

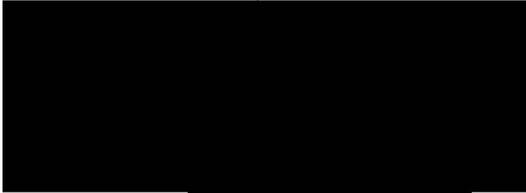
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FILE:

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Office: NEBRASKA SERVICE CENTER

Date:

DEC 27 2006

IN RE:

Petitioner:

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:



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 for

Robert P. Wiemann, Chief
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 dismissed.

The petitioner is a plumbing business. It seeks to employ the beneficiary permanently in the United States as a plumber apprentice. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. According to the information on the petition, the petitioner seeks to classify the beneficiary as an employment-based immigrant pursuant to § 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker (requiring at least two years of specialized training or experience) or professional. The director determined that the beneficiary could not be classified as a skilled worker, as the labor certification establishes that the proffered position does not require at least two years of training or experience. The director determined further that the petitioner could not request that the position be reclassified to that of an unskilled (other) worker, as the petition was not accompanied by evidence that the beneficiary meets the requirements of the labor condition application.

On appeal, counsel states, in part, that the director was required to issue a request for evidence (RFE) requesting that the petitioner submit the "business necessity letter," which was inadvertently omitted from the petition. Counsel states further that, had the request for this evidence been issued, the petitioner would have been given the opportunity to reclassify the beneficiary to a different category.

Counsel's statements are not persuasive. If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. 8 C.F.R. § 103.2(b)(8). The regulations are clear that no RFE is required when there is evidence of the petitioner's ineligibility for the benefit sought. In this case, the petitioner sought a skilled worker classification based on a labor certification that could not support such a classification. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification. 8 C.F.R. § 204.5(I)(3)(ii)(D).

In this case, the petitioner filed the petition for a skilled worker on January 2, 2004 without the "business necessity letter," which was stipulated as "other special requirements" on the labor certification. As correctly stated in the director's June 23, 2004 decision, the beneficiary could not be classified as a skilled worker, as the labor certification establishes that the proffered position does not require at least two years of training or experience, and the petitioner could not request that the position be reclassified to that of an unskilled (other) worker, as the petition was not accompanied by evidence that the beneficiary meets the requirements of the labor condition application. In view of the foregoing, the director properly denied the petition.

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.