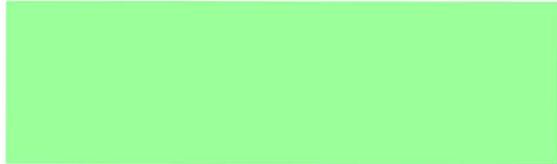


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



Date: Office: TEXAS SERVICE CENTER

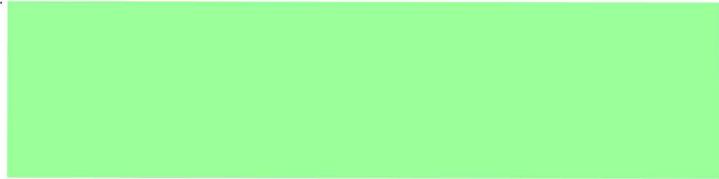
FILE:

FEB 21 2013

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a home improvement business. It seeks to employ the beneficiary permanently in the United States as a carpenter to classify him as a skilled worker pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). 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 it possessed the continuing ability to pay the proffered wage to the beneficiary since the priority date. The director denied the petition accordingly. Counsel filed a timely appeal on the petitioner's behalf.

On appeal, counsel asserts that the petitioner has the continuing ability to pay the proffered wage to the beneficiary since the priority date. Counsel submits documentation in support of the appeal.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). In the instant case, the ETA Form 9089 was accepted on August 6, 2007. The proffered wage as stated on the ETA Form 9089 is \$18.82 per hour or \$39,145.60 annually. The ETA Form 9089 states that the position requires no education, no training, and either 24 months of experience in the offered job of carpenter or 30 months of experience in the alternative occupation of laborer.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); see also 8 C.F.R. § 204.5(g)(2).

The AAO issued a Notice of Intent to Dismiss and Request for Evidence (NOID/RFE) to counsel and the petitioner on November 26, 2012, acknowledging that the petitioner had submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation, for 2007, Forms 1099-MISC, Miscellaneous Income, purportedly reflecting compensation paid by the petitioner to the beneficiary

in 2007, and bank statements, in support of the claim that it possessed the continuing ability to pay the proffered wage from the priority date of August 6, 2007. To supplement the record the AAO requested that the petitioner submit its annual reports, complete federal income tax returns, or audited financial statements for 2008, 2009, 2010, and 2011. The AAO also requested that petitioner submit any Forms W-2, Wage and Tax Statements, or Form 1099-MISC statements, issued by the petitioner to the beneficiary in 2008, 2009, 2010, and 2011.

In addition, the AAO noted that the Form 1099-MISC statement purportedly reflecting compensation paid by the petitioner to the beneficiary in 2007 listed [REDACTED] with taxpayer identification number [REDACTED] as the recipient of this compensation. The AAO informed the petitioner that the record contained no evidence that beneficiary and the individual listed on the Form 1099-MISC were in fact one and the same person. The AAO requested that the petitioner provide evidence demonstrating that the beneficiary and [REDACTED] with taxpayer identification number [REDACTED] were one and the same individual.

Finally, beyond the decision of the director, the evidence in the record does not establish that the beneficiary possesses the required experience for the offered position. 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, 145 (3d Cir. 2004) (AAO's *de novo* authority is well recognized by the federal courts).

The petitioner must demonstrate that the beneficiary possessed all of the requirements stated on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977). *See also, Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, U.S. Citizenship and Immigration Services (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 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).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states that any experience requirements for professionals and skilled workers must be supported by letters from employers giving the name, address, and title of the trainer or employer, and a description of the experience of the alien.

The labor certification states that the offered position requires 24 months of experience in the offered job of carpenter or 30 months of experience in the alternate occupation of laborer. At part K of the ETA Form 9089, the beneficiary claimed to have been a self-employed independent contractor working as a laborer from May 12, 2006 to August 6, 2007, to have been employed by the petitioner as a laborer from January 25, 2005 to May 12, 2006, and to have been employed as a laborer by [REDACTED] from February 15, 2004 to January 22, 2005. In the NOID/RFE, the AAO noted that the record did contain an experience letter from the petitioner's president, [REDACTED], but that this individual listed the beneficiary's position as "Carpenter"

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and the dates of the beneficiary's employment with the petitioner as January 2005 to August 2007. The AAO informed the petitioner that this information was inconsistent with the information listed at Part K of the ETA Form 9089 and, therefore, this letter was not sufficient to demonstrate that the beneficiary possessed the required experience for the offered position. The AAO requested that the petitioner provide additional evidence establishing that the beneficiary had the experience required by the labor certification.

The petitioner and counsel were given 45 days to respond to the NOID/RFE. The AAO specifically alerted the petitioner and counsel that failure to respond to the NOID/RFE would result in dismissal since the AAO could not substantively adjudicate the appeal without the information requested. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

While the record reflects that the NOID/RFE mailed to petitioner at its business address was returned by the United States Postal Service as undeliverable, the NOID/RFE mailed to counsel was not returned. More than 45 days have passed since the NOID/RFE was issued, and the AAO has received no response from either the petitioner or counsel. Therefore, the appeal will be dismissed on this basis, as well as those issues specifically raised by the AAO in the NOID/RFE. *See* 8 C.F.R. § 103.2(b)(13).

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

ORDER: The appeal is dismissed.