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U.S. Citizenship
and Immigration
Services



FILE: LIN 02 259 52586 Office: NEBRASKA SERVICE CENTER Date: **MAY 11 2004**

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:

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


Robert P. Wiemann, Director
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 remanded to the director to request additional evidence and entry of a new decision.

The petitioner is a dance company. It seeks to employ the beneficiary permanently in the United States as a professional dancer. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor (DOL). The petitioner seeks to classify the beneficiary as a skilled worker under Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). This section 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.

Eligibility in this case hinges on whether classification as a skilled worker is appropriate based on the position requirements set forth on the labor certification. The director determined that the proffered position did not require at least two years of experience or training, and therefore the petition did not meet the regulatory requirements for a skilled worker position. Consequently, the director denied the petition on February 12, 2003.

In evaluating the beneficiary's qualifications, Citizenship and Immigration Services (CIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS 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 Mandany 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 record indicates that the labor certification form was certified by the DOL on October 17, 2001. Section 14 of this form, as amended by the petitioner and approved by the DOL, states that the *minimum* requirements for the position are as follows:

1. Eight years of grade school education;
2. Four years of high school education; and
3. Training in ballet and modern jazz.

The requirements set forth by the petitioner on the labor certification are merely a high school education and training in modern jazz and ballet for an unspecified period of time. As previously noted, a visa petition for classification of an alien as a skilled worker mandates that the proffered position require at least two years of experience or training.

The director, therefore, correctly determined that the petition as filed under Section 203(b)(3)(A)(i) did not meet the requirements for classification of the beneficiary as a skilled worker.

On appeal, counsel asserts on the Form I-290B that "[the petitioner] requires at least two years of experience for this position."¹ This statement is unpersuasive for two reasons. First, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec.

¹ Counsel also states that "a full explanation of the reasons for this appeal will be sent within thirty days of the date of this appeal." As of the date of this decision, this office has received no additional documentation.

503, 506 (BIA 1980). Second, as previously stated, the AAO may not alter the terms of the labor certification. Although the petitioner indicated on the Form I-140, Immigrant Petition for Alien Worker, that the classification sought was that of a skilled worker under Section 203(b)(3)(A)(i), the job offer portion of the accompanying labor certification does not require that the beneficiary possess two years of experience as required for a skilled worker classification. Since the labor certification, once certified, cannot be altered or amended, the AAO is bound by the terms set forth therein. Counsel's allegation that the petitioner requires a minimum of two years experience is untimely and inappropriate on appeal, since the labor certification cannot be amended to include this statement for purposes of satisfying the classification requirements for a skilled worker position.

Although the petitioner has not qualified under its selected classification, the petitioner may qualify under another classification. Specifically, Section 203(b)(3)(A)(iii) of the Act allows for the extension of visas to "other workers," which are identified as:

Other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The director, however, failed to offer the petitioner the opportunity to amend the petition to apply for classification under Section 203(b)(3)(A)(iii) of the Act.

A review of the record shows that the petitioner submitted extensive documentary evidence establishing the beneficiary's qualifications in ballet and modern jazz. Specifically, the AAO notes that the beneficiary possesses approximately 10 years of dance training in addition to a Bachelor of Fine Arts in Dance from the University of Cincinnati. Since the petitioner merely required "training" in ballet and modern jazz, it is clear that the beneficiary meets or exceeds the petitioner's minimum requirements. Therefore, the petitioner may qualify under Section 203(b)(3)(A)(iii) of the Act.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to determine whether the petitioner wishes to pursue classification under Section 203(b)(3)(A)(iii). Additionally, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.