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invasion of personal privacy

[Redacted]

File:

[Redacted]

Date:

MAY 26 2004

IN RE: Petitioner:

Beneficiary:

[Redacted]

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:

[Redacted]

INSTRUCTIONS:

This is the decision 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

for

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a head chef. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that the proffered position requires a skilled laborer according to the definition at 203(b)(3)(A).

On appeal, the counsel submits a brief and additional evidence.

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 unavailable in the United States.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

A position calling for a skilled worker is one that requires at least two years of training or experience, as is noted above. Positions requiring less than two years training or experience are not skilled positions. A petition filed pursuant to Section 203(b)(3)(A)(i) of the Act must be denied if the proffered position does not require a skilled worker. Eligibility in this matter hinges on the petitioner demonstrating that the proffered position requires at least two years training or experience. The regulation at 8 C.F.R. § 204.5(l)(4) states, in pertinent part:

“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.”

The Form ETA 750 Labor Certification Application submitted in this matter states that the position requires one year of experience in the job offered (head chef), or two and one half years as a chef.

On August 19, 2003, the Director, Nebraska Service Center, found that the proffered position is not a position that requires a skilled worker, as it does not require a minimum of two years training or experience.

On appeal, counsel asserts that, because the proffered position is arguably for a skilled worker, the director should have issued a Request for Evidence, rather than a denial. Counsel also asserts that the proffered position is a position for a skilled worker, as one of the alternative training requirements is for more than two years of experience. Further, counsel also asserts that the other alternative, one year of experience as a head chef, also indicates that the proffered position requires a skilled worker because, in order to hold the position of head chef, one would need two years of experience as a chef.

As was noted above, whether the proffered position calls for a skilled or other worker is based on the requirements of training and/or experience placed on the job by the prospective employer. In this case, the prospective employer has indicated that one may qualify for the proffered position either by working as a head chef for a year or by working as a chef for two and a half years.

The first alternative qualification, one year of experience as a head chef, does not, on its face, call for two or more years of training or experience. That indicates, at least ostensibly, that the position requires *a minimum* of less than two years of experience. Counsel urges that this office should look behind the ostensible requirement of one year of experience as a head chef, and find that one year of experience as head chef necessarily implies two years of previous experience as a chef. This office does not share counsel's certainty in that inference. The evidence submitted does not demonstrate credibly that the proffered position requires at least two years training or experience. Therefore, the petitioner has not established that the petition may 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 appeal is dismissed.