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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS2090
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U.S. Citizenship
and Immigration
Services

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FILE:

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LIN 06 269 50523

Office: NEBRASKA SERVICE CENTER

Date: APR 22 2009

IN RE:

Petitioner:
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)

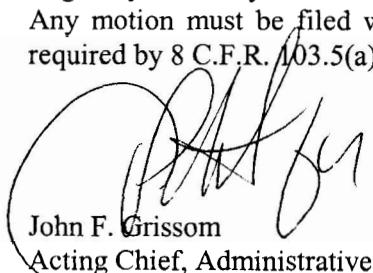
ON BEHALF OF PETITIONER:

[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.

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 Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a leadman. As required by statute, the petition is accompanied by an original Form ETA 750, Application for Alien Employment Certification, certified by the U.S. Department of Labor (DOL). The director determined that the petitioner had not established that the position, leadman, requires at least two years of training or experience, and therefore the beneficiary cannot be found qualified for classification as a skilled worker. Therefore, the director denied the petition accordingly.

Further, the director stated that the petition was filed on August 23, 2006, concurrently with a Form I-485 Application to Register Permanent Residence or Adjust Status, which is required to have a visa available at the time of filing. The director then found that due to visa regression and differences in the availability of visa between the two classifications, skilled workers and “other workers,” U.S. Citizenship and Immigration Services (USCIS) could not downgrade the petition to the “other worker” classification and exercise administrative discretion and offer the petitioner an opportunity to amend the petition.¹

The record demonstrated that the appeal was properly filed, timely and made 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 issues in this case are whether or not the petitioner had demonstrated from the evidence presented that the petitioner’s proffered position, leadman, is supported by a labor certification that requires at least two years of training or experience, and that therefore whether or not beneficiary is qualified for classification as a skilled worker under the petition as filed.

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 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.

¹ The AAO has no jurisdictional authority to determine or review adjustment of status matters.

The regulation at 8 C.F.R. §204.5(1)(D)(4) states in pertinent part;

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.

The Form ETA 750 only required one year of experience to qualify for the position offered.²

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the alien is, in fact, qualified for the certified job.

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *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 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 (Act. Reg. Comm. 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

A central issue in this proceeding involves the classification sought. The appropriate box to be selected on Part 2 of the Form I-140 petition for the other worker classification is box "g." Box "g" is left blank on the petition.

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) or section 203(b)(3)(A)(ii) of the Act, (8 U.S.C. § 1153(b)(1)(A), 8 U.S.C. § 1153(b)(3)(A)(ii) respectively), as a professional³ or skilled worker. The director determined that the petitioner had not established that the petition or the beneficiary qualifies for classification as a skilled worker. The director's finding on this point is not at issue in this case.

² Accordingly, as the petition only required one year of experience, the petition may only be filed as other worker preference classification. We note, although there is no correspondence in the record either requesting or requiring the amendment to the labor certification, the required experience was reduced from two years to one year. There is a DOL correction stamp approving the change. Since "other worker" is the only preference classification applicable here, and the labor certification requirements determine preference classifications, this is another basis for ineligibility.

³ Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. Since the labor certification does not require a baccalaureate degree, the professional classification is not available for the petitioner.

On appeal counsel contended that the priority dates for skilled workers and “unskilled workers” (i.e. other worker) on the date of the director’s decision on November 15, 2006, were “current”⁴ and therefore there existed no relevant differences in the availability of skilled and other worker visas on the date of the denial. Counsel contends in support of the above assertion that the concurrent filing of the I-140 petition and the Form I-485 Application is not relevant to the review of the I-140 petition by USCIS.

Along with the appeal the petitioner submitted a typed reproduction of the U.S. Department of State “Visa Bulletin” published on November 2006.

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority workers. -- Visas shall first be made available. . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

- (A) Aliens with extraordinary ability
- (B) Outstanding professors and researchers
- (C) Certain multinational executives and managers

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability.

(3) Skilled workers, professionals, and other workers.-

(A) In general. - Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (1) and (2), to the following classes of aliens who are not described in paragraph (2):

(i) Skilled workers. - Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(ii) Professionals. - Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

(iii) 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.

⁴ According to the U.S. Department of State “Visa Bulletin” published November 2006. See http://travel.state.gov/visa/frvi/bulletin/bulletin_3046.html as accessed March 6, 2009.

(B) Limitation on other workers. - Not more than 10,000 of the visas made available under this paragraph in any fiscal year may be available for qualified immigrants described in subparagraph (A)(iii) [i.e. other workers].

Based upon the above statutory restriction on visa issuance, the other worker classification has the least number of visas available out of all the classifications. The Form I-140, Immigrant Petition for Alien Worker, was filed concurrently with the beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status, on August 23, 2006. The petitioner checked box "e" under Part 2 of the Form I-140 petition requesting classification as either a professional or skilled worker. The petitioner also signed the Form I-140 under penalty of perjury, certifying that "this petition and the evidence submitted with it are all true and correct."

As the director noted, the priority date would have had to have been current at the time that the petitioner concurrently filed the I-140 petition and the I-485 adjustment application. The "Visa Bulletin" published by the U.S. Department of State for August 2006, states that the other worker category was "unavailable" at the time of filing.

The petition was accompanied by an original Form ETA 750, Application for Alien Employment Certification; an October 30, 2002, letter from the petitioner confirming its job offer to the beneficiary; the petitioner's U.S. Individual Income Tax Returns Form 1120 for 2002, 2003 through 2004; and the beneficiary's U.S. Individual Income Tax Return Form 1040 for 2005.

On November 15, 2006, the director denied the petition finding that the petitioner had not established that the beneficiary meets the statutory and regulatory requirements for classification as a skilled worker.

