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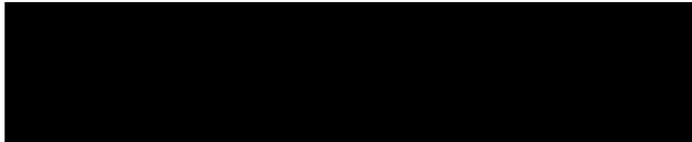
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B6



Date: JAN 06 2012

Office: TEXAS SERVICE CENTER

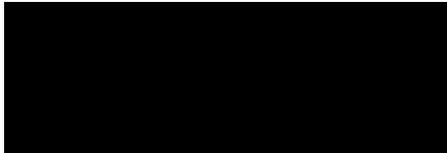
FILE: 

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 preference 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 sustained. The petition will be approved.

The petitioner is a general contractor in the construction industry. It seeks to employ the beneficiary permanently in the United States as an "ornamental design sculptor." 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 had 48 months of experience in the proffered position, an ornamental design sculptor, as required by the ETA Form 9089. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 August 12, 2008 denial, the issue in this case is whether or not petitioner established that the beneficiary met the experience requirements of the ETA Form 9089 as of the priority date.

Counsel asserts on appeal that the petitioner has established that the beneficiary has 48 months of experience in the proffered position as required by the ETA Form 9089.

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)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). Here, the labor certification application was accepted on December 16, 2005.

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

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).

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'r 1986). *See also, Madany 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). As previously stated, according to the plain terms of the labor certification, the applicant must have four years of experience in the job offered, with the job duties stated on ETA Form 9089, H.11. as: "Create original artwork through woodcarving ornamental and mosaic designs, interior and exterior wood and stone for contractor who builds new homes."

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he has in excess of four years of experience in the proffered position. The beneficiary attested to the following relevant experience:

- The beneficiary states that he was self-employed from January 2, 1998 until December 16, 2005 working 35 hours per week performing the following job duties: "create original artwork through woodcarving ornamental and mosaic designs, interior and exterior wood and stone for contractor who builds new homes."
- September 1, 1980 to May 1, 1996 - [REDACTED] Ornamental Sculptor, 40 hours per week.
- October 1, 1985 to June 1, 1996 - [REDACTED] Art Director, 35 hours per week.²

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 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.

² In an employment records booklet submitted by the petitioner it is noted that the beneficiary worked from July 29, 1980 as a sculptor on a contract basis upon referral of the [REDACTED] until he was dismissed from the position on July 14, 2003 due to the closure of the [REDACTED]

(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, counsel submits a brief and additional evidence to establish that the beneficiary has the required 48 months of experience in the proffered position as required by the ETA Form 9089. The petitioner initially submitted the following evidence to establish the beneficiary's qualifications for the proffered position:

- A letter of recommendation dated January 19, 1999 signed by [REDACTED] which states that the beneficiary was employed by that organization from July 14, 1980 through October 4, 1985, and that he primarily worked as an artist in Monumental Art Style.

The letter states that from October 5, 1985 through June 15, 1996, while continuing his creative work as an artist, the beneficiary was appointed Art Director.

- A recommendation letter dated January 19, 1999 from the [REDACTED] (also signed by [REDACTED]) describes the beneficiary's duties as art director are listed as follows: production management; conduction of corporate contracts-for production of decorative, graphic, art and craft products; chairing the Creative Council, responsible for the distribution of assignments among company departments; quality control; public relations including organization of exhibitions, conferences, auctions, etc.; and directing of the children's art studio.
- A list of 19 works of art which were completed by the beneficiary between 1982 and 1996 on letterhead from the Ukrainian National Artist Association.

The director denied the petition as the evidence did not show that "Monumental Art Style" would encompass four years of experience as an "Ornamental Design Sculptor" or duties similar to those set forth on the ETA Form 9089.

On appeal, counsel submitted a Certificate³ from the National Union of Artists of Ukraine which states that the beneficiary was employed by the [REDACTED] of the

³ Counsel additionally submits photos of work completed by the beneficiary while he was self-employed as a "contractor to homeowners, for whom he has created his ornamental designs." We note, however, that nothing in the photographs identifies that the beneficiary completed the work. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel also

██████████ from 1980 through 1996, having a position of a “sculptor of artistic (higher) education.” The Certificate states that from 1980 through 1996 the beneficiary completed a number of artworks for the ornamental decoration of interiors and exteriors of state and public institutions such as schools, libraries, hospitals, theaters, offices, cafes and restaurants. The Certificate further noted that the beneficiary’s work comprised original design and completion of artworks that included wood carving, stone carving, ceramics, mosaic and metal works. The Certification describes duties consistent with the those stated on ETA Form 9089 and is sufficient with the additional evidence that verifies his dates of employment to establish that the beneficiary has the required 48 months of experience as an “Ornamental Design Sculptor” as required by the ETA Form 9089.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.

submitted an educational evaluation, which addresses the beneficiary’s ██████████ which he attended from 1975 to 1980. The regulation at 8 C.F.R. § 204.5(1)(2) related to *skilled workers* states that, “Relevant post-secondary education may be considered as training for the purposes of this provision.” The regulation, however, does not allow education to serve as experience.