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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

bc



File: [Redacted]
LIN 06 212 51855

Office: NEBRASKA SERVICE CENTER

Date: **APR 13 2009**

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.

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, as required by 8 C.F.R. 103.5(a)(1)(i).


John F. Grissom
Acting 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 kitchen and bathroom remodeling company. It seeks to employ the beneficiary permanently in the United States as a tile and marble setter. As required by statute, the petition is accompanied by a Form ETA 9089 Application for Permanent Employment Certification certified by the U.S. Department of Labor (DOL). The director determined that the petitioner had indicated the wrong visa classification for the beneficiary on the petition. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, was timely, but did not make 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 denial dated April 25, 2007, the single issue in this case involves the visa classification sought. On Part 2 of the Form I-140 petition, the petitioner checked box "e," indicating that it seeks to classify the beneficiary pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), as an alien capable of performing skilled labor. The director determined that the petitioner incorrectly indicated that the position requires work from an alien capable of performing skilled labor.

The AAO will affirm the director's denial and dismiss the appeal. Upon review, the director's decision was proper under the law and regulations. As will be discussed in detail, a petitioner may not make material changes to a petition after adjudication in order to establish eligibility. Additionally, the Act prohibits U.S. Citizenship and Immigration Services (USCIS) from providing a petitioner with multiple adjudications for a single petition with a single fee. Counsel claims that he erroneously requested classification of a tile and marble setter as an alien who is a "skilled worker (requiring at least two years of specialized training or experience)."

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), specifically 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.

As used in this section, the term "skilled labor" means a level of expertise gained after having worked in the field of the proffered position for two or more years. The specific requirements for supporting documents to establish that an alien has gained two or more years of experience are set forth in the regulation at 8 C.F.R. § 204.5(1)(3):

Initial evidence—

(i) *Labor certification or evidence that alien qualifies for Labor Market Information Pilot Program.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is a shortage occupation with the Labor Market Pilot Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. The job offer portion of an individual labor certification, Schedule A application, or Pilot Program application for a professional must demonstrate that the job requires the minimum of a baccalaureate degree.

(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.

On April 25, 2007, the director denied the petition finding that the petitioner incorrectly indicated that the position requires work from an alien capable of performing skilled labor.

On appeal, the petitioner submitted a November 27, 2006 letter from the petitioner stating: "The box on the I-140 Petition of skilled worker (box "e") was checked instead of the box that should have been checked, which was the box indicating "any other worker" (box "g")." The attorney who prepared the Form I-140 petition requested on appeal that the petition now be adjudicated pursuant to section 203(b)(3)(A)(iii) of the Act.¹

¹ *Other workers.* 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.

As discussed, the Form I-140 petition was clearly marked under Part 2 as a petition filed for classification as “a skilled worker.” The petitioner signed the Form I-140 petition under penalty of perjury, attesting that the information on the form was correct. As the petition was unaccompanied by instructions from previous counsel or the petitioner specifying otherwise, the director properly adjudicated the petition pursuant to section 203(b)(3)(A)(i) of the Act. Since the director’s decision was not in error, the petitioner is precluded from requesting a change of classification on appeal. A request for a change of classification will not be entertained for a petition that has already been adjudicated. A post-adjudication alteration of the requested visa classification constitutes a material change. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Furthermore, USCIS is statutorily prohibited from providing a petitioner with multiple adjudications for a single petition with a single fee. The initial filing fee for the Form I-140 petition covered the cost of the director’s adjudication of the Form I-140 petition. Pursuant to section 286(m) of the Act, 8 U.S.C. § 1356, USCIS is required to recover the full cost of adjudication. In addition to the statutory requirement, Office of Management and Budget (OMB) Circular A-25 requires that USCIS recover all direct and indirect costs of providing a good, resource, or service.² If the petitioner now seeks to classify the beneficiary as an unskilled skilled worker pursuant to section 203(b)(3)(A)(iii) of the Act, then it must file a separate Form I-140 petition requesting the new classification. On appeal, counsel has cited no statute, regulation, or standing precedent that permits a petitioner to change the classification of a petition once a decision has been rendered by the director.

In this matter, the petitioner’s appellate submission did not address the beneficiary’s eligibility pursuant to section 203(b)(3)(A)(i) of the Act. With regard to regulatory requirements at 8 C.F.R. § 204.5(l), the petitioner has not specifically challenged the reasons stated for denial and has not provided any additional evidence to overcome the director’s decision.

Review of the record does not establish that the beneficiary has distinguished himself as being capable of performing skilled labor. Therefore, the petitioner has not established the beneficiary’s eligibility pursuant to section 203(b)(3)(A)(i) of the Act, and the petition may not be approved.

Additionally, beyond the director’s decision, the petitioner has failed to establish its continuing ability to pay beginning on the priority date. The tax returns in the record of proceeding reflect insufficient net income or net current assets to pay the proffered wage of \$80,017.60 per year. *See* 8 C.F.R. 204.5(g)(2).³

² *See* <http://www.whitehouse.gov/omb/circulars/a025/a025.html> (last visited March 24, 2009).

³ 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, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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.