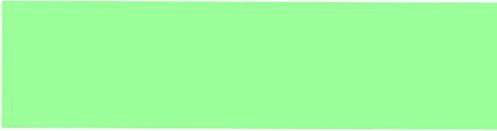


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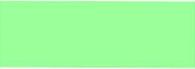
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

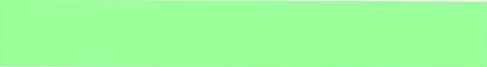


U.S. Citizenship
and Immigration
Services



DATE: **MAR 20 2013**

OFFICE: TEXAS SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Professional Pursuant to Section 203(b)(3)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(ii)

ON BEHALF OF PETITIONER:

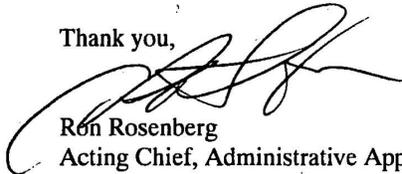


INSTRUCTIONS:

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 employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is a warehouse and distributor.¹ It seeks to employ the beneficiary permanently in the United States as a graphic designer. An ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification.

On appeal, the petitioner, through counsel, submits additional evidence. Counsel contends that the beneficiary's educational credentials satisfied the terms of the labor certification and that the petition should be approved.

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.²

For the reasons discussed below, we concur with the director's denial of the petition, but would also note that various decisions by federal circuit courts, which are binding on this office, have upheld our authority to evaluate whether the beneficiary is qualified for the job offered.

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.

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date, the day the ETA Form 9089 was accepted for processing by any office within DOL's employment system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on August 16, 2011, which establishes the priority date. It indicates that the petitioner has employed the beneficiary as a graphic designer since October 9, 2003. The Immigrant Petition for Alien Worker (I-140) was filed on November 15, 2011.

The ETA Form 9089 sets forth the minimum requirements for the position of a graphic designer. Part H contains the following:

H.4. Education: Bachelor's in Graphic Design

¹ The petitioner's 2010 tax return refers to it as an auto parts wholesaler.

² 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).

- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: 2 years of Graphic Design experience using Adobe Photoshop, Adobe Illustrator, Adobe Indesign, Adobe Bridge, Nikon NX, Microsoft Word, Microsoft Excel, Microsoft Powerpoint, Adobe PageMakeover, Movie Maker, iMovie, Solidwork, Rhino RD Software, Macromedia Flash, Macromedia Dreamweaver, Macromedia Firework, Photosynth & QuarkXpress required.

The job duties of the job offered as a graphic designer are described in H.11:

Assist in the production of all company advertising including catalogs, advertising including catalogs, advertising, promotional materials, website & related photography utilizing design, layout & illustration skills. Production of company newsletters & visual design/production support for other departments. Assist in the design of production of all printed material such as posters, catalogs, labels, & decals. Provide design & layout service of other departments. Catalog, product packing & web site photo retouching. Produce illustrative material where needed. Participate in interdepartmental quality improvement projects as required. Show expertise in Adobe Photoshop for image manipulation, design & compositing. Conduct shoots by Hi-Resolution digital camera in studio environment. Maintain all company photo archives. Manage & maintain entire graphic design, art & digital photo studio & travel to printer for press check. In charge of trade show literature including but not limited banner, sign & flyer.

Part J of the labor certification states that the beneficiary's highest level of education related to the offered position is a Master's degree in Art-Studio Art from the [REDACTED], completed in 2002.

The record contains a copy of the beneficiary's diploma evidencing that he received a Master of Arts in Studio Art from [REDACTED] on December 14, 2001. The record does not contain a copy of his undergraduate degree or his transcript of grades for either a bachelor's degree or the beneficiary's master's degree.

The director denied the Form I-140 on March 20, 2012, finding that the petitioner had failed to demonstrate that the beneficiary had a major in Graphic Design as required by the terms of the labor certification.

In determining whether a beneficiary is eligible for a preference immigrant visa, United States Citizenship and Immigration Services (USCIS) must ascertain whether the alien is, in fact, qualified

for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. 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. 1986). See also, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

As noted above, the ETA 9089 in this matter is certified by DOL. Section 212(a)(5)(A)(i) of the Act provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. See *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14). *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for

the purpose of “matching” them with those of corresponding United States workers so that it will then be “in a position to meet the requirement of the law,” namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL’s role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS’s decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor (“DOL”) must certify that insufficient domestic workers are available to perform the job and that the alien’s performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien’s entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a *de novo* determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

On appeal, counsel asserts that the petitioner has shown how a major in Graphic Design is similar/or the same as a major in Studio Art.

In support of this contention and in response to the director's request for evidence questioning whether the beneficiary's Studio Art degree may be considered as a degree in Graphic Design, the petitioner has submitted the following:

1. An excerpt from the [REDACTED] catalog related to the Bachelor of Arts in Studio Art. It describes the intermediate level of courses in this degree as including courses in "such areas as drawing, painting, printmaking, graphic design, photography, digital imaging and computer multimedia."

