verify that she fulfilled the requirements of the certified labor certification.⁴ Going on record without supporting documentary evidence is not sufficient for

⁴ See, however, 20 C.F.R. § 656.17 regarding experience gained with the petitioning employer. It provides in pertinent part:

(h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation

.....
(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

(i) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

(ii) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

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)).

Based on a review of the underlying record and the argument submitted on appeal, it may not be concluded that the certified position required at least two years of experience or training or required a *minimum* of a baccalaureate degree in order to approve the petition for the skilled worker or professional visa classification initially sought by the petitioner. Additionally, the alien failed to

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

- (i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
- (ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

- (i) The term "employer" means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.
- (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.

sign the ETA Form 9089 and the petitioner failed to demonstrate that the beneficiary possessed the requisite work experience.

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.