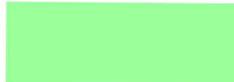


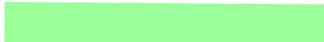


U.S. Citizenship
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Services

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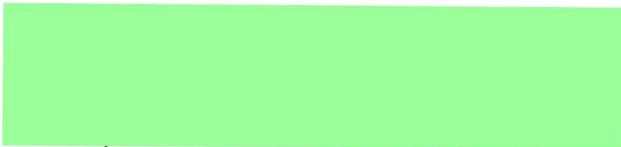
Date: **JUN 28 2012** Office: NEBRASKA SERVICE CENTER

FILE: 

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:

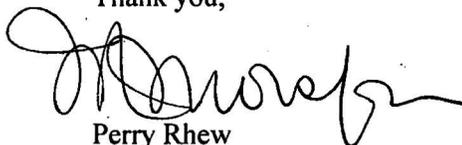


INSTRUCTIONS:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a general contractor. It seeks to employ the beneficiary permanently in the United States as a lead operator. As required by statute, the petition is accompanied by labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the petition requires at least two years of training or experience and, therefore, that the beneficiary cannot be found qualified for classification as a skilled worker. The denial notice also noted that the labor certification lacked the signatures of the beneficiary, the form preparer, and the employer. The director denied the petition accordingly.

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.

As set forth in the director's April 20, 2009 denial, an issue in this case is whether or not the petitioner has established that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

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)(iii) of 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.

Here, the Form I-140 was filed on April 1, 2008. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional or a skilled worker.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal, counsel asserts that the director erred in not issuing a Request for Evidence (RFE) before denying the petition. Counsel also references a June 1, 2007 memo issued by Donald Neufeld, Acting Associate Director of U.S. Citizenship and Immigration Services (USCIS) which states that a petitioner or applicant should be provided with the opportunity

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).

to review and rebut derogatory information of which he or she is unaware. Counsel goes on to assert that “[o]bviously, the petitioner was unaware that the incorrect box was selected on Form I-140 or that an unsigned Form ETA-9089 was submitted.” A copy of the ETA Form 9089 with new signatures from counsel, the petitioner, and the beneficiary was submitted along with a corrected and unfiled copy of Form I-140 with Part 2.g checked to indicate a request for classification as any other worker requiring less than two-years of training or experience.

The AAO notes that if all required initial evidence is not submitted with the application or petition, or does not demonstrate eligibility, USCIS, in its discretion, may deny the petition. 8 C.F.R. § 103.2(b)(8)(ii)(rule effective for all petitions filed on or after June 18, 2007). The petitioner filed its petition with USCIS on April 1, 2008, and is thus subject to this provision. Therefore, the director’s denial of the petition without issuing an RFE seeking the missing initial evidence of the petitioner’s eligibility was an appropriate use of discretion. It is also noted that USCIS will not approve a petition unless it is supported by an original certified ETA Form 9089 that has been signed by the employer, beneficiary, attorney and/or agent. *See* 20 C.F.R. § 656.17(a)(1).

Further, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff’d*, 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency’s internal guidelines “neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.”) *See also* Stephen R. Viña, Legislative Attorney, Congressional Research Service (CRS) Memorandum, to the House Subcommittee on Immigration, Border Security, and Claims regarding “Questions on Internal Policy Memoranda issued by the Immigration and Naturalization Service,” dated February 3, 2006. The memorandum addresses, “the specific questions you raised regarding the legal effect of internal policy memoranda issued by the former Immigration and Naturalization Service (INS) on current Department of Homeland Security (DHS) practices.” The memo states that, “policy memoranda fall under the general category of nonlegislative rules and are, by definition, legally nonbinding because they are designed to ‘inform rather than control.’” CRS at p.3 citing to *American Trucking Ass’n v. ICC*, 659 F.2d 452, 462 (5th Cir. 1981). *See also Pacific Gas & Electric Co. v. Federal Power Comm’n*, 506 F.2d 33 (D.C. Cir. 1974), “A general statement of policy . . . does not establish a binding norm. It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy announces what the agency seeks to establish as policy.” The memo notes that “policy memoranda come in a variety of forms, including guidelines, manuals, memoranda, bulletins, opinion letters, and press releases. Legislative rules, on the other hand, have the force of law and are legally binding upon an agency and the public. Legislative rules are the product of an exercise of delegated legislative power.” *Id.* at 3, citing to Robert A. Anthony, *Interpretive Rules, Policy*

Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use them to Bind the Public?, 41 Duke L.J. 1311 (1992).

