



U.S. Citizenship
and Immigration
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FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date: OCT 25 2005

EAC-03-146-50085

IN RE:

Petitioner:

[REDACTED]

Beneficiary:

PETITION: 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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a cabinet maker. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the training or experience requirements on the ETA 750 did not support the preference classification under which the petition had been filed

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), Skilled workers, 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)(iii) of the Act, Other workers, 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 not available in the United States.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. The petitioner must establish that the offered position as certified satisfies the requirements for the preference classification under which the petition was filed. See 8 C.F.R. § 204.5(a), (l). In addition, to be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 27, 2001.

The Form ETA 750 states that the position of cabinet maker requires no minimum education, training or experience. On the Form ETA 750B, signed by the beneficiary on January 26, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on April 14, 2003. On the petition, the petitioner claimed to have been established on January 12, 1993, to have a gross annual income of \$3,495,622.00 and to have a net annual income of \$341,487.00. The item on the petition for the petitioner's current number of employees was left blank. With the petition, the petitioner submitted supporting evidence.

The director issued a request for evidence (RFE) dated March 17, 2004. The petitioner's submissions in response to the RFE were received by the director on June 10, 2004.

In a decision dated September 30, 2004, the director determined that the petitioner sought classification of the beneficiary under section 203(b)(3)(A)(i) of the Act, which provides for the granting of preference classification to qualified immigrants who are capable of performing skilled labor requiring at least two years training or experience. The director found that the ETA 750 submitted in support of the instant petition required no training or experience. The director therefore denied the petition.

On appeal, counsel submits no brief and submits additional evidence. Counsel states on the notice of appeal that the original ETA 750 as filed by the petitioner had the requirement for two years of experience in Part A, Item 14. The only evidence submitted with the I-290B Notice of Appeal form was a copy of a letter dated October 14, 2004 from the organization where counsel works, signed by the president of that organization. The letter is addressed to a certifying officer of the United States Department of Labor, in New York, New York.

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 I-290B notice of appeal form contains four blocks concerning the possible submission of a brief and/or additional evidence on appeal. The instructions on the form state "Please check the one block which applies." The first block is to be checked if no separate brief or evidence is being submitted. The second block is to be checked if a separate brief and/or evidence is being submitted with the I-290B form. The third block is to be checked if the petitioner is sending a brief and/or evidence to the AAO within thirty days. The fourth block is to be checked if the petitioner needs additional time to submit a brief and/or additional evidence, beyond the thirty days allowed by checking block number three. The following words appear on the form as part of the language indicated by block number four: "*(May be granted only for good cause shown. Explain in a separate letter.)*"

Although counsel submitted evidence with the I-290B form, counsel did not check block number two. Rather, counsel checked block number four, and entered 90 days as the period of time needed in order to submit a brief and/or additional evidence. Counsel submitted no separate letter explaining the need for 90 days to submit a brief and/or additional evidence.

Instructions to CIS official forms are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). By failing to submit an explanatory letter showing good cause to grant the petitioner 90 days within which to submit a brief and/or additional evidence, the petitioner failed to comply with the instruction to that effect on the I-290B Notice of Appeal form, and thereby failed to conform with the regulations.

Moreover, to date, more than twelve months after counsel signed the I-290B form, no further documentation has been received. For the foregoing reasons, the instant appeal will be decided based on the evidence currently in the record, including the copy of the letter dated October 14, 2004 which was submitted with the I-290B notice of appeal.

A noted above, the director denied the petition because the director determined that the training or experience requirements on the ETA 750 did not support the preference classification under which the petition had been filed.

In the request for evidence (RFE) dated March 17, 2004, the director had stated the following:

It does not appear that your petition is approvable to classify the beneficiary as a third preference alien under section 203(b)(3)(i) of INA because the labor certification states that there is no minimum education, training, and/or experience required to perform the proposed job. Section 203(b)(3)(i) requires the beneficiary to have at least two years education, training and/or experience. However, there are no minimum requirements under section 203(b)(iii). If you wish to change the requested preference classification, please place an "X" next to the sentence below. Also indicate the new preference number and classification that you are seeking, and sign where indicated.

_____ I request that my petition be adjudicated as a _____ preference petition under section _____.

Petitioner's signature _____

(RFE, March 17, 2004, at 1).

In response to the RFE, the petitioner submitted additional evidence. The petitioner returned the RFE with the blanks completed in handwriting, as shown below.

