identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

U.S. Citizenship and Immigration Services

B6

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: APR 19 2005

EAC 03 140 54490

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

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 knitting mills firm. It seeks to employ the beneficiary permanently in the United States as a knitting machine fixer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied 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 and denied the petition accordingly.

On appeal, counsel contends that the labor certification requirements represented a harmless error and that in this case, the director should approved the petition.

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.

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.

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.

The Immigrant Petition for Alien Worker, (I-140), filed March 28, 2003, sought visa classification of the beneficiary as a skilled worker (requiring at least two years of specialized training or experience) under section 203(b)(3)(A)(i) of the Act.

The alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements. In this case, no information appears in Block 14 or 15, signifying that no experience, training, or education is required for the certified position of knitting machine fixer.

On June 19, 2003, the director notified the petitioner that its petition was not approvable as a third preference "skilled worker" under section 203(b)(3)(A)(i) because the ETA 750-A states that no experience or training is required to perform the duties of the offered position. The director informed the petitioner that the position of knitting machine fixer appears to be approvable under section 203(b)(3)(A)(iii), which has a minimum qualification of less than two years of education, training or experience. The director offered the petitioner the opportunity to change the requested preference classification to that of "other worker" under section 203(b)(3)(A)(iii).

In response, counsel submitted copies of correspondence with the Department of Labor and copies of newspaper advertisements referencing the certified position. Counsel states in a transmittal letter, dated July 10, 2003, that there was an apparent typographical error in the ETA 750 in that the required two years of experience was omitted from the approved labor certification but two years is the "Specific Vocational Preparation" (SVP) estimate determined by the DOL as the amount of time required to develop the skill needed to perform the job as it is described in the Dictionary of Occupational Titles. As the alien beneficiary complies with this level of experience, counsel asserts that the I-140 should be approved as a third preference skilled worker.

The director denied the petition on September 8, 2003. Citing 8 C.F.R. 204.5(l)(4), the director determined that in order to classify the alien as a skilled worker under section 203(b)(3)(A)(i) of the Act, the position must require at least two years of experience and/or training. As the labor certification establishes that no education, training or experience is required for the offered position, the alien can only be classified as an "other worker" under section 203(b)(3)(A)(iii).

On appeal, counsel renews the contentions that were previously expressed in her response to the director's June 2003 inquiry as to whether the petitioner desired to amend the visa classification sought to that of "other worker." Counsel resubmits recruitment advertisements and argues that they required two years of experience for the certified position. Counsel maintains that the SVP requirements are also two years of experience to qualify as a knitting machine fixer and that the omission of this work experience on the application for labor certification was merely a typographical error. Counsel claims that the petitioner attempted to obtain a new ETA 750A re-endorsed by DOL, but had not received a timely response before the petition was denied.

As stated above, whether an alien receives a visa classified as an "other worker" under section 203(b)(3)(A)(iii) or as a "skilled worker" under section 203(b)(3)(A)(iii) of the Act is determined by the requirements of training and/or experience placed on the position by petitioner as set forth on the DOL's approved labor certification. *See* 8 C.F.R. 204.5(l)(4) *supra.* Here, the labor certification was filed on April 17, 2001. Although the Dept. of Labor and the former Immigration and Naturalization Service (INS) had a long standing agreement that changes on the labor certification relating to the name and address of the employer would be made by INS, no such agreement included changes in the job requirements (items 14 and 15) because it relates to the process which tests the U.S. labor market.[1] It is not current Citizenship and Immigration Services (CIS) policy to, in effect, alter the job requirements set forth on the Dept. of Labor Form ETA 750 in order to cure even inadvertent errors made by a petitioner and/or the Dept. of Labor. As the approved labor certification specifies that no education, training or experience be required by the certified job, a petition for a visa classification of "other worker" is the only one that is eligible for approval. As the petitioner declined to amend the visa classification sought from skilled worker to other worker, the director correctly denied the petition.

---

[1] DOL policy bars amendments of the approved labor certification except to correct mistakes made by the certifying officers, e.g., in spelling of the employer or alien's name. The only amendment to the substantive elements that may be made by a certifying officer is where the amendment was approved prior to the issuance of certification. *See* DOL Field Memorandum No. 47-92, dated May 7, 1992, published in 57 Fed. Reg. 31219 (1992).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.