



U.S. Citizenship
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Services

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File: [Redacted]
LIN-06-221-50363

Office: NEBRASKA SERVICE CENTER

Date: **AUG 12 2008**

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:



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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (“director”), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (“AAO”) on appeal. The appeal will be dismissed.

The petitioner’s business relates to providing building services. The petitioner seeks to employ the beneficiary permanently in the United States as a supervisor, janitorial (“Janitorial Services Supervisor (Bilingual)”). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director’s December 15, 2006 decision, the petition was denied as Form ETA 750 only required one year of experience. Therefore, the petitioner failed to demonstrate that the petition was for a skilled worker as requested on Form I-140.

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).¹

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. 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.

The petitioner has filed to obtain an immigrant visa and classify the beneficiary as a skilled worker. 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that the Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *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 the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 25, 2001. The labor certification was approved on March 17, 2005, and the petitioner filed the I-140 on the beneficiary’s behalf on July 17, 2006. The petitioner represented the following information on the I-140 Petition: date established: February 14, 1987; gross annual income: \$5,204,088; net annual income: \$121,875; and current number of employees: 125.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On December 15, 2006, the director denied the petition as the petitioner sought to classify the position under 203(b)(3)(A)(i) as a skilled worker requiring two or more years of experience. Form ETA 750 listed the position requirements as one year of experience in the job offered, or one year of experience as a supervisor of any field. Accordingly, the petition would not qualify for professional or skilled worker classification, and the petitioner did not demonstrate that the beneficiary qualified for the position. The director provided that the denial was without prejudice to filing another petition for another classification supported by the appropriate evidence.

The petitioner filed an appeal and requested that the petition be reopened and reconsidered. Counsel asserts that Form I-140 contained a typographical error, and that “professional or skilled worker” was accidentally checked instead of the “other worker” category. Counsel requests that the beneficiary’s petition be processed under section 203(b)(3)(A)(iii) of the Act as a third preference other worker.

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. § 103.2(b)(1) provides that a petitioner must “establish eligibility for a requested immigration benefit.” Further, 8 C.F.R. § 103.2(b)(8) provides that, “if there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required evidence.”

The petitioner requested consideration as a professional or skilled worker. The Form ETA 750 position did not meet the requirements of that classification. The petitioner, therefore, did not establish its eligibility for the benefit sought. Thus, the director was justified in denying the petition without issuing a request for evidence or notice of intent to deny first. 8 C.F.R. § 103.2(b)(8)(i). Further, the record before the director evidenced clear ineligibility for the benefit sought. The petitioner has not provided any evidence on appeal to establish eligibility under the professional or skilled worker category. The petitioner cannot request to amend classification on appeal, but instead, as the director noted, would have leave to refile the petition and request the proper classification. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998).

Further, although not raised in the director’s decision, the petition should also have been denied as the petitioner failed to document the beneficiary’s prior experience required to meet the terms of the certified labor certification. 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*, 229 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). The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

In evaluating the beneficiary’s qualifications, Citizenship and Immigration Services (“CIS”) must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of*

Silver Dragon Chinese Restaurant, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

On the Form ETA 750A, the "job offer" position description provides:

Supervise and coordinate activities of workers engaged in cleaning and/or maintaining facilities. Assign tasks to workers and subcontractors; inspect completed work for conformance of standards. Issue supplies and equipment; submit requests for repair of cleaning equipment. Train new workers; resolve worker's problems.

Experience: 1 year in the job offered, Janitorial Services Supervisor (Bilingual), or 1 year in a related occupation of a supervisor, any field.

The petitioner listed the special requirements as bilingual: English/Spanish.

On the Form ETA 750B, signed by the beneficiary on April 20, 2001, the beneficiary listed her prior experience as: (1) the petitioner, from January 2001 to present (date of signature), position: Janitor; (2) self-employed, Rockville, Maryland, from August 1998 to December 1999, position: House Cleaner; and (3) Ruth Schaeffer, Potomac, Maryland, from August 1997 to August 1998, position: Housekeeper; and (4) Comercial Jacobe, Lima Peru, from March 1991 to December 1992, position: Supervisor.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3), which provides:

(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 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.

The petitioner did not provide any documentation to evidence the beneficiary's prior experience or show that she had the required one year of prior experience. Accordingly, the petitioner failed to demonstrate that the beneficiary had the experience required for the position, and the petition should have been denied on this basis as well.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.