

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

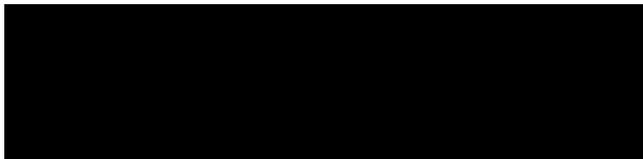
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington DC 20529-2090



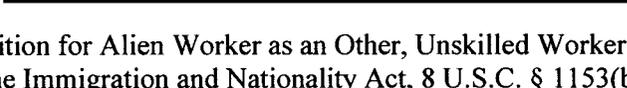
U.S. Citizenship
and Immigration
Services

PUBLIC COPY

36

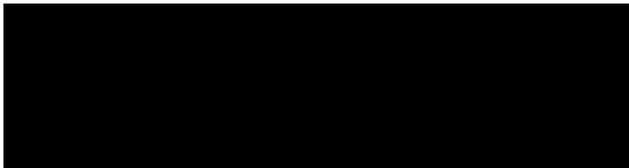


FILE:  Office: NEBRASKA SERVICE CENTER Date: JUL 28 2010

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

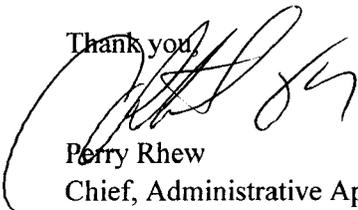


INSTRUCTIONS:

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 your 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 \$585. 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 design company. It seeks to employ the beneficiary permanently in the United States as an architectural sand blaster. As required by statute, an ETA Form Application for Permanent 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 also determined that the petitioner had failed to establish that the beneficiary possessed the requisite two years of experience as an architectural sand blaster.

On appeal, the petitioner, through counsel, submits additional evidence¹ relating to the beneficiary's experience and asserts that the petition merits approval.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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.

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.

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) states 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

¹ The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.

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 May 3, 2007, indicates that the petitioner was established in 1976 and currently employs two workers. The petitioner sought visa classification (Part 2, paragraph g of I-140) of the beneficiary as an unskilled worker (requiring less than two years of training or experience) under section 203(b)(3)(A)(iii) of the Act. The ETA Form 9089 submitted in support of this visa classification required twenty-four months (two years) of work experience in the job offered as an architectural sand blaster.² The job duties of the certified position described in Part H-11 of the ETA Form 9089 state:

Etch/Cut designs in glass using sandblasting equipment, acid solutions and design patterns. Spray template against glassware with sand to cut design Sandblast exposed area of glass with spray gun. Knowledge of SS and aluminum.

Citing 8 C.F.R. § 204.5(l)(2), and as mentioned above, the director observed that the certified position described on the ETA Form 9089 required two years of experience. As the visa classification sought on the I-140 petition designated the unskilled worker category (paragraph g), the I-140 petition was not approvable because it was not supported by the appropriate ETA Form 9089. In order to be classified as an unskilled worker, the ETA Form 9089 must require less than two years of training or experience. The director denied the petition on this basis because the petitioner did not demonstrate that the position required less than two years of training or experience.

On appeal, the petitioner, through counsel, states that the that the wrong classification was selected because of a typographical error and that it should be permitted to correct the error and offer an amended I-140 with the correct box checked. The petitioner additionally submits a copy of its 2007 federal income tax return and a copy of an employment verification letter intended to show that the beneficiary had the experience required by the certified position.

The AAO concurs with the director's conclusion in this regard. The regulation at 8 C.F.R. § 103.2(b)(8)(ii) clearly allows the denial of an application or petition, notwithstanding any lack of required initial evidence, if evidence of ineligibility is present. 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. Further, there are no provisions permitting the petitioner to amend the petition on appeal in order to reflect a request under another classification. 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. 1988). As the labor certification required two years of experience, the petition may not be filed as an unskilled worker petition. The proper

²The labor certification does not require any minimum level of education or training.

remedy would be to submit a new petition, supported by the appropriate labor certification and submit the required fee and documentation.

Additionally, the petitioner must demonstrate that the beneficiary has the required experience as set forth on the ETA Form 9089 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 December 19, 2005.

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.

On appeal, the petitioner provided an employment verification letter, dated September 25, 2008, from a Colombian firm that verified that the beneficiary was employed doing architectural sandblasting full-time from March 1, 1993 until August 15, 1997. The beneficiary's duties were described and the letter was signed by the manager of the company. The letter satisfies the regulatory requirement of corroboration from an employer who can describe the qualifying experience.

It remains, however, that the labor certification³ provided does not support the approval of the petition for the unskilled worker visa classification initially sought by the petitioner. Therefore, the appeal will be dismissed on this basis.

³ The labor certification also does not comply with the requirements of 20 C.F.R. 656.17, because it does not contain the signatures of the employer, alien or attorney and it is not the original ETA Form 9089. The regulation at 20 C.F.R. 656.17 states in pertinent part:

(a) Filing applications. (1) Except as otherwise provided by §§656.15, 656.16,

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

and 656.18, an employer who desires to apply for a labor certification on behalf of an alien must file a completed Department of Labor *Application for Permanent Employment Certification* (ETA Form 9089). The application must be filed with an ETA application processing center. Incomplete applications will be denied. 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.