

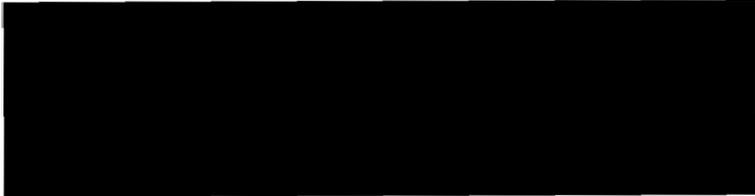
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U.S. Citizenship
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Services

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FILE:



LIN-06-107-50481

Office: NEBRASKA SERVICE CENTER

Date:

NOV 07 2008

IN RE:

Petitioner:

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:



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 preference visa petition was denied by the Acting Director (Director), Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.¹ The appeal will be dismissed.

The petitioner is an e-commerce pharmacy. It seeks to employ the beneficiary permanently in the United States as a web master (senior web developer/system administrator). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker, however, the labor certification presented was not certified to require two years of specialized training or experience, and no Form ETA 750 or ETA Form 9089 labor certification was submitted with the petition to support the classification sought. The director denied the petition accordingly.

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.

As set forth in the director's November 13, 2006 denial, the single issue in this case is whether or not the petition is accompanied with a DOL certified labor certification to support the classification the petitioner sought for the beneficiary.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.² On appeal, counsel submits a brief and recruitment materials relating to the underlying labor certification process as additional evidence to support the instant petition's qualification under the skilled worker category.

Section 203(b)(3)(A)(i) of the Act 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

¹ The petitioner through the same counsel filed an I-140 immigrant petition (Receipt Number LIN-05-019-51458) under the unskilled worker category on behalf of the same beneficiary on October 21, 2004 based on a certified labor certification. The petition was denied on August 30, 2005 and the subsequent appeal was filed on September 29, 2005. The AAO sustained the appeal and approved the petition on August 14, 2006. However, while the appeal was pending with the AAO, the petitioner filed the instant identical immigrant petition on behalf of the instant beneficiary with the Nebraska Service Center on February 28, 2006 based on the same certified labor certification but under the skilled worker category.

² 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).

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 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 not available in the United States.

The record shows that the petitioner filed the instant petition to classify the beneficiary as a skilled worker under Section 203(b)(3)(A)(i) of the Act by checking box e for a professional or a skilled worker, in Part 2 of the Form I-140. Section 203(b)(3)(A)(i) of the Act defines a skilled worker as requiring at least two years training or experience.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the 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, Mandany 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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of web master. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|------------------------------|------------------------------------|
| 14. | Experience | |
| | Job Offered | Blank |
| | Related Occupation | 1 [year] |
| | Related Occupation (specify) | Webmaster , system engineer |

The duties are delineated at Item 13 of the Form ETA 750A and since this is a public record, need not be recited in this decision. Item 15 of Form ETA 750A reflects the following as other special requirements:

Item 14 to include 1 year of exp with the HBS pharmacy software; 1 year of exp with the AIX operating system, RS/6000 servers, and the H.A.C.M.P. clustering software; 1 year of exp with Blue Martini software, development of java server pages, and WebLogic application server. Experience can be gained concurrently.

In his denial decision, the director stated that the Form ETA 750 indicates that the qualifications for this position are one year of experience in a related occupation; and no education or alternate combination of education and experience is specified on the Form ETA 750. The director denied the petition under the skilled worker category since the petitioner had not established that the position requires at least two years of training or experience.

On appeal counsel asserts that the position requires more than two years of experience and therefore, the beneficiary may be classified as a skilled worker. Counsel also submits recruitment materials to support his assertions that the labor certification was approved "as a skilled worker."³

The AAO notes that counsel also represented the petitioner in the labor certification application processing. The evidence in the record shows that in the newspaper advertisements placed in The Oregonian Friday, January 4, 2002 and Friday, January 18, 2002 editions and website of FlipDog.com, the petitioner required: 1 year of experience with the HBS pharmacy system; 1 year of experience with the AIX operating system, RS/6000 servers, and the H.A.C.M.P. clustering software; 1 year of experience with Blue Martini software, development of java server pages, and WebLogic application server and 5 years of experience with Unix, Perl shell scripting, and Oracle databases.

In a letter dated July 29, 2003, the Oregon Employment Department (OED) found that the employer's advertisements required more experience than was listed as the actual minimum requirements on the Form ETA 750 Part A, specifically five years of experience with Unix, Perl shell scripting, and Oracle databases and also informed the petitioner of an option to request that the application be forwarded directly to the DOL Region 6 Certifying Officer. In a response received by OED on August 21, 2003, counsel asked to amend the form by adding the five years of experience requirement. On September 17, 2003, OED issued another letter to the petitioner stating that the five years of experience requirement would be over the standard vocational preparation (SVP) for a webmaster position. Therefore, contrary to counsel's assertion, OED did not accept the amendment request. In this letter, OED again offered the petitioner the option to request that the application be forwarded directly to DOL. The record contains a copy of a letter dated February 23, 2004 from counsel addressed to OED requesting the application to be forwarded directly to DOL.

Counsel did not submit any further correspondence from OED regarding this labor certification application. From the correspondence currently in the record, OED expressed its concerns that DOL would allow the petitioner to add the five years of experience requirement to the Form ETA 750. The record does not contain any evidence that OED forwarded to DOL the application with the five years of experience requirement. Instead, the Form ETA 750A certified by DOL clearly shows that the position requires one year of experience in a related occupation without the five-year requirement. Therefore, the petitioner failed to establish that the position requires at least two years of experience and that the certified labor certification was certified differently than how it submitted to CIS with only one year of experience as the requirement.

In addition, the petitioner's filing history does not support its assertion that the position requires at least two years of experience. CIS records show that the petitioner filed a Form I-140 immigrant petition on behalf of the instant beneficiary based on the underlying labor certification. The petitioner with assistance of counsel expressly requested that CIS classify the beneficiary as an unskilled worker by checking box g in Part 2 of the Form I-140. Box g is for any other worker (requiring less than two years of training or experience), not for a skilled worker. Filing the petition as a skilled worker after filing and receiving an approval from the AAO as an unskilled worker is inconsistent and indicates an awareness of the categories' requirements. The instant petition was filed after the previous unskilled worker petition had been denied by the director. The petitioner

³ DOL does not determine whether a petition or alien is a skilled or unskilled worker.

filed the instant petition based on the same labor certification. The petitioner failed to explain how a labor certification supporting an unskilled worker petition could also be used to support a skilled worker petition.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner failed to establish eligibility for the benefit sought, i.e. the third preference as a skilled worker, with a valid labor certification for that category. The AAO concurs with the director's decision that with the instant labor certification the petition is not approvable under the skilled worker category, and accordingly the director's November 13, 2006 decision will be affirmed.

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.