



U.S. Citizenship
and Immigration
Services

B6



FILE: [REDACTED]
LIN 06 254 52711

Office: NEBRASKA SERVICE CENTER

Date: **DEC 01 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)

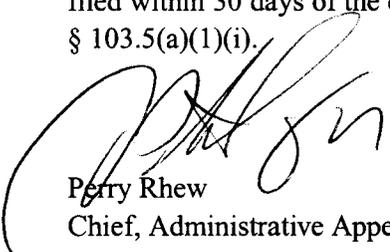
ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 a metal restoration and maintenance firm. It seeks to employ the beneficiary permanently in the United States as a metal restoration worker. As required by statute, an ETA Form 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. The director also determined that the petitioner had not established that it had the ability to pay the proffered wage or that the petitioner had demonstrated that the beneficiary possessed the requisite work experience. The director denied the petition on June 22, 2007.

On appeal, the petitioner submits additional evidence and provides an explanation of how the designation of the required work experience on the ETA 750 was related to the state workforce agency's (SWA) requirements for the occupation.

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.

Part 5 of the Immigrant Petition for Alien Worker, (I-140), filed on August 31, 2006, indicates that the petitioner currently employs 600 workers, reported a gross annual income of \$52,000,000 and a net annual income of \$2,500,000. The petitioner sought visa classification (Part 2, paragraph e of I-140) 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 Form ETA 750 submitted in support of this visa classification required only six months of experience in the job offered as a metal restoration worker. A related occupation of an “[a]ssistant (helper) metal restoration” was also listed on Item 14 of the ETA 750, but no length of required experience was given. Additionally, in item 14, the petitioner amends the work experience by stating, “the Company. . . agree[s] that the job experience for this occupation be six months, minimum.”

Citing 8 C.F.R. § 204.5(l), and as mentioned above, the director observed that the certified position described on the Form ETA 750 required six months of experience. As the visa classification sought on the I-140 petition designated the skilled worker category (paragraph e), the I-140 petition was not approvable because it was not supported by the appropriate Form ETA 750. In order to be classified as a skilled worker, the Form ETA 750 must require at least two years of training or experience. The director denied the petition on this basis because the petitioner did not demonstrate that the position required at least two years of training or experience.

On appeal, the petitioner submits correspondence with the state workforce agency indicating that although it considered that the job required a minimum of two years of experience, it amended the requirements on the ETA 750 in order to comply with the SWA’s determination that the minimum requirements for the position must reflect six months of experience. A copy of the internal notice of posting the certified job indicates that the petitioner advertised the job as requiring “2 years of experience” rather than the six months minimum as required by the SWA.¹

It is noted that the regulation at 8 C.F.R. § 103.2(b)(8)(ii) provides that if all the required initial evidence has been submitted but fails to establish eligibility, USCIS may in its discretion, deny the petition for lack of initial evidence or for ineligibility or request additional evidence. It is noted that neither the law nor the regulations require the director to consider other classifications if the petition is not approvable under the visa classification requested. We cannot conclude that the director committed reversible error by adjudicating the petition under the skilled worker classification requested by the petitioner on the I-140. Further, there are no provisions permitting the petitioner to amend the petition on appeal in order to reflect a request under another classification that would be consistent with the requirements set forth on the ETA 750.

It is additionally noted that although the director’s denial addressed the petitioner’s failure to demonstrate its ability to pay the proffered wage of \$13.00 per hour (annualized to \$27,040) and the failure of the petitioner to provide employment verification of the required six months of

¹ It is unclear whether the SWA required the petitioner to repost the notice or re-advertise following the experience requirement amendment.

experience in the job offered in one sentence, the burden to support the petition with pertinent financial and employment verification documentation remained with the petitioner.² Although sufficient employment verification was provided on appeal pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(A), neither the underlying record nor the appeal was supported by sufficient financial documentation, consistent with the requirements of 8 C.F.R. § 204.5(g)(2), necessary to establish the petitioner's continuing financial ability to pay the proffered wage beginning at the priority date of June 5, 2002. The director's brief referral to this deficiency in his decision was appropriate given the evidence of ineligibility in the record.

² The regulation at 8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [United States Citizenship and Immigration Services (USCIS)].

The priority date is the date that the ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). 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. Here, the ETA 750 was accepted for processing on June 5, 2002. Although the petitioner has provided evidence indicating that it has either employed and paid the proffered wage to the beneficiary (2006) or has reported enough substantial net income or net current assets sufficient to cover the proffered wage in 2004 and 2005 through figures declared on audited financial statements, the petitioner provided no evidence relevant to 2002 and 2003. The record also does not contain any specific statement from the petitioner's financial officer affirming that as a prospective U.S. employer of more than 100 or more employees, it has had the continuing financial ability to pay the named beneficiary's proffered wage beginning at the priority date. Finally, no specific assertion has been made pursuant to the petitioner's profitability, reputation or historical growth that would establish the petitioner's ability to pay the proposed wage offer. See *Matter of Sonogawa* 12 I&N Dec. 612 (BIA 1967). Thus, even if the petitioner had sought the correct visa classification on the I-140, the petition would not be eligible for approval as the record currently stands.

Based on a review of the underlying record and the argument submitted on appeal, it may not be concluded that the certified position required at least two years of experience or training in order to approve the petition for the skilled worker visa classification initially sought by the petitioner. Additionally, the evidence was insufficient to demonstrate that the petitioner had the continuing financial ability to pay the certified salary beginning at the priority date.

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.