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[Redacted]

FILE: [Redacted]
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Office: NEBRASKA SERVICE CENTER

Date: JUN 07 2005

IN RE: Petitioner: [Redacted]
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.

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a parent. He seeks to employ the beneficiary permanently in the United States as a child monitor. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the petition and denied the petition accordingly.

On appeal, counsel gives a brief statement of reasons for the appeal on the Form I-290B and along with a brief and no 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)(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.

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 25, 2001. The labor certification states that

the position requires three months experience. However, the Form I-140 petition, drafted by counsel, indicates the petition seeks classification of the beneficiary as a skilled worker.

With the petition counsel submitted:

- The labor certification approved May 8, 2003;
- A letter from [REDACTED] and [REDACTED] dated February 6, 2001, confirming that the beneficiary had worked full time as a live-in babysitter from December 26, 1999 to December 31, 2000; and,
- The petitioner's Form 1040 income tax return for 2001.

On October 20, 2003, the director issued a request for evidence (RFE) seeking only the petitioner's birth certificate. The RFE, however, did not seek further evidence of the beneficiary's experience, her training received or for how long, to find out if the petitioner could otherwise establish the beneficiary met the requirements of 8 C.F.R. 204.5 § (l)(3)(ii).

On October 30, 2003, in response to the RFE counsel submitted:

- A certified copy of the certificate; and,
- The petitioner's Form 1040 tax return for 2002.

On December 16, 2003, the director denied the petition, finding the evidence submitted did not demonstrate that the beneficiary has the two years of salient work experience required for skilled worker classification.

Counsel asserts on appeal, that the director erred in that:

- He should have noticed the obvious clerical mistake in the petition, which intended to seek unskilled classification of the beneficiary but which instead sought classification as a skilled worker; and,
- The director should have inquired – through a notice of intent to deny or his RFE – if the petitioner wanted to amend the petition or invite near certain denial.

The evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of experience. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position. The Form I-140 petition, as written, seeks a classification with experience minimums far in excess of those set by blocks 14 and 15 of the Form ETA 750.

This office notes that in general, if nothing in the record shows a petitioner would have wanted a lesser classification, the director cannot be faulted for choosing not to go outside the petition and verify if correctly drafted. In those circumstances, the director is correct in deciding the beneficiary is ineligible without making further inquiry.

Here, the director did not err by not questioning, in the RFE, if the petitioner really meant to classify the beneficiary a skilled worker, as proposed by the petition. It is not up to a director to monitor whether counsel is correctly performing the job for which he was hired. However, this office may review of cases *de novo*. 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, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Here we are persuaded by the unique circumstances of this record that counsel did made a clerical mistake and would have intended, if asked, that the petition require a classification meeting the job experience specified on the certified Form ETA 750. We therefore find the petitioner intended, but for the clerical mistake, to classify the beneficiary under section 203(b)(3)(a)(iii), as an unskilled worker with at least three months job experience. We also find the petitioner, whose household includes his wife and four children, has the ability to pay the proffered wage, given his adjusted gross income of \$928,750 in 2001 and of \$748,588 in 2002 reported on his Form 1040 income tax returns for those years.

The AAO notes our finding in this case is that the petitioner from the outset had to file the petition for “other worker” classification. The AAO distinguishes this case from a scenario where the petitioner, realizing during the proceedings the beneficiary’s ineligibility in one classification, raises the beneficiary’s eligibility for another classification. Such a scenario would be clearly precluded by *Matter Of Katigbak*, 14 I. & N. Dec. 45, Interim Decision (BIA 1971) 2125.

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 and, but for a clerical error on the petition, has established that the beneficiary is qualified as an unskilled worker under section 203(b)(3)(a)(iii) of the Act.

ORDER: The appeal is sustained. The petition, hereby amended to classify the beneficiary as an unskilled worker under Section 203(b)(3)(a)(iii) of the Act, is granted.