



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED]
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Office: NEBRASKA SERVICE CENTER

Date: DEC 01 2009

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Professional or Skilled Worker 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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment based 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 an individual householder. She seeks to employ the beneficiary permanently in the United States as a live-in-housekeeper. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that the requirements set forth on the approved labor certification were consistent with the visa classification sought and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and asserts that the designation of the wrong visa classification was a simple error. Counsel maintains that the petition merits approval.

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).

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

On the Immigrant Petition for Alien Worker (Form I-140), the petitioner sought visa classification of the beneficiary as a skilled worker (requiring at least two years of training or experience) under section 203(b)(3)(A)(i) of the Act. The petitioner checked paragraph e of Part 2 of the I-140.

Citing 8 C.F.R. § 204.5(l), the director determined that in order to classify the alien as a skilled worker under section 203(b)(3)(A)(i) of the Act, the certified position as set forth on the Form ETA 750 must require at least two years of training or experience. As Item 14 of the labor certification establishes that the position's minimum requirements are six years of grade school and three months of experience in the job offered, the beneficiary can only be classified as an other, unskilled worker under section 203(b)(3)(A)(iii). The director denied the petition primarily on this basis because the petitioner did not demonstrate that the position required at least two years training or experience. The director additionally noted in his denial that the petitioner had failed to submit evidence of the beneficiary's education and failed to provide documentation demonstrating that she could cover her household expenses while also paying the proffered wage.¹

Counsel states on appeal that the designation of the visa classification as a skilled worker on paragraph e of the I-140 rather than paragraph g for an other, unskilled worker was a simple error and requests reconsideration. Counsel asserts that the director should have notified the petitioner of the problem. Counsel additionally submits financial documentation on appeal including the petitioner's 2006 and 2007 tax return and a summary of household expenses, as well as evidence related to the beneficiary's education. Despite this submission, the petitioner may not overcome the request for the wrong classification on appeal.

Counsel's assertion is not persuasive. The regulations at 8 C.F.R. § 103.2(b)(1) and 8 C.F.R. § 103.2(b)(8)(ii) clearly permit the denial of an application or petition where the required initial evidence is not submitted with the application or petition or where eligibility for the requested benefit is not established. It is noted that neither the law nor the regulations require the director to request additional evidence or to consider other classifications if the petition is not approvable under the classification requested and the petition is not supported by sufficient evidence to establish eligibility. We cannot conclude that the director committed reversible error by adjudicating the petition under the classification requested by the petitioner. Further, there are no provisions permitting the petitioner to amend the petition on appeal in order to reflect a request under another classification. It is further noted that the AAO decisions mentioned in the copy of *Interpreter Releases* submitted by counsel are specific to the facts in those cases and are not considered binding precedent on the instant matter.²

¹ As stated on the ETA 750 with a priority date of May 10, 2004, the proffered wage is \$562.76 per week or \$29,263.52 per year. The I-140 was filed on January 3, 2007. The petitioner provided her 2004 and 2005 tax returns with the petition.

² See 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a).

Based on a review of the underlying record, it may not be concluded that the petitioner established that the certified position required at least two years training or experience in order to approve the petition for the visa classification sought.

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.