U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

B-6

U.S. Citizenship and Immigration Services

[redacted]

FILE: LIN 02 272 52503 Office: NEBRASKA SERVICE CENTER Date: JUL 8 2004

IN RE: Petitioner: [redacted]
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:

[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

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The Director, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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 petitioner had not established that the proffered position requires a skilled laborer according to the definition at 203(b)(3)(A).

On appeal, 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)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for granting 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.

The Form ETA 750 Labor Certification Application submitted in this matter states that the position requires two years of experience as a cook. A notation also states, "In lieu of 2 years Indian cuisine cooking experience, will accept two years formal training or education in Indian Cuisine Food Production, or any combination thereof totaling 2 years."

The Form I-140 petition indicates, at Part 2, that the petition is for "A skilled worker (requiring at least two years of specialized training or experience) or professional . . . ." Because the position does not require a baccalaureate degree, it is not a petition for a professional and must, therefore, be considered a petition for a skilled worker and analyzed as such.

8 C.F.R. 204.5(l)(2) states, in pertinent part, that 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) . . . ."

On October 23, 2002, the Director, Nebraska Service Center, issued a Request for Evidence in this matter. The request noted that the petitioner had submitted evidence that the beneficiary completed approximately 13 months of experience in the job offered and one and one-half years of related training. The request asked the petitioner to

provide evidence that the beneficiary had two years of experience prior to March 19, 2001, the priority date of the petition.

In response, counsel submitted a letter, dated October 29, 2002. In the letter, counsel argued that the use of the word "or" in the phrase "training or experience" in the law and regulations pertinent to this visa classification is not meant solely in the disjunctive, but that the requirement of a combination of training and experience totaling two years can qualify a position as requiring a skilled worker. In support of that position, counsel cited 8 C.F.R. § 204.5(l)(4). Counsel states that the wording of that regulation indicates that, "[Citizenship and Immigration Services (CIS) clearly] recognizes that a combination of training and experience which totals two years can satisfy the necessary requirements to qualify as a 'skilled worker.'" Counsel further argued, in the alternative, that the petition should be approved as a petition for an "Other Worker."

On February 26, 2003, the director denied the petition, finding that the evidence submitted did not demonstrate that the proffered position requires at least two years of training or experience.

On appeal, counsel again asserts that the requirement of a combination of experience and training totaling two is sufficient to qualify a position as one for a skilled worker. In support of that position, counsel submits a non-precedent decision, the facts of which he asserts are similar to the facts of the instant case. Although 8 C.F.R. 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect.

Counsel is incorrect that, in the alternative, the petition may be analyzed as a petition for an "other worker" under Section 203(b)(3)(A)(iii) of the Act. The petition clearly indicates that it is a petition either for a skilled worker or a professional. The Form ETA 750 clearly indicates that it is not a petition for a professional. This case must stand or fall as a petition for a skilled worker.

Counsel notes that 8 C.F.R. § 204.5(l)(4) states, in pertinent part, "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." (Emphasis supplied.) Counsel states that "Clearly, by that regulation, the Service recognizes that a combination of training and experience which totals two years can satisfy the necessary requirements to qualify as a 'skilled worker.'"

Counsel's conclusion does not follow from the wording of that regulation. The regulation may merely recognize that a labor certification could call, for instance, for two or more years of experience **and** two or more years of training. The regulation neither states nor implies that a requirement of training and experience totaling two years qualifies a position as one requiring a skilled worker. It does not support counsel's position.

The issue before this office is whether 8 C.F.R. §204.5(l)(2), in stating that a position which requires a skilled worker is one "requiring at least two years training or experience" precludes positions requiring or allowing a combination of two years training and experience from qualifying. Had the phrase been intended to preclude

a combination of experience and training totaling two years, it could have been phrased "two years training or two years experience." In the absence of any clear indication that a combination of training and experience is forbidden by the regulation, this office is not inclined to impose, or uphold, such a restriction.

The petitioner has overcome the sole basis for denial. 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.