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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

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 23 2009

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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 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

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 a Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a head cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the Immigrant Petition for Alien Worker (Form I-140). The director determined that the petitioner failed to establish that the requirements set forth on the approved labor certification supported the visa classification sought, and denied the petition on January 26, 2009.

On appeal, the petitioner, through counsel, faults the director for failing to request any evidence from the petitioner regarding issues of experience, training or other matters. Counsel insists that the position as described by the specific vocational preparation (SVP) established by DOL as a position that requires at least one year of experience, but no more than two years of experience and that the director erred in denying the petition. Counsel contends that irreparable harm would accrue to the beneficiary and the petitioner if the I-140 is not approved as the beneficiary is undocumented and would have to return to Mexico and the petitioning business would suffer. Counsel submits a declaration by the owner of the petitioning business, [redacted] on appeal. It indicates that she knew the position could require one to two years of experience but she tried not to exclude any applicants by only requiring a high school education through her recruitment efforts. Additional evidence in the form of newspaper advertisements submitted on appeal confirm that the position was advertised requiring only a high school diploma.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB,* 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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 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.

Item 14 of the ETA 750 instructs the employer to state the minimum education, training, and experience for a worker to satisfactorily perform the certified job. Item 14 states that the certified position of head cook requires that the applicant have completed four years of high school. There are no training requirements and no work experience requirements certified by DOL. Item 15 requires that the applicant have a food workers certificate.

On the I-140, the petitioner sought visa classification (Part 2, paragraph e of I-140) of the beneficiary as a skilled worker (requiring at least two years of training or experience) under section 203(b)(3)(A)(i) of the Act.

Citing 8 C.F.R. § 204.5(l), the director also determined that in order to classify the alien as an skilled worker under section 203(b)(3)(A)(i) of the Act, and as requested by the petitioner on the I-140, the certified position as set forth on the ETA 750 must require, at a minimum, at least two years of training or experience. The director denied the petition on this basis because the petitioner did not demonstrate that the position as described on the ETA 750 required at least two years training or experience. In fact, Form ETA 750 does not specify any educational, training or experiential requirements and could only properly be filed as an "other worker."

The AAO concurs with the director's decision. It is unclear why, if the position required one year and up to two years of experience, that this was not submitted in some way on the ETA 750 to be certified by DOL. It remains that the petitioner failed to submit a certified ETA 750 that is consistent with the requirements of the visa classification sought. It is clear that the ETA 750 describes an unskilled, other worker pursuant to section 203(b)(3)(A)(iii) of the Act. The I-140, as filed however, requires a skilled worker under section 203(b)(3)(A)(i) of the Act. As such, the ETA 750 does not support the visa classification sought by the petitioner. The regulation at 8 C.F.R. § 103.2(b)(8)(ii), clearly allows USCIS, in its discretion to deny the petition for lack of initial evidence or for ineligibility or request additional evidence. 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 visa classification requested. We cannot conclude that the director committed reversible error by adjudicating the petition under the classification requested by the petitioner. Further, there are no provisions permitting the petitioner to amend the petition on appeal in order to reflect a request under another classification.

Based on a review of the underlying record and the argument submitted on appeal, it may not be concluded that the petitioner established that the certified position required at least two years

training or experience in order to approve the petition for the visa classification designated as a skilled worker.[1]

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.

[1] It is additionally noted that the petitioner failed to demonstrate its continuing financial ability to pay the proffered wage of $13.00 per hour (annualized to $27,040 per year) pursuant to 8 C.F.R. § 204.5(g)(2), which requires audited financial statements, annual reports or federal tax returns. The evidence must demonstrate a petitioner's continuing ability to pay a certified wage as of the priority date. The individual Form(s) 1040 submitted by the sole proprietor reflect reported adjusted gross income(s) of $13,127 in 2004; $9,080 in 2005; and -$22,590 in 2006. None of these amounts could cover payment of the proffered wage. Moreover, the petitioner failed to submit evidence of its ability to pay in 2001, 2002 or 2003 that would demonstrate its ability to pay as of the priority date forward. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, at 1002 n. 9. (noting that the AAO reviews appeals on a *de novo* basis). The petitioner's failure to establish its continuing ability to pay the proffered wage constitutes an independent basis of denial of the petition.