



U.S. Citizenship  
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[REDACTED]

FILE:

[REDACTED]  
SRC-98-100-52771

Office: TEXAS SERVICE CENTER

Date: NOV 17 2005

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 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 Director of the Texas Service Center denied the immigrant visa petition for abandonment and subsequently reopened the matter and denied the petition. The Administrative Appeals Office (AAO) summarily dismissed an appeal and three subsequent motions to reopen. The matter is again before the AAO on motion to reconsider and/or reopen. The motion will be denied. The appeal remains dismissed and the petition remains denied.

The petitioner is a hotel and seeks to employ the beneficiary as a hotel/motel receptionist. After issuing a notice of intent to deny, the director ultimately denied the petition on the basis that the petitioner filed the petition under the wrong category since the proffered position did not qualify as a skilled worker position. The petitioner argued that the proffered position does qualify as a skilled worker position because it requires the applicant to have multilingual skills.

The AAO has consistently noted that a request for classification of an employment-based third-preference immigrant visa under Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3) requires that the petitioner establish that there is a corresponding qualified immigrant 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.

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.

(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.

Thus, for petitioners seeking to qualify a beneficiary for the third preference “skilled worker” category, the petitioner must produce evidence that the beneficiary meets the “educational, training or experience, and any other requirements of the individual labor certification” as clearly directed by the plain meaning of the regulatory provision, which require, ***at a minimum, two years of training or experience.*** The AAO informed the petitioner and the petitioner’s counsel of this minimum requirement and pointed out that the petitioner has set forth no such requirement on its accompanying Form ETA 750A (Form ETA 750A), Application for Alien Labor Certification, certified by the U.S. Department of Labor (DOL).

The AAO has consistently affirmed the director’s finding that the petitioner’s argument about multilingualism is irrelevant in these proceedings. Multilingualism is not a regulatory-sanctioned element of establishing that a proffered position qualifies as a skilled worker position. The AAO further notes that multilingualism is not a

requirement of the proffered position as set forth on the Form ETA 750A anyway. Furthermore, Citizenship and Immigration Services (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 petitioner checked box “e” on the visa petition that elicits the petitioner’s request for classification of petition type. Box “e” is for “a skilled worker (requiring at least two years of specialized training or experience) or professional.” Box “g” would have been for “any other worker (requiring less than two years training or experience).” In the service center director’s notice of intent to deny issued on April 28, 1998, the petitioner and the petitioner’s counsel was notified of the error made when filing the petition.

In all of its motions, and in the motion before the AAO now, counsel reiterates prior assertions about the multilingual aspect of the position and citation to Board of Alien Labor Certification Appeals (BALCA) cases, reference to the general requirements of receptionists from the DOL’s *Dictionary of Occupational Titles*, all of which are irrelevant since every argument requires the AAO to consider additional requirements to the proffered position that are not delineated on the Form ETA 750A or to pardon the failure of the proffered position to require two years of training or experience and still prevail under the third preference immigrant visa category.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or CIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

The content of counsel’s motion does not satisfy the requirements of a motion to reopen under 8 C.F.R. § 103.5(a)(2) because no new facts have been asserted and no new documentary evidence has been submitted. The content of counsel’s motion does not satisfy the requirements of a motion to reconsider under 8 C.F.R. § 103.5(a)(3) because counsel fails to assert that the director and the AAO made an erroneous decision through misapplication of *CIS* law or policy or based upon evidence of record at the time of the director’s decision<sup>1</sup>.

Thus, the motion is defective. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The AAO additionally notes that the record of proceeding does not contain evidence that the petitioner has consented to be represented by the counsel who has submitted the pleadings in this matter. No properly executed Form G-28, Notice of Entry of Appearance as Attorney or Representative by the petitioner’s representative is in the record of proceeding. Thus, these matters could have additionally been rejected because CIS regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary’s behalf, from filing an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B). Although counsel states that it represents the

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<sup>1</sup> Counsel has previously relied upon BALCA case law, which was discussed and dismissed by prior AAO decisions, but has failed each time to demonstrate how BALCA case law is binding on an agency not under DOL’s jurisdiction or how the cases cited apply to the instant one.

petitioner as well as the beneficiary, no Form G-28 was submitted signed by both counsel and the petitioner's authorized representative. Thus, pursuant to a defective procedural aspect of the appeal and subsequent motions, all pleadings could have been rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1). Any additional proceedings must address that.

This decision is without prejudice to the petitioner to file a new petition under the proper category of unskilled worker.

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. The petitioner has not met that burden.

**ORDER:** The motion is dismissed. The previous decision of the AAO, dated December 18, 2003, is affirmed. The petition remains denied.