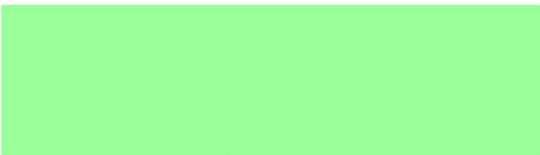


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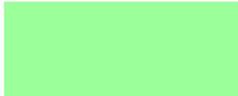
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



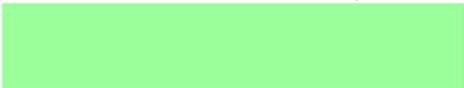
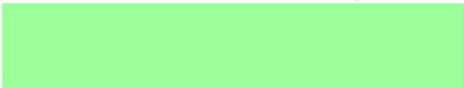
U.S. Citizenship  
and Immigration  
Services



DATE: OFFICE: NEBRASKA SERVICE CENTER

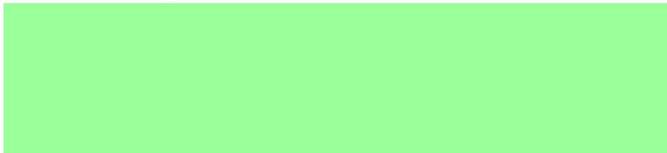
FILE: 

**JAN 14 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,

*Elizabeth McCormack*

 Ron Rosenberg  
Acting 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 screen printing and sublimation business. It seeks to employ the beneficiary permanently in the United States as a graphic designer. 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 beneficiary met the experience required for the proffered position. 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 June 25, 2010 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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>

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2006 and to currently employ 7 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on March 10, 2010, the beneficiary claimed to have worked for the petitioner from October 1, 2006 to April 8, 2009.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, *and any other requirements* of the individual labor certification" (emphasis added).

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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).

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). A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). "To do otherwise would make a farce of the preference [s]ystem and priorities set up by statute and regulation." *Id.*

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 noted by the director in his decision, the petitioner has not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified 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'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires 48 months experience in the position offered. The duties for the position are described as

Create, manipulate and color all artwork which is needed for product design such as graphics, prints, stiped, embroideries, sublimation, logos, etc. Design original prints and artwork, and contribute ideas regarding color and placement. Responsible for creating novelty prints and graphics for the product line. Support the graphics design process and work closely with the designer, merchandise manager, and production partner for the apparel line. Participate in pre-concept meetings with the design team to create well-balanced, saleable lines. Responsible for re-coloring existing prints and artwork as well as for making recommendations of purchased artwork.

On the labor certification, the beneficiary claims to qualify for the offered position based on experience

as a graphic designer for [REDACTED] from November 1, 2000 to September 25, 2006 for 40 hours per week.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains a letter on [REDACTED] letterhead signed by [REDACTED] supervisor. In his letter, [REDACTED] stated that the beneficiary worked 40 hours per week as a graphic designer from November 1, 2000 to September 25, 2006. The letter also states that as a graphic designer, the beneficiary was "responsible for creating original prints, novelty prints and graphics, and re-coloring existing prints and artwork for [the] company's product lines. [The beneficiary] also supported the graphics design process, reviewed final layouts, and participated in pre-concept meetings with the design team."

As noted in the director's RFE dated April 15, 2010, [REDACTED] is also the president of the petitioner. In response to the RFE, the petitioner submitted the beneficiary's Internal Revenue Service Forms W-2 for 2001, 2002, 2003, 2004, 2005, 2006 and a letter on [REDACTED] letterhead dated April 30, 2010 signed by [REDACTED] silk screen printing supervisor. In his letter, [REDACTED] states that he began working for [REDACTED] in 2004 and states that the beneficiary worked for [REDACTED] until 2006. [REDACTED] is therefore, unable to verify the beneficiary's employment for [REDACTED] beginning on November 1, 2000. [REDACTED] also stated that [REDACTED] was the beneficiary's and his supervisor during the time of the beneficiary's employment for [REDACTED]

In his decision dated June 25, 2010, director noted that although the Forms W-2 submitted for the beneficiary are evidence of the beneficiary's employment for [REDACTED] the Forms W-2 indicate that the beneficiary did not work full-time for [REDACTED] for all the years noted in the ETA Form 9089 and in [REDACTED] letter. The Forms W-2 state the following wages for the beneficiary:

- 2001: \$7,014.06
- 2002: \$801.07
- 2003: \$11,340.00
- 2004: \$9,450.00
- 2005: \$270.00
- 2006: \$1,350.00

On appeal, the petitioner did not address the director's concerns regarding the inconsistencies between the ETA Form 9089, [REDACTED] letter describing the beneficiary's full-time employment for [REDACTED] and the beneficiary's Forms W-2. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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Instead of addressing the inconsistencies in the record of proceeding, counsel submits a letter on [REDACTED] letterhead dated July 12, 2010 and signed by [REDACTED] president. In his letter, [REDACTED] states that the beneficiary worked for [REDACTED] from July 1992 to September 2000 for 45 hours per week as chief of the art department and as a graphic artist. The AAO notes that the beneficiary's employment with [REDACTED] was not included in the ETA Form 9089 even though specifically requested to include all relevant work experience on the ETA Form 9089. There are no other objective independent records to corroborate the beneficiary's employment with [REDACTED]. Not including the employment in the ETA Form 9089, lessens the credibility of the evidence submitted and facts asserted. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976).

The petitioner has not submitted any other evidence on appeal nor has the petitioner addressed the inconsistencies in the record of proceeding. The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has failed to establish that the beneficiary is qualified for the offered position.

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.