It is noted that the catalog lists graphic design as only one of the areas including in the intermediate level of studies and does not document that a degree in Studio Art is the same as a degree in Graphic Design. Moreover, no documentation has been submitted that establishes what major field of study the beneficiary studied for his bachelor's degree.

2. An excerpt from the [REDACTED] catalog related to the Master of Art in Studio Art. It describes the following emphasis areas as "painting, drawing, printmaking, photography, electronic media and graphic design."

Similar to the description of the bachelor's program at [REDACTED] graphic design is discussed as only one of six emphasis areas of a Master's in Studio Art. The petitioner has submitted no convincing evidence that the beneficiary's major in Studio Art actually equates to a major in Graphic Design.

3. A copy of the DOL's Occupational Outlook Handbook, 2010-11 Edition, which includes an observation that bachelor's degree programs "in fine arts or graphic design are offered at many colleges, universities, and private design schools. Most curriculums include studio art, principles of design, computerized design, commercial graphics production, printing techniques, and Web site design."

Again, the above description refers to bachelor degree programs, which has not been provided here. Further, it suggests that studio art courses may be part of a graphic design bachelor's course of study but in no way establishes that a major in Graphic Design is the same as a major in Studio Art.

The labor certification requires a Bachelor's in Graphic Design. There is no indication on the ETA Form 9089, certified by DOL, that a related or similar field of study would be acceptable or an alternate field of study would be acceptable. If the beneficiary has received such a degree, it has not been documented. 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).

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," in the required field of study, the beneficiary does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act as he does not have the minimum level of education in the specified field of study required.

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. As is discussed above, the petitioner must demonstrate that the beneficiary possessed all of the requirements stated on the labor certification as of the August 16, 2011, priority date. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

As stated above, the labor certification states that the offered position requires 24 months (2 years) in the job offered as a graphic designer as stated in H.6, and that this experience must include the specific skills and requirements as set forth in H.14.

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.

The petitioner indicated on Part J-21 of the ETA Form 9089 "n/a" to whether any of the alien's qualifying experience had been gained with the employer in a position substantially comparable to the job opportunity sought. Therefore his experience as a graphic designer with the petitioner may not be counted toward the required experience set forth on the ETA Form 9089.³

³The regulation at 20 C.F.R. § 656.17 states:

(h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation

(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

(ii) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

Part K of the labor certification states that the beneficiary qualifies for the offered position based on experience as documented by the following employment verification letters:

-
- (i) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).
- (1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.
 - (2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.
 - (3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer cannot require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:
 - (i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
 - (ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.
 - (4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.
 - (5) For purposes of this paragraph (i):
 - (i) The term "employer" means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.
 - (ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

- a. A certification from the [REDACTED] School of Communication Arts, dated February 15, 2012, signed by two faculty members, stating that the beneficiary was registered to study Newspaper and Magazine Production in 1993. The letter also states that the duration of the period was from June 4, 1990 to March 10, 1994, but does not explain whether the beneficiary was registered to study in these years. The letter continues to state that the beneficiary learned to use various graphic software, including "Adobe Photoshop, Adobe Illustrator, Pagemaker (basic programs prior to their development into the current Adobe Indesign)."

This letter does not document 2 years of experience as a graphic designer. At most, it affirms that he learned three to four of the eighteen specific skills set forth in H.14 of the ETA Form 9089. Moreover, this experience is not listed on the ETA Form 9089, signed by both the petitioner and the beneficiary. *See Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.)

- b. A letter from the [REDACTED] Bangkok, Thailand, dated February 21, 2012, signed by the managing director, stating that he is the former chief administration officer of [REDACTED] and that the beneficiary is a former employee of [REDACTED] who held a position in the editorial department of "[REDACTED]" magazine from April 3, 1995 to July 31, 1998, where he used his ability in writing and photography and "had a role in assisting magazine layout utilizing software including Microsoft Word, Adobe Photoshop, Adobe Illustrator and Adobe Pagemaker."

This letter does not identify the beneficiary's job title and does not document any experience as a graphic designer. Additionally, the dates of the beneficiary's stated employment conflict with the dates stated on the labor certification of January 1, 1995 to January 1, 1998. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The labor certification states that the beneficiary worked as a photojournalist and not as a graphic designer. The letter verifies one more of the eighteen specific skills listed on H.14 of the labor certification that has not been addressed by the letter from the School of Communication Arts in "(a)" above.

Therefore, the evidence in the record is not sufficient to establish that the beneficiary possessed 2 years of experience as a graphic designer including the specific skills detailed on H.14 by the priority date as required by the terms of the labor certification.

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.

(b)(6)

Page 10.

Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(recognizing AAO *de novo* authority).

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.