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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



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Date: OCT 04 2011

Office: TEXAS SERVICE CENTER

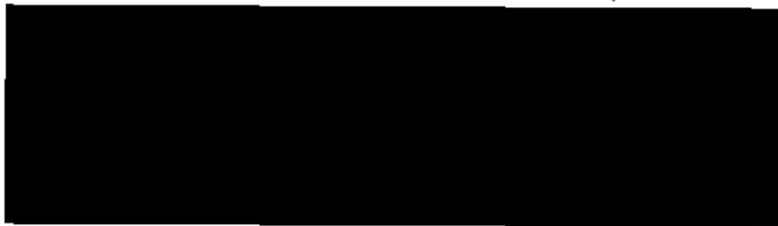
FILE: 

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 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, with a fee of \$630. 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 Director, Texas 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 describes itself as an automobile repair business. It seeks to employ the beneficiary permanently in the United States as a auto body repairer. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. 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 classified as a skilled worker. The director also found that the petitioner had not established its continuing ability to pay the proffered wage of \$28,974.40 from the priority date of January 16, 2007. 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.

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

As set forth in the director's November 26, 2008 denial, the issues in this case are 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 and whether or not the petitioner has established its continuing ability to pay the proffered wage from the priority date of January 16, 2007.

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.

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).

Here, the Form I-140 was filed on January 9, 2008. On Part 2.e. of Form I-140, the petitioner indicated that it was filing the petition for a professional or a skilled worker.

On appeal, counsel and the petitioner assert that the petitioner made a typographical error on Form I-140 and that the petitioner intended to check Part 2.g. indicating that it was filing the petition for an unskilled worker.

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 only requires six months of experience to perform the offered position. No additional experience, training or postsecondary education is required. However, the petitioner requested the skilled worker classification on the Form I-140. There is no provision in the Act or regulations that permits the AAO to consider a petition under a different visa classification once the director has rendered a decision on the case. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to U.S. Citizenship and Immigration Services (USCIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

Since the labor certification does not require at least two years of training, experience or postsecondary education, the beneficiary may not be classified in the requested skilled worker category, and the petition is properly denied for this reason.

The second issue is whether or not the petitioner has established its continuing ability to pay the proffered wage of \$28,974.40 from the priority date of January 16, 2007.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the labor certification was accepted on January 16, 2007. The proffered wage as stated on the ETA Form 9089 is \$13.93 per hour (\$28,974.40 per year). The petitioner's fiscal year is from July 1 to June 30.

The director's decision stated that the petitioner had not submitted tax returns needed to determine its ability to pay the proffered wage from the priority date of January 16, 2007. The petition was filed on January 9, 2008. The record contains the petitioner's tax returns from 2004 (for fiscal year July 1, 2004 to June 30, 2005) and 2005 (for fiscal year July 1, 2005 to June 30, 2006). Contrary to counsel's claims, these returns have little probative value when determining the petitioner's ability to pay the proffered wage from the priority date. On appeal, counsel also claims that the petitioner's 2006 tax return (for fiscal year July 1, 2006 to June 30, 2007) were not yet due. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, tax returns are generally due on the 15th day of the third month after the end of the tax year. See Instructions for Form 1120, U.S. Corporation Income Tax Return, page 3, at <http://www.irs.gov/pub/irs-pdf/i1120.pdf> (accessed September 29, 2011). Therefore, according to IRS rules, the petitioner's 2006 tax return would have been due when the instant petition was filed.

The regulation 8 C.F.R. § 204.5(g)(2) states that the petitioner must demonstrate its ability to pay the proffered wage "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence," and that the evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." The petitioner's failure to provide tax returns from the priority date is, by itself, 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. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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)).

The petitioner failed to submit evidence that meets the requirements of 8 C.F.R. § 204.5(g)(2) either initially or on appeal. Therefore, the AAO concurs with the director that the petitioner has not submitted evidence necessary to establish its ability to pay the proffered wage of \$28,974.40 from the priority date of January 16, 2007.²

² Counsel claims on appeal that the director should not have denied the petition without first issuing a Requesting for Additional Evidence. The regulation at 8 C.F.R. § 103.2(b)(8) states that a petition shall be denied "[i]f there is evidence of ineligibility in the record." The regulation does not state that the evidence of ineligibility must be irrefutable. Where evidence of record indicates that a basic element of eligibility has not been met, it is appropriate for the director to deny the petition without a

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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.

request for evidence. If the petitioner has rebuttal evidence, the administrative process provides for a motion to reopen, motion to reconsider, or an appeal as a forum for that new evidence. Accordingly, the denial was appropriate, even though the petitioner might have had evidence or argument to rebut the finding.