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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: EAC 99 050 52635

Office: VERMONT SERVICE CENTER

Date: MAY 06 2002

IN RE: Petitioner:
Beneficiary:



Petition: Petition to Classify Preference Status of Alien on Basis of Occupation Pursuant to Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)(A)(iii)

IN BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was dismissed by the Director, Vermont Service Center. A subsequent appeal was dismissed by the Associate Commissioner, Examinations. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted, the previous decisions of the director and the Associate Commissioner will be affirmed and the petition will be denied.

The petitioner is an auto service station. It seeks to employ the beneficiary permanently in the United States as an auto service station manager. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that the beneficiary had met the petitioner's qualifications for the position as stated in the labor certification at the time of the filing date. The Associate Commissioner affirmed this determination on appeal.

On motion, counsel submits a brief and previously submitted documentation.

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 or seasonal nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

A labor certification is an integral part of this petition, but the issuance of a labor certification does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the training, education, and experience specified on the labor certification as of the petition's filing date. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is January 25, 1996.

The Application for Alien Employment Certification (Form ETA 750) indicated that the position of auto service station manager required three years of experience in the job offered.

The Associate Commissioner determined that the petitioner had not shown that the beneficiary possessed the requisite experience in the job offered.

On motion, counsel reiterates his argument that the beneficiary worked overtime, which, when calculated, established that the

beneficiary had an additional four months of experience to establish he had the requisite three years of experience.

As stated by the Associate Commissioner, however, "[o]vertime cannot be accepted as evidence that the beneficiary had the requisite experience. Working overtime for 33 months results in 33 months of work experience, not three years, or 36 months of work experience."

Upon review, the petitioner has been unable to present sufficient evidence to overcome the findings of the director, or Associate Commissioner, in their decisions to revoke the approval of the petition. The petitioner has not established eligibility pursuant to section 203(b)(3) of the Act and the petition may not be approved.

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 Associate Commissioner's decision of May 2, 2001, is affirmed. The petition is denied.