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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

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FILE: 

Office: NEBRASKA SERVICE CENTER

Date:

NOV 04 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 preference 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 granite company. It seeks to employ the beneficiary permanently in the United States as a sales representative. As required by statute, the petition is accompanied by 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 is qualified to perform the duties of the proffered position as the petitioner failed to document that the beneficiary had the two years of prior experience in the position offered required by the labor certification. 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 October 22, 2007 denial, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary met the experience requirements of the labor certification. The director determined that the labor certification specifically requires the beneficiary to have two years experience in the job title of "Granite Representative II;" that the labor certification does not allow for any other type of previous qualifying experience or training as the petitioner failed to indicate that it would accept experience in any related or alternate occupation on the labor certification; and, that the petitioner has not established that the beneficiary had the required experience as a "Granite Representative II" as of the date the petition was filed.

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 petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 9089 labor certification application was accepted for processing on August 11, 2006.

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.

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.<sup>1</sup>

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). According to the plain terms of the labor certification, the applicant must have two years of experience in the job offered, Granite Sales Representative II.

In this case, the ETA Form 9089 includes the following information:

- Section F, question 2: the O\*NET code is 41-4012.00;
- Section F, question 3: the Occupation Title is "Sales Representatives;"
- Section H, question 3: the Job Title is "Granite Sales Representative II;"
- Section H, question 4: Minimum education level required is "None;"
- Section H, question 4-A: Other education required is "n/a;"
- Section H, question 4-B: Major field of study required is "n/a;"
- Section H, question 6: Experience in the job offered is required;
- Section H, question 6-A: Number of months experience required in the job offered is "24;" and,
- Section H, question 10: Experience in an alternate occupation is not acceptable.
- Section H, question 11: Job duties - "Sell granite to buying customers. Coordinate and execute sales."
- Section H, question 14: Specific skills required: none stated.

On the ETA Form 9089, the title of the job offered was that of "Granite Representative II." The occupation title under the prevailing wage information provided by the State Workforce Agency (SWA)

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<sup>1</sup> 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).

is "Sales Representative." The SOC code provided by the SWA [REDACTED] which corresponds to the occupation "Sales Representatives, Wholesale and Manufacturing." The petitioner submitted a request for a Prevailing Wage Determination (PWD) to the Rhode Island Department of Labor and Training (RIDLT), which included the title "Granite Representative II" and the job description as "sell granite to buying customers."

On appeal, counsel asserts that the occupational title of the job offered to the beneficiary was classified under the Standard Occupational Classification (SOC) code as 41-4012, which corresponds to the occupation "Sales Representatives, Wholesale and Manufacturing," and that the requirement of the position proffered does not require that the beneficiary specifically have sales experience as a "Granite Representative II."

The occupation of the offered position is determined by the DOL and its classification code is noted on the labor certification. The broad occupation title is used as a basis to determine the wage in connection with the petitioner's job requirements. The DOL previously used the Dictionary of Occupational Titles (DOT) to classify occupations. O\*NET is the current occupational classification system in use by the DOL.<sup>2</sup> O\*NET incorporates the Standard Occupational Classification (SOC) system,<sup>3</sup> which is designed to cover all occupations in the United States.<sup>4</sup> The SOC classifies workers at four levels of aggregation: major group; minor group; broad occupation; and detailed occupation. All SOC occupations are assigned a six-digit code.<sup>5</sup>

The record also reflects that pursuant to regulations, advertisements for the position of "Granite Representative II" were placed in two editions of the *Providence Sunday Journal*, and on the Rhode Island Department of Labor and Training website for 30 days. The newspaper advertisement stated the following job duties: "Granite Representative II: ... Plan and execute all importing in accordance with company needs; supervise and coordinate all fabrication and sales; travel for business when it's possible and as needed." A job notice was also posted on the employer's premises for 10 days which states Granite Representative II, "[p]lan and execute all importing in accordance with company needs;

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<sup>2</sup>O\*NET, located at <http://online.onetcenter.org>, is described as "the nation's primary source of occupational information, providing comprehensive information on key attributes and characteristics of workers and occupations" (accessed June 10, 2010).

<sup>3</sup><http://www.onetcenter.org/taxonomy.html> (accessed June 10, 2010).

<sup>4</sup><http://www.bls.gov/soc/socguide.html> (accessed June 10, 2010).

<sup>5</sup>The first and second digits represent the major group; the third digit represents the minor group; the fourth and fifth digits represent the broad occupation; and the sixth digit represents the detailed occupation. In cases where the O\*NET-SOC occupation is more detailed than the original SOC detailed occupation, it is assigned the six-digit SOC code from which it originated, along with a two-digit extension starting with .01, depending on the number of detailed O\*NET-SOC occupations linked to the particular SOC detailed occupation. See [http://www.onetcenter.org/dl\\_files/UpdatingTaxonomy2009\\_Summary.pdf](http://www.onetcenter.org/dl_files/UpdatingTaxonomy2009_Summary.pdf) (accessed June 10, 2010). For older labor certifications that were assigned a DOT code instead of an O\*NET-SOC code, O\*NET contains a crosswalk that translates DOT codes into the current O\*NET-SOC codes. See <http://online.onetcenter.org/crosswalk/DOT> (accessed June 10, 2010).

supervise and coordinate all fabrication and sales; travel for business when it's possible and as needed." The advertisements in the newspaper and on the website, as well as on the posted job notice, all specified the minimum requirements of the position to be "2 years experience in sales, marketing, or equiv."

The labor certification requires two years experience in the job offered as a Granite Representative. The certified job offer does not allow for experience in any related alternate occupation, in H.10, such as sales in any field. USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). The advertised job title and job duties include the duties of planning and executing all importing in accordance with company needs, and supervising and coordinating all fabrication and sales and additionally states that travel is required [this requirement is not stated on the labor certification]. The ETA Form 9089 job description requires selling granite to customers. By the terms of the labor certification and the advertised job duties, the position would appear to require some knowledge of granite or the industry to perform the duties of the position offered. Had the petitioner sought to allow experience in any field, it could have selected "yes" in Section H question 10 and identified in Section H questions 10-A and 10-B that 24 months experience in any sales field would be acceptable.

To document the beneficiary's prior experience, the petitioner submitted an experience letter from [REDACTED] which states that the beneficiary was employed by that organization as a computer salesman from August of 1996 until September of 1998 where the beneficiary performed all activities related to the sales of computers.<sup>6</sup> The experience letter submitted does not state that the beneficiary has experience in the granite industry selling granite and coordinating sales of granite. As such, the petitioner failed to demonstrate that the beneficiary had the required two years of experience in the position offered by the time of the priority date. The beneficiary listed only his position with Styllus Informatica on ETA Form 9089. The labor certification does not state any other prior experience and the petitioner did not submit any other letters to document the two years prior experience in the job offered.

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

**ORDER:** The appeal is dismissed.

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<sup>6</sup> The beneficiary partially shares the same surname as the letter's author. In any further filings, the petitioner should submit independent objective evidence to verify this experience.