The AAO also notes that counsel's claim that the petitioner was unaware of the details on the Form I-140 and the ETA Form 9089 filed by the petitioner is unpersuasive. Both the petitioner and counsel signed and dated the Form I-140 on March 27, 2008, under a declaration that the contents of the form are true and correct under the penalty of perjury. Although the ETA Form 9089 was not signed by the petitioner, it is reasonable to expect a petitioner to be familiar with the contents of the forms it files. A petitioner's failure to apprise himself of the contents of the paperwork or the information being submitted constitutes deliberate avoidance and does not absolve him of responsibility for the content of his petition or the materials submitted in support. *See Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6th Cir. 2005) (unpublished) (an applicant who signed his application for adjustment of status but who disavowed knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application's contents). In addition, the law generally does not recognize deliberate avoidance as a defense to misrepresentation. *See Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005); *United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993).

Therefore, it is incorrect to consider the petitioner's claimed error in selecting the incorrect classification on the Form I-140 and the submission of an unsigned Form ETA-9089 as possible derogatory information of which the petitioner was unaware. Thus, the director's decision does not conflict with the previously referenced memo.

Counsel also states that the director erred in citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972) in support of the assertion that the burden of proof rests with the petitioner. The AAO notes that although counsel is correct in her assertion that *Matter of Treasure Craft of California* dealt with whether or not a petitioner's statement of fact unsupported by documentary evidence could be accorded status of being on the record, the decision also stated:

It has been decided that the burden of proof to establish eligibility for the benefits sought rests with the petitioner in visa petition proceedings (*Matter of Brantigan*, 11 I&N Dec. 493).

Thus, the director did not err in citing the decision.

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

(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.

In this case, the labor certification indicates that a high school education with no training and no experience is required for the proffered position. However, the petitioner requested the skilled

worker classification on the Form I-140. There is no provision in statute or regulation that compels USCIS to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

The evidence submitted does not establish that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

Beyond the decision of the director, the petitioner also failed to establish that it is the same entity that filed the labor certification or a successor-in-interest to the entity that filed the labor certification. 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 (9th 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 labor certification lists [REDACTED] located at [REDACTED] MN [REDACTED] as the proposed employer, while the Form I-140 lists [REDACTED] located at [REDACTED] as the petitioner. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1980). In addition, if the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

In the instant case, the petitioner has failed to provide sufficient evidence that the two entities which share similar names but different addresses are the same entity, are related entities, or that one is the successor-in-interest to the other. The record contains an undated and unsigned letter on [REDACTED] letterhead which states that [REDACTED] does business as [REDACTED] and has offices in several locations including [REDACTED] Florida. As the letter is unsigned, undated, and not accompanied by other probative evidence to establish that the petitioner and the proposed employer are parts of the same entity, the petitioner has not demonstrated that it is the same entity which filed the labor certification or that it has a successor-in-interest relationship to that entity.

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The evidence in the record does not satisfy all three conditions described above because it does not fully describe and document any transaction transferring ownership of the predecessor, it does not demonstrate that the job opportunity will be the same as originally offered, and it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods. In the instant case, counsel has provided no evidence to address the issue that the proposed employer on the labor certification is not the same entity as the petitioner who filed the Form I-140. Accordingly, the petition must also be denied because the petitioner has failed to establish that it is a successor-in-interest to the employer that filed the labor certification.

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage. The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay “shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.” *Id.*

The record before the director closed on April 1, 2008, with the filing of the petition. As of that date, the employer’s 2006 federal income tax return was the most recent return available since according to the tax returns submitted, the employer’s fiscal year began on October 1st and ended on September 30th.² However, the record only contains the employer’s partial tax returns for 2003, 2004, and 2005. As the priority date is April 27, 2001, the petitioner must establish its ability to pay the proffered wage on the priority date and continuing until the beneficiary obtains permanent resident status.

In this matter, the record contains copies of only the first page of [REDACTED] tax returns on Form 1120S for 2003, 2004, and 2005. In addition, the record contains balance sheets and condensed comparative income statements for the periods ending on September 30th for 2004, 2005, and 2006 which appear to be unaudited statements. Counsel’s reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant’s report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner’s failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is 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.

² As previously noted, the entity listed on the labor certification known as [REDACTED] which is reflected on the tax returns as [REDACTED] has not been proven to be the same entity or a successor-in-interest to the petitioner, [REDACTED] which filed the Form I-140.

Accordingly, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

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.