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U.S. Department of Homeland Security
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U.S. Citizenship
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FILE:

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Office: NEBRASKA SERVICE CENTER

Date:

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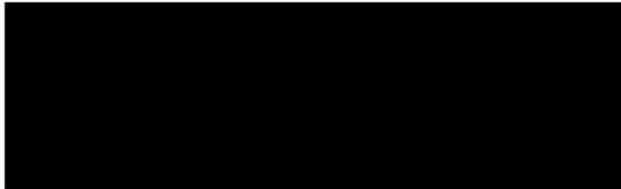
IN RE:

Petitioner:

Beneficiary:

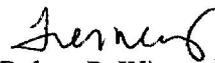
PETITION: Immigrant Petition for _____ orker as a _____ led Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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.


for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference 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 leather tooling firm. It seeks to employ the beneficiary permanently in the United States as a shoe and leather worker repairer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director found that the terms of the proffered position as set forth on the labor certification did not require a skilled worker or professional. Yet, the petitioner indicated on the Form I-140, Immigrant Petition for Alien Worker, that it filed the petition for a skilled worker or professional. The director denied the petition accordingly.

On appeal, counsel requests reconsideration of the petition under a different immigrant classification.

Counsel indicates on Part 2 of the notice of appeal, filed August 15, 2005, that a brief and/or additional evidence would be sent to the AAO within 30 days. As of this date, more than seventeen months later, nothing further has been received by this office. Nothing has been received in response to a recent facsimile inquiry sent to counsel by the AAO regarding this brief and/or additional evidence. This decision will be rendered on the record as it stands.

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 alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. The educational, training, and experience requirements are set forth in Item 14 and Item 15. In this case, the only requirement listed is eight years of grade school and one year of experience as a shoe and leather worker and repairer. The petitioner, however, initially requested a visa classification as a skilled worker in paragraph "e" of Part 2 of the Immigrant Petition for Alien Worker (I-140). Pursuant to section 203(b)(3)(A)(i) of the Act, as noted above, this classification requires a minimum of least two years training or experience.

On May 11, 2005, the director issued a request for evidence. It mainly related to the petitioner's ability to pay the proffered wage of \$12.04 per hour, but the director additionally stated that she was enclosing a copy of the I-140 and instructed the petitioner to "[I]ndicate on the enclosed copy of the I-140, Immigrant Petition for Alien Worker, that you have marked the correct category in Part 2."

In response, the petitioner, through counsel, provides the first page of the I-140 with the same visa classification of "skilled worker" as selected in paragraph "e" of Part 2 of the original I-140. Counsel's transmittal letter, dated May

24, 2005, also indicates that “we have enclosed the first page of the I-140 Petition form with the correct box checked as requested.”

On August 1, 2005, the director denied the petition, noting that the I-140 indicates that the petitioner wishes to employ the beneficiary as a skilled worker. The director concluded that because the labor certification’s minimum training and experience requirements do not describe a position that would require at least two years training or experience, the beneficiary cannot be classified as a skilled worker.

On appeal, counsel explains that his former paralegal committed the error of selecting the wrong category of skilled worker on the original I-140 and also inadvertently checked paragraph “e” skilled worker instead of paragraph “g” designating “any other worker (requiring less than two years of training or experience)” on the I-140 submitted in response to the request for evidence. He explains that he did not see the final product as the transmittal letter was only stamped with his signature by someone other than himself. He acknowledges that it may not be a ground for appeal but requests that the case be returned to the director with instructions to allow the approval of the petition based on “scrivener’s error” and that the beneficiary receive the “other worker,” unskilled visa category under section 203(b)(3)(A)(iii) of the Act.

The regulation at 8 C.F.R. § 204.5(l) provides 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.

In this case, item 14 of the ETA 750 requires that the beneficiary possess eight years of grade school and one year of experience as a leather maker. This only conforms to the unskilled worker visa classification under section 203(b)(3)(A)(iii) of the Act. Thus, the correct selection on the I-140 is paragraph “g”, which describes the classification as “any other worker (requiring less than two years of training or experience).”

There is no provision in statute or regulation that compels CIS to re-adjudicate a petition under a different visa classification in response to a petitioner’s request to change it, once the director’s decision has been rendered. Additionally, the director offered the petitioner the opportunity to change the visa classification before her decision was made. In this matter, the appropriate remedy would be to file another petition with the proper fee and required documentation.

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.