



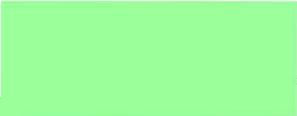
U.S. Citizenship
and Immigration
Services

(b)(6)



Date: JUN 19 2013

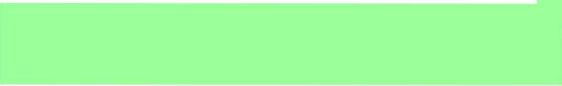
Office: NEBRASKA SERVICE CENTER



IN RE:

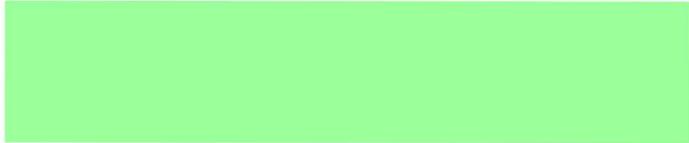
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a 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 with the field office or service center that originally decided your case by filing a 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 employment based 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 painting firm. It seeks to employ the beneficiary permanently in the United States as a painter. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petition was not supported by the appropriate labor certification and that the petitioner had requested the incorrect visa classification.

The AAO conducts appellate review¹ 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 AAO concurs that the labor certification does not support the visa classification sought. The determination of whether a worker is a professional or skilled 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.² The regulation at 8 C.F.R. § 204.5(l)(3)(i) states in pertinent part that the "job offer portion of an individual labor certification, Schedule A application, or Pilot Program application for a professional must demonstrate that the job requires the minimum of a baccalaureate degree."

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), also 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.

Item(s) 14 and 15 of the Form ETA 750 set forth the minimum requirements of the certified position as only 6 years of grade school education and 2 years of work experience in the job offered. No other requirements are specified. As the visa classification sought on the Form I-140 petition designated the professional category (paragraph e), the Form I-140 petition is not approvable because it is not supported by the appropriate labor certification. In order to be classified as a professional, the Form

¹ 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.

² *See i.e.*, 8 C.F.R. § 204.5(l) that also 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.

ETA Form 750 must require a minimum of a baccalaureate degree pursuant to section 203(b)(3)(A)(ii) of the Act.

On appeal, counsel asserts that the application had been submitted based on the beneficiary's experience and that the beneficiary did not possess a bachelor's degree. It is unclear if counsel is requesting a change of visa classification. Even so, there is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. 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).

Based on the foregoing, the record failed to establish that the labor certification supports the visa classification sought.

Beyond the decision of the director, the petition will be denied and the appeal dismissed based on the petitioner's failure to submit evidence of the ability to pay the proffered wage of \$50,960 pursuant to the regulation at 8 C.F.R. 204.5(g)(2)³ and failure to submit evidence of the beneficiary's qualifying two years of required experience as a painter.⁴ Each petition filing is a separate proceeding with a

³ 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 AAO takes administrative notice of the director's denial of the petition in LIN0916751636, based on the petitioner's failure to demonstrate its continuing ability to pay the proffered wage from the priority date onward. In that case, as a sole proprietor, the petitioner failed to submit evidence of the sole proprietor's household expenses during the relevant period, and additionally failed to establish that there were sufficient funds to cover the proffered wage of \$50,960 out of the sole proprietor's adjusted gross income for 2001, 2002, and 2003.

⁴ The regulation at 8 C.F.R. § 204.5(l)(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.

separate record. *See* 8 C.F.R. § 103.8(d). It is noted that the employer submitted a letter on appeal stating that the beneficiary had been working for the petitioner, but failed to identify the job title or duties. Moreover, if the alien has gained the requisite experience while working for the employer, the burden is on the employer to show that the alien gained his experience in jobs that are not similar to the job for which the certification is sought. *See MMMats, Inc.*, 1987-INA-540 (Nov. 24, 1987); *Brent-Wood Products, Inc.*, 1988-INA-0259 (Feb. 28, 1989 (en banc)); *Delitzer Corp. of Newton*, 1988-INA-842 (May 9, 1999) (en banc). The employer failed to submit evidence that the experience gained with it was not similar to the job of painter sought for certification. 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); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(AAO's *de novo* authority supported by federal courts.)

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

(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.