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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  
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SEP 27 2010

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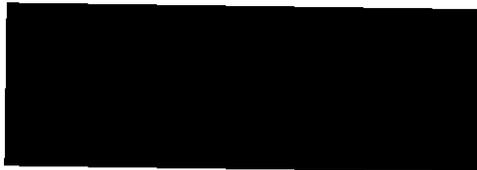
Petitioner:

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:

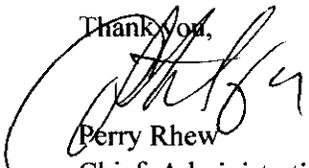


INSTRUCTIONS:

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 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, Texas Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a furniture manufacturer. It seeks to employ the beneficiary permanently in the United States as a furniture finisher. As required by statute, an ETA Form 9089 Application for Permanent Employment Certification (ETA 9089) approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had failed to establish that the ETA Form 9089 supported the visa classification sought. He also concluded that the petitioner had not established that the beneficiary had the required work experience as of the priority date, and denied the petition accordingly.

On appeal, the petitioner, through counsel, asserts that the beneficiary has the requisite work experience and 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 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 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 July 30, 2007, indicates that the petitioner was established in 1999 and currently employs eleven workers. The petitioner sought visa classification (Part 2, paragraph e of I-140) of the beneficiary as a skilled worker (requiring at

least two years of training or experience) under section 203(b)(3)(A)(i) of the Act.<sup>1</sup> Part H, of the ETA Form 9089, however, which was submitted in support of this visa classification, required a high school education and six months of work experience in the job offered as a furniture finisher or six months of experience in an alternate occupation described as furniture assembling. Alternatively, the labor certification allowed alternate combination of education and experience of a GED and one year of experience in the job offered of furniture finisher or one year in furniture assembly. It is noted that part H-14 of the ETA Form 9089 requires that the beneficiary has skills in the use of pneumatic tools.

Part H-11 describes the duties to be performed in the job offered of a furniture finisher:

Shape, finish, and refinish damaged, worn, or used furniture or new high-grade furniture to specified color or finish. Mix compounds, including piano finishing products, such as urethane, polyurethane and polyester. Apply compound with spray gun, clean cabins.<sup>2</sup>

As mentioned above, the director observed that the certified position described on the ETA Form 9089 did not support the visa classification sought on the I-140 petition. As the visa classification

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<sup>1</sup>*Other worker* means a qualified alien who is capable, at the time of petitioning for this classification, of performing unskilled labor (requiring less than two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

\* \* \*

*Skilled Worker* means an alien who is capable, at the time of petitioning for this classification, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Relevant post secondary education may be considered as training for the purposes of this provision. 8 C.F.R. § 204.5(1)(2).

<sup>2</sup>It is unclear what "clean cabins" means in relation to the business of furniture manufacturing as claimed on Part 5 of the I-140 petition. It is equally unclear what business activity and product or service the petitioner referred to where it describes its business activity as "wholesale" and product or service as "smokeless" on line 2 of page 3 of its 2005 federal income tax return. This should be addressed when or if further petitions are filed. It is further noted that the petitioner claimed to have not paid any "additional wages" to the beneficiary in 2006 in response to the director's notice of intent to deny which curiously used the same phrasing. On the ETA Form 9089, however, we note that the beneficiary claims that he worked for the petitioner from August 1, 2000 to March 13, 2007. Additionally, it is noted that the priority date is in 2007 and the evidence of the ability to pay the proffered wage ended on August 31, 2006, as shown on the petitioner's 2005 tax return. In further filings, the petitioner must submit the required evidence that shows the continuing ability to pay the proffered wage as of the priority date. See 8 C.F.R. § 204.5(g)(2).

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 minimum requirements must be consistent with the visa classification sought and 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 ETA 9089 specified at least two years of training or experience.

On appeal, counsel does not specifically address the requested visa category, but emphasizes that the beneficiary has the requisite experience and that the petitioner has the ability to pay the proffered wage. The AAO concurs with the director's denial on the issues cited.

The ETA Form 9089 submitted to and certified by DOL specified that the offered position and alternate occupation of furniture assembly requires a minimum of six months of experience. The alternative combination of a GED and one year of experience additionally does not support a skilled worker visa classification which requires a minimum of two years of training or experience. The only visa category that is consistent with these minimum requirements is that of an unskilled, other worker, as set forth on paragraph (g) of the I-140.

The AAO concurs with the director's decision that the petition is not approvable as a skilled worker as requested by the petitioner. 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.<sup>3</sup> In this matter, the appropriate remedy would be to file another petition, select the proper category and submit proper fee and required documentation.

The director also denied the petition because the petitioner failed to establish that the beneficiary possessed the required work experience, whether considered in either visa category. We would also note that the petitioner failed to document that the beneficiary has skill in the use of pneumatic tools, as specifically required by H-14 of the ETA Form 9089. Additionally, the petitioner failed to submit any evidence that the beneficiary possesses a high school education or GED as required on the ETA Form 9089. The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled

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<sup>3</sup> 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).

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 petitioner must demonstrate that the beneficiary has the necessary education and experience specified on the labor certification 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.<sup>4</sup> 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 9089 was accepted for processing on March 13, 2007, which establishes the priority date.

Relevant to the beneficiary's work experience, the petitioner initially submitted a copy of a letter, dated July 20, 2006, from an [REDACTED]. It is signed by the owner and manager, [REDACTED]. The letter indicates that the business is a woodshop and that the beneficiary worked there from August 15, 1996 to March 1, 1999, "in the carpentry area, specifically building and refurbishing furniture."

The director issued a notice of intent to deny on March 17, 2008. In this notice, he requested more detailed documentation of the beneficiary's work experience as the letter from [REDACTED] failed to detail the duties performed by the beneficiary. The director also requested evidence of the petitioner's ability to pay the proffered wage.

The petitioner submitted a second letter, dated April 7, 2008, from [REDACTED] of the [REDACTED]. In this letter, [REDACTED] described the beneficiary's with some specificity in the field of furniture finisher. However, the letter stated that the beneficiary worked at that firm from August 15, 1995 to March 1, 1999, rather from August 15, 1996 to March 1, 1999 as stated in the first letter. The petitioner provided no explanation for this inconsistency and the director partially based his denial of the petition on this issue, noting this discrepancy in his discussion of the beneficiary's experience.

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<sup>4</sup> If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

On appeal, the petitioner submitted a third letter, dated May 21, 2008, from [REDACTED]. He explains that the firm's books had been reviewed and he confirms that the beneficiary's employment was from August 15, 1996 until March 1, 1999. He adds that the letter stating the employment to have commenced a year earlier had been incorrect. The AAO accepts this clarification and finds that the beneficiary acquired the requisite of at least six months of furniture finishing experience as of the priority date.

However, as noted above, the petition is not approvable because the ETA Form 9089 does not support the visa classification sought on the I-140. Beyond the decision of the director, and as additionally noted above, the petitioner failed to submit evidence that the beneficiary possessed the requisite high school education or skill in pneumatic tools, as required by the terms of the ETA Form 9089. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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 (federal courts have recognized the AAO's *de novo* authority).

Based on a review of the underlying record and the evidence submitted on appeal, it may not be concluded that the labor certification provided supports the approval of the petition for a skilled worker visa classification sought by the petitioner. Additionally, there was insufficient evidence to establish that the beneficiary has the required education and special skill as required by the ETA Form 9089. Therefore, the appeal will be dismissed on these alternative and independent bases.

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.