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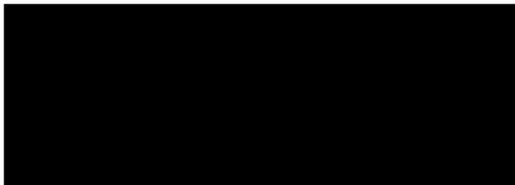
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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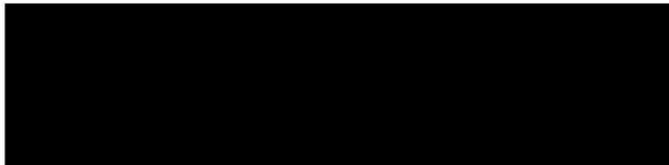
Date: JUN 12 2009

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)

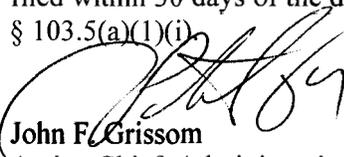
ON BEHALF OF PETITIONER:



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.

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).


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 an individual. She seeks to employ the beneficiary permanently in the United States as a housekeeper. As required by statute, the petition is accompanied by Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).¹ The director determined that the petitioner had not established that the position requires at least two years of training or experience and, therefore, the beneficiary cannot be found qualified for classification as a skilled worker. The director further determined that the petitioner had not established that it had sufficient funds to pay the proffered wage of \$23,277.80 (35 hour week) from the priority date and continuing until the beneficiary obtains lawful permanent residence or that the beneficiary met the three-month experience requirement of the labor certification. 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 March 14, 2008 denial, the issues in this case are whether or not the petitioner has established that the position requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker, whether or not the petitioner has the continuing ability to pay the proffered wage from the priority date of September 8, 2003, and whether or not the beneficiary meets the three-month experience requirement of the labor certification.

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 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.

Here, the Form I-140 was filed with U.S. Citizenship and Immigration Services (USCIS) on December 15, 2006. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional or a skilled worker.

¹ The labor certification states the qualifications of the position of housekeeper, as certified by DOL, are three months of experience in the job offered as a housekeeper.

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 letter that states:

Reference is made to your letter of March 14, 2008 in connection with the above captioned subject. With regard thereto, please be advised that we are attempting to comply with the requirements of [sic] seeks to classify the beneficiary as an immigrant under section 203(b)(3)(A) of the Immigration and Nationality Act, as amended.

The petition indicates that the petitioner wishes to employ the beneficiary as a Packager [sic]. The Title 8, Code of Federal Regulation, part 204.5(1)(4) states:

It should read as:

Any other worker (requiring less than two years of training or experience, with Classification: 203(b)(3)(A)(iii) Other Workers.

Also, Form ETA 750, application for alien employment certification, which was certified by the Department of Labor, indicates that the qualifications for this position are three months of experience in the job offered.

With your kind consideration, we hope this will be sufficient to approve the subject's application.

The regulation at 8 C.F.R. 204.5(i) provides 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.

The regulation at 8 C.F.R. § 204.5(1)(3) states, in pertinent part:

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).

(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 occupational designation. The minimum requirements for this classification are at least two years of training or experience.

(D) *Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

In this case, the Form ETA 750, Application for Alien Employment Certification, indicates that the requirements are three months of experience in the job offered for the proffered position. Accordingly, based on the labor certification requirements, the petitioner could only file the I-140 under 2 “g” for an “other worker” requiring less than two years of training or experience. However, the petitioner requested the skilled/professional worker classification on the Form I-140. There is no provision in statute or regulation that compels USCIS to readjudicate a petition under a different visa classification in response to a petitioner’s request to change it, once the decision has been rendered. 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. 1988). In this matter, the appropriate remedy would be to file another petition with the proper fee and required documentation.

The evidence submitted does not establish that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

⁵ It should be noted that even if the appeal had not been dismissed for the above stated grounds, it would have been dismissed for lack of evidence of the petitioner’s ability to pay the proffered wage of \$23,277.80 from the priority date of September 8, 2003 and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The petitioner submitted no evidence related to this issue either with the initial petition or on appeal. Additionally, counsel does not address this issue in his letter on appeal. Furthermore, the appeal would have been dismissed for lack of evidence that the beneficiary met the three-month experience requirement of the labor certification as of the priority date of September 8, 2003. Similarly, the petitioner submitted no evidence to document the beneficiary’s experience either

For the reasons discussed above, the assertions of counsel on appeal do not overcome the decision of the director.⁵

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.

with the initial filing or on appeal. Counsel fails to address this issue as well.