U.S. Department of Homeland Security
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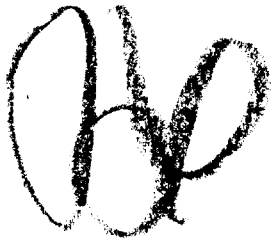
U.S. Citizenship and Immigration Services



[redacted]

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 15 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

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

The petitioner is a private individual. She seeks to employ the beneficiary permanently in the United States as a childcare worker. 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 position requires two years of training or experience and thus is not a position for a skilled worker.

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

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.

The regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

> (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.

Eligibility in this matter hinges on the petitioner demonstrating that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The priority date of the petition is the date the request for labor certification was

accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted for processing on April 30, 2001.

The Form ETA 750 in this matter was amended on January 27, 2003 with the consent of the Department of Labor. It originally stated that the proffered position required one year of experience in the job offered or one year in a related occupation. As amended, it states that the position requires three months of experience in the job offered. The Department of Labor also approved the Form ETA 750 on January 27, 2003.

The Form ETA 750, Part B states that the beneficiary worked as a nurse and assistant, nurse trainee, and nurse/assistant at the [redacted] from August 1971 through 1974. Item 14 of that same form states that the documents submitted as evidence of the beneficiary's education and experience include "Former employer letter re nursing experience." A letter from the Hospital of Fushun City Bureau of Mining Nursing Department states that the beneficiary worked at that location from the end of 1969 through 1974.[1]

On Part 2 of the I-140 petition, which is labeled "Petition Type," selection "e" is clearly checked, indicating that the petition is for a skilled worker (requiring at least two years of experience) or professional. With the petition counsel submitted a letter, dated March 20, 2003, in which he stated that the petition is for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act, and that the beneficiary has 30 years of experience as a nurse/lab technician.

On August 11, 2003, the director denied the petition. The director noted that the petition was for a skilled worker, but that the Form ETA 750 did not indicate that the position required a minimum of two years experience.[2]

On appeal, counsel asserts that "e" on Part 2 of the I-140 petition, indicating that the petition is for a skilled worker or a professional, was selected in error. Counsel states that the petitioner intended to file for an "Other Worker," pursuant to Section 203(B)(3)(a)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). Counsel asks that the petition and evidence be reevaluated as a petition for an "Other Worker."

With the appeal, counsel submits a print-out of what purports to be the transcript a January 22, 2003 teleconference between an unnamed representative of an immigration attorney's association and an unnamed official of the NSC. In that print-out, the representative of the attorney's association suggests a hypothetical situation in which an attorney checks what is clearly an incorrect box on the I-140 petition and asks the ostensible NSC representative whether that situation could be resolved without denying the petition. The ostensible NSC representative replied that in such a situation the attorney should submit a letter explaining

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[1] Although this letter appears to have been submitted on appeal, it is mentioned here for clarity and continuity.

[2] This office notes that the petition might, in the alternative, have been interpreted as petition for a professional. In that event, the petition should also have been denied, as the beneficiary does not have the equivalent of a bachelor's degree, the ETA 750 does not indicate that the proffered position requires a bachelor's degree, and no evidence was submitted to demonstrate that a bachelor's degree is the minimum educational requirement for entry into the field.

the error and asking that the classification be changed. The NSC representative added that if the cover letter submitted with the petition indicates a classification sought other than that indicated on the petition, the Service Center might contact the attorney for clarification.

The AAO is not bound by abstract pronouncements of unnamed officials at the NSC. Further, the instant case does not present the same situation as the hypothetical. Both the petition and the cover letter indicate that the petitioner was seeking classification of the position as one calling for a Skilled Worker. The only contrary indication is that the Form ETA 750 indicates that the position requires less than two years experience. In this case, counsel seems to have sought classification of the position as calling for a Skilled Worker. Only after the petition was denied did counsel seek to have the position classified as one calling for an Other Worker.

The petition calls for a Skilled Worker. The Form ETA 750 does not indicate that the proffered position requires a Skilled Worker. As such, the petition may not 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.