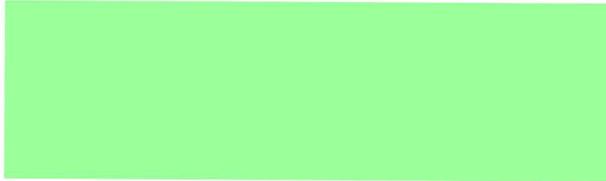


(b)(6)

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



U.S. Citizenship  
and Immigration  
Services



Date: JUN 07 2013 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:

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 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 in accordance with the instructions on 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,

*Rachel NiFund*  
for

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The petitioner was a provider of delivery services. It sought to employ the beneficiary permanently in the United States as a computer programmer. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary possesses either a United States baccalaureate degree or a foreign equivalent degree as required by the terms of the labor certification. The director further determined that the petitioner had not established the continuing ability to pay the proffered wage to the beneficiary since the priority date. The director denied the petition accordingly.

The AAO issued a Notice of Intent to Dismiss and Notice of Derogatory Information (NOID/NDI) to the petitioner on April 8, 2013, informing the petitioner that a review of the publically accessible official website for the California Secretary of State at <http://kepler.sos.ca.gov/cbs.aspx>, as well as public records accessed through Westlaw, revealed that the status of the petitioner, [REDACTED] was suspended. The status "suspended" is defined at the website <http://www.sos.ca.gov/business/be/cbs-field-status-definitions.htm> as:

The business entities, powers, rights and privileges were suspended or forfeited in California 1) by the Franchise Tax Board for failure to file a return and/or failure to pay taxes, penalties, or interest; and/or 2) by the Secretary of State for failure to file the required Statement of Information and, if applicable, the required Statement by Common Interest Development Association.

The AAO informed the petitioner that if it was no longer an active business, the petition and its appeal to this office have become moot.<sup>1</sup> In which case, the appeal shall be dismissed as moot. Therefore, the AAO requested that the petitioner provide evidence of good standing or other documents demonstrating that the petitioning business is not inactive and had current business activity.

In the NOID/NDI, the AAO specifically alerted the petitioner that failure to respond to the NOID/NDI would result in dismissal since the AAO could not substantively adjudicate the appeal without the information requested. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

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<sup>1</sup> Where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

Because the petitioner failed to respond to the NOID/NDI, the AAO is dismissing the appeal.

Beyond the decision of the director, it does appear that the record contains sufficient evidence to establish that the beneficiary possessed the twenty-four months of experience in the offered job of computer programmer as required by the terms of 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 (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 ETA Form 9089 at Part K., reflects that the beneficiary qualifies for the offered position based on her experience as a computer programmer with the petitioner since August 12, 2002. The labor certification also states that the beneficiary was employed as a computer operator by the publishing company, [REDACTED] in New Delhi, India, from February 20, 1997 to June 15, 2000. No other experience is listed. Nevertheless, representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the petitioner cannot be used to qualify the beneficiary for the certified position.<sup>1</sup> Specifically, the petitioner indicates that questions J.19 and J.20, which ask about experience

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<sup>1</sup> 20 C.F.R. § 656.17 states:

(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.

in an alternate occupation, are not applicable. In response to question J.21, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?," the petitioner answered "no." The petitioner specifically indicates in response to question H.6 that 24 months of experience in the job offered is required and in response to question H.10 that experience in an alternate occupation is not acceptable. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable<sup>2</sup> and the terms of the ETA

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(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.

<sup>2</sup> A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

5) For purposes of this paragraph (i):

- ...
- (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

Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates that her position with the petitioner was as a computer programmer, and the job duties are the same duties as the position offered. Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as she was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. In addition, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary's experience with the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(A) states:

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.

As noted above, the labor certification reflects that the beneficiary was employed as a computer operator by the publishing company, [REDACTED] in New Delhi, India, from February 20, 1997 to June 15, 2000. However, the record is absent a letter of employment from [REDACTED] corroborating the beneficiary's claim of employment with this enterprise. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The record contains a letter dated June 15, 2000 and containing the letterhead of [REDACTED] in New Delhi, India, that is signed by an individual with an illegible signature. It is noted that this individual also failed to identify their title at [REDACTED]. Although this individual indicated that the beneficiary had been employed as a software engineer by [REDACTED] from February 20, 1997 to October 15, 2000, the letter does not include a description of the beneficiary's job duties and experience with this enterprise. In addition, the letter is dated June 16, 2000, but the individual who signed the letter attested to the beneficiary's employment with [REDACTED] after this date up through October 15, 2000. Further, the dates of employment attributed to the beneficiary at [REDACTED] February 20, 1997 to October 15, 2000, conflict with the applicant's claim that she was employed as a computer operator by the publishing company, [REDACTED] in New Delhi, India, from February 20, 1997 to June 15, 2000. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

For the reasons stated above, the beneficiary's employment with [REDACTED] may not be used to establish the beneficiary's work experience. See *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976) (where the Board noted in dicta that the beneficiary's experience, without such fact certified by DOL on the beneficiary's labor certification lessens the credibility of the evidence and facts asserted).

The evidence in the record is not sufficient to establish that the beneficiary possessed the required 24 months of experience in the offered job of computer programmer as listed at Part H.6., of ETA Form 9089. Accordingly, the petition cannot be approved for this reason.

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.