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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington DC 20529-2090

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 22 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment based 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 an automobile collision repair firm. It seeks to employ the beneficiary permanently in the United States as an auto metal technician. The petitioner submitted a copy of the Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), with the petition.

The director determined that the petitioner had not established that the requirements set forth on the approved labor certification were consistent with the visa classification sought. The director further concluded that the petitioner had also failed to submit the original Form ETA 750 with the petition, as well as evidence of its ability to pay the proffered wage, and evidence that the beneficiary met the required educational and/or training and skills requirement as set forth on the Form ETA 750. Finally, the director noted that the alien identified on the Immigrant Petition for Alien Worker (I-140) as the beneficiary did not have the same name as the alien identified on the Form ETA 750.

On appeal, the petitioner, through counsel, asserts that the selection of the visa classification on the I-140 petition may have been a typographical error. He also maintains that any flaws of the petition and required evidence could have been resolved if the director had issued a request for evidence.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

It is noted that counsel indicated on the Form I-290B, Notice of Appeal or Motion that additional evidence and/or a brief would be submitted to the AAO within 30 days. This office has received nothing further. As such this decision will be rendered on the current record of proceedings. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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 other 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.

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 not available in the United States.

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

> (4) *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.

Part 5 of the I-140, filed on August 15, 2007, indicates that the petitioner was established on January 1, 1988 and currently employs thirty workers. The petitioner sought visa classification (Part 2, paragraph g of I-140) of the beneficiary as an unskilled worker (requiring less than two years of training or experience) under section 203(b)(3)(A)(iii) of the Act. The Form ETA 750 submitted in support of this visa classification required three months of electrical or mechanical training and two years of work experience in a related occupation defined as auto body repair, electrical, and/or mechanical work. Further, item 15 of the ETA 750 sets forth additional requirements that must be satisfied. It states that the beneficiary must have ICAR class certificates (including welding certification) or equivalent and 3 months of computer experience.

Citing 8 C.F.R. § 204.5(l)(2), and as mentioned above, the director observed that the certified position described on the Form ETA 750 required two years of experience. As the visa classification sought on the I-140 petition designated the unskilled worker category (paragraph g), the I-140 petition was not approvable because it was not supported by the appropriate Form ETA 750. In order to be classified as an unskilled worker, the Form ETA 750 must require less than two years of training or experience. The director denied the petition on this basis because the petitioner did not demonstrate that the position required less than two years of training or experience.

On appeal, counsel states that the selection of the unskilled worker category (paragraph g) on the I-140 may have been a typographical error that could have been amended if the director had issued a request for evidence.

The AAO concurs with the director's denial of the petition on this basis. The regulation at 8 C.F.R. § 103.2(b)(8)(ii) clearly allows the denial of an application or petition, notwithstanding any lack of required initial evidence, if evidence of ineligibility is present. It is noted that neither the law nor the regulations require the director to consider other classifications if the petition is not approvable under the classification requested.[1] We cannot conclude that the director committed reversible error by adjudicating the petition under the classification requested by the petitioner. As the labor certification required two years of experience, the petition may not be filed as an unskilled worker petition. The proper remedy would be to submit a new petition

[1]It is also noted that counsel's transmittal letter submitted with the Form I-485, Application to Register Permanent Residence or Adjust Status, specifically refers to paragraph g, "other worker" as the requested visa classification for the beneficiary.

supported by the appropriate labor certification, select the proper category, and submit the required fee and documentation.

Further, as noted by the director, no evidence of the petitioner's ability to pay the proffered wage of $21.78 per hour was provided. In any future filing of a employment-based immigrant petition, it is incumbent on the petitioner to establish its continuing financial ability to pay *all proposed wage offers* as of the respective priority date of each pending petition. Each petition must conform to the requirements of 8 C.F.R. § 204.5(g)(2)[2] and be supported by pertinent financial documentation. The petitioner must establish that its ETA 750 (or ETA Form 9089) job offer to the beneficiary is a realistic one as of the priority date with respect to the beneficiary's qualifications and the petitioner's ability to pay the proffered wage. A petitioner's filing of a labor certification application establishes a priority date for any immigrant petition later filed based on the labor certification. The priority date is the date that the application for labor certification was accepted for processing by any office within the employment service system of DOL. *See* 8 CFR § 204.5(d). *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In this case, the priority date is April 27, 2001. As noted by the director, no evidence was submitted to establish the petitioner's ability to pay the proffered wage and therefore the petition was not eligible for approval on this basis.

If the petitioner elects to file a new petition seeking a visa classification for a beneficiary as a skilled worker requiring a minimum of two years of training or experience, it must be supported by proof that the beneficiary has the required training and experience to meet the terms of the labor certification as set forth in 8 C.F.R. § 204.5(l)(3).[3] As noted above, the director is not

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[2] The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

[3] (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

compelled to issue a request for evidence for such evidence and no prescribed evidence related to the beneficiary's training, experience or skills is contained in the record. Additionally, even if the petition was considered as one requesting a visa classification of an other, unskilled worker under section 203(b)(3)(A)(iii) of the Act, which the labor certification does not support, the record lacked the evidence required by 8 C.F.R. § 204.5(l)(3)(ii) in that no documentation of the beneficiary's required three months of training was submitted with the petition and no documentation of the ICAR certificates or three months of computer experience was provided.

Further, as noted by the director, the petition was not submitted with the original approved Form ETA 750 and the record does not contain the document. The regulation at 8 C.F.R. 103.2(b) provides in pertinent part:

> (4) *Submitting copies of documents.* Application and petition forms, and documents issued to support an application or petition (such as labor certifications, Form DS 2019, medical examinations, affidavits, formal consultations, letters of current employment and other statements) must be submitted in the original unless previously filed with USCIS.

As the original Form ETA 750 was not provided, the petition is additionally not approvable.

Finally, it is noted that the name of the sponsored alien on item 1 of the ETA 750 is "[redacted] (Emphasis added). The name of the beneficiary specified on part 3 of the I-140 petition is [redacted] The spelling of the last name is not the same and for that reason, unless the petitioner seeks a correction from DOL, the I-140 may not be approved on behalf of this alien as it is not clear the same alien is the beneficiary on both documents. It is noted that DOL bars amendment to the approved labor certification once approval has been issued in a final determination by the certifying officer, except to correct mistakes made by the certifying officers, e.g., in the spelling of the employer's or alien's name.[4]

Based on a review of the underlying record and the evidence submitted on appeal, it may not be concluded that the labor certification provided supports the approval of the petition for an unskilled worker visa classification initially sought by the petitioner. Further, the petitioner failed to submit the original labor certification, failed to establish that the beneficiary possessed the required skills or experience, failed to establish the petitioner's ability to pay the proffered wage, and failed

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> 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.

[4] *See* DOL National Office memo to certifying officers, dated March 30, 1992; DOL Field Memorandum No. 47-92, dated May 7, 1992, published in 57 Fed. Reg. 31219 (1992).

to establish that the same alien is identified on the ETA 750 as is named on the I-140. 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.