The petitioner and counsel have not explained why the Form I-140 petition that was filed in this matter requested classification as a skilled worker.

The burden is on the petitioner to select the appropriate classification. As discussed, the Form I-140 petition was clearly marked under Part 2 as a petition filed for classification as a professional or skilled worker. The petitioner signed the Form I-140 under penalty of perjury, attesting that the information on the form was correct. The director properly adjudicated the petition pursuant to section 203(b)(3)(A)(i) of the Act.

Further, 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). In addition, the Ninth Circuit has determined that once USCIS concludes that an alien is not eligible for the specifically requested classification, the agency is not required to consider, *sua sponte*, whether the alien is eligible for an alternate classification. *Brazil Quality Stones, Inc., v. Chertoff*, Slip Copy, 2008 WL 2743927 (9th Cir. July 10, 2008).

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 covered the cost of the director's adjudication of the I-140 petition under the skilled worker category. 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.⁵ If the petitioner now seeks to classify the beneficiary as an other worker pursuant to section 203(b)(3)(A)(iii) of the Act, then it must file a new 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.

We note that the director's denial of the petition was based solely on the documentation submitted by the petitioner. Further, with regard to evidence of ineligibility, the regulation at 8 C.F.R. § 103.2(b)(8)(i) provides in pertinent part: "If the record evidence establishes ineligibility, the application or petition will be denied on that basis." Further, 8 C.F.R. § 103.2(b)(8)(ii) provides in pertinent part: "If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility" If the director determines that the initial evidence supports a decision of denial, the regulation at 8 C.F.R. § 103.2(b)(8) does not require solicitation of further documentation.

We agree with the director's decision because the petition was submitted with a labor certification that requires one year of experience. Therefore, the offered position is not a job requiring two years of experience and cannot qualify for eligibility under section 203(b)(3)(A)(i) of the Act.

Finally, the concurrent filing of the Form I-140 and the Form I-485 raises an additional issue regarding the petitioner's request for a change of classification.

The regulation at 8 C.F.R. § 245.1(g)(1) states, in pertinent part: "An alien is ineligible for the benefits of section 245 of the Act unless an immigrant visa is immediately available to him or her at the time the application is filed."

The regulation at 8 C.F.R. § 245.2(a)(2) states, in pertinent part:

Proper filing of application --

(i) Under section 245. (A) An immigrant visa must be immediately available in order for an alien to properly file an adjustment application under section 245 of the Act See § 245.1(g)(1) to determine whether an immigrant visa is immediately available.

(B) If, at the time of filing, approval of a visa petition filed for classification under section 201(b)(2)(A)(i), section 203(a) or section 203(b)(1), (2) or (3) of the Act

⁵ See <http://www.whitehouse.gov/omb/circulars/a025/a025.html>.

would make a visa immediately available to the alien beneficiary, the alien beneficiary's adjustment application will be considered properly filed whether submitted concurrently with or subsequent to the visa petition, provided that it meets the filing requirements contained in parts 103 and 245. For any other classification, the alien beneficiary may file the adjustment application only after the Service has approved the visa petition.

(C) A visa petition and an adjustment application are concurrently filed only if:

- (1) The visa petitioner and adjustment applicant each file their respective form at the same time, bundled together within a single mailer or delivery packet, with the proper filing fees on the same day and at the same Service office,

The above regulations require that an immigrant visa be immediately available for concurrent filings of Form I-140s and Form I-485s submitted for those seeking classification pursuant to section 203(b)(1), (2) or (3) of the Act. The Form I-140 petition was filed concurrently with the beneficiary's Form I-485 on August 23, 2006.

The beneficiary checked box "a" under Part 2 of the Form I-485 application to indicate that he was filing the petition on the basis of "an immediately available immigrant visa number." However, at that time, no immigrant visas were immediately available for third-preference other workers with priority dates after April 20, 2001.⁶ Therefore, based on a priority date of April 20, 2001, the petitioner and the beneficiary were ineligible to concurrently file the Form I-485 application for adjustment with the Form I-140 petition as an "other worker." If the Form I-140 and Form I-485 are filed together with separate fees (as in the present case) and there is no visa currently available, the Form I-140 and fee shall be accepted, but all relating Form I-485s and ancillary applications shall be rejected.⁷ Thus, if previous counsel had initially checked box "g" for classification as an other worker, the beneficiary's Form I-485 would have been rejected by the service center. However, as previous counsel for the petitioner checked box "e" for classification as a skilled worker, the service center accepted the beneficiary's I-485 on August 23, 2006 because at that time immigrant visas for section 203(b)(3)(A)(i) of the Act were current for all countries but India.⁸

In this matter, the petitioner's appellate submission does 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(h), the petitioner has not specifically challenged the reasons stated for denial and has not provided any additional evidence to overcome the director's decision.

⁶ See http://travel.state.gov/visa/frvi/bulletin/bulletin_2978.html. The priority date for the I-140 petition in this case is April 20, 2001.

⁷ See Interoffice Memorandum from William Yates, Associate Director of Operations, *Regression of E31 and E32 Visa Numbers for Applicants from Mainland China and Rescission of March 31, 2004 Policy Memo re: Concurrent Adjudication of Concurrently Filed Form I-140s and Form I-485s* (December 29, 2004). With regard to remittance of a single check for multiple filings, if the alien's priority date is not current at the time of those filings, then all filings shall be rejected.

⁸ See http://travel.state.gov/visa/frvi/bulletin/bulletin_2978.html.

Therefore, the petitioner has not established the beneficiary's eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

Order: The appeal is dismissed.