 X I request that my petition be adjudicated as a 3 preference petition under section 203(b)(3)(i) .

Petitioner's signature X [illegible signature]

(RFE, as returned, June 10, 2004, at 1).

The petitioner's handwritten responses on the RFE fail to distinguish between the two relevant subsections of the third preference category, namely section 203(b)(3)(i) of the Act, for skilled workers, and section 203(b)(3)(iii) of the Act, for other workers. On the returned RFE, the petitioner placed an "X" in the space to indicate a request to change the preference classification on the petition as submitted, which was the classification for skilled workers. However, in the blank on the next line the petitioner wrote that adjudication was requested under section 203(b)(3)(i), which is the same classification as had been requested originally.

With the petitioner's response to the RFE, counsel also submitted a copy of a letter dated June 8, 2004 from counsel to a certifying officer of the United States Department of Labor, in New York, New York. In that letter, counsel states that the offered position of cabinet maker is a position requiring two years of experience and that on the ETA 750 the required experience was inadvertently omitted. In the letter, counsel requests confirmation from the certifying officer that the beneficiary could be processed as a third preference.

Counsel's letter of June 8, 2004 fails to distinguish between section 203(b)(3)(i) of the Act, for skilled workers, and section 203(b)(3)(iii) of the Act, for other workers. Moreover, in requesting an opinion from the Department of Labor about the appropriate preference category, counsel's letter fails to recognize the distinction in responsibilities between the Department of Labor and CIS. A certification of an ETA 750 by the Department of Labor is a certification that there are not sufficient available workers to perform the labor of the offered position and that the employment of the alien beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed. *See* Act § 212(a)(5)(B). The determination of whether a particular beneficiary shall be granted an immigrant visa based on an approved ETA 750 is the responsibility of CIS, which has authority to adjudicate I-140 employment-based immigrant petitions. *See* Act §§ 203(b)(3), 204(a)(1)(F).

The letter dated October 14, 2004, which is submitted for the first time on appeal, contains slightly different information than that in counsel's letter of June 8, 2004. The October 14, 2004 letter is from the organization where counsel works and is signed by the president of that organization. It is addressed to the same certifying officer of the United States Department of Labor, in New York, New York. In the October 14, 2004 letter, the president states that on the ETA 750 which was certified, Part A, Item 14 was left blank when the ETA 750 was submitted. The president states that CIS had denied the petition under the third preference category. The president's letter then continues as follows:

We always submit two originals of the ETA 750-A and B forms. We are hoping that, perhaps, in one of the ETA 750-A form we filed had the two-year experience required indicated in Item 14. [sic]

We would like, therefore, to solicit your kind understanding to provide us, if at all possible, with the other original of the ETA 750-A and hopefully, it shows the correct entry.

Immigration has given us until November 3rd to reply. Thank you for your kind cooperation.

(Letter from the president of counsel's organization, October 14, 2004, at 1).

The letter dated October 14, 2004 shows a continuing intention on the part of the petitioner that the offered position be classified as one for a skilled worker.

The regulation at 8 C.F.R. § 204.5(l)(2) states in pertinent part

Definitions. As used in this part:

Other worker means a qualified alien who is capable, at the time of petitioning for this classification, of performing unskilled labor (requiring less than two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

...

Skilled worker means an alien who is capable, at the time of petitioning for this classification, 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. Relevant post-secondary education may be considered as training for the purposes of this provision.

The ETA 750 as certified by the Department of Labor states that the offered position of cabinet maker requires no minimum education, training or experience. 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 regulation at 8 C.F.R. § 204.5(l)(4) states in pertinent part as follows:

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 ETA 750 submitted with the instant petition fails to support a classification of the beneficiary as a skilled worker under section 203(b)(3)(i) of the Act. The petitioner was given an opportunity to change the preference

classification, but the petitioner chose to continue with the skilled worker classification of section 203(b)(3)(i). Since the ETA 750 does not support a skilled worker classification, the petition must be denied.

In his decision, the director correctly cited the relevant statutory and regulatory provisions and correctly found that the ETA 750 labor certification did not indicate that any form of training or experience was required to fill the offered position. The director found that the petitioner had declined the opportunity to change the preference classification and had stated that it wished to pursue approval under section 203(b)(3)(i) of the Act. The director found that the ETA 750 did not support classification under that subsection. The director's decision to deny the petition was correct.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

This decision on the instant appeal does not preclude the petitioner from filing a new petition under the other worker classification of section 203(b)(3)(iii) of the Act.

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.