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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  
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Services

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FILE: LIN 07 057 52915 Office: NEBRASKA SERVICE CENTER Date: **JUN 16 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)

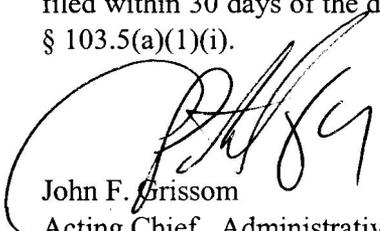
ON BEHALF OF PETITIONER:



**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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
John F. Grissom  
Acting 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 construction firm. It seeks to employ the beneficiary permanently in the United States as a roofer. 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. The director denied the petition on March 7, 2008.

On appeal, the petitioner, through counsel, asserts that the designation of the wrong visa classification was a simple error and the director should have issued a request for evidence to permit the petitioner to address the discrepancies, instead of denying the petition outright.

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 December 19, 2006, indicates that the petitioner currently employs four workers, reported a gross annual income of \$1,576,162 and a net annual income of \$100,664. 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 one year of experience in the job offered as a roofer.

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 one year 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 counsel asserts that the director should have issued a request for evidence to allow the petitioner to amend the I-140 (paragraph e) to reflect a request for the unskilled worker category designated on Part 2, paragraph “g” of the I-140. Counsel asserts that the error was merely clerical and that a request for evidence would have permitted the petitioner to resolve this discrepancy. The AAO does not concur. The regulation at 8 C.F.R. § 103.2(b)(8), clearly allows the denial of an application or petition, notwithstanding any lack of required initial evidence, “if there is evidence of ineligibility in the record.” 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 classification requested. 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 additionally noted that although the director’s denial addressed the petitioner’s failure to demonstrate its ability to pay the proffered wage of \$33,197 in one sentence, the burden to support the petition with pertinent financial documentation remained with the petitioner.<sup>1</sup> As

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<sup>1</sup> 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

neither the underlying record nor the appeal was supported by any financial documentation consistent with the requirements of 8 C.F.R. § 204.5(g)(2), the director's brief referral to this deficiency in his decision was not inappropriate given that there was already evidence of ineligibility in the record.

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, there was no evidence that the petitioner had the continuing financial ability to pay the certified salary.

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.

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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 March 21, 2005. On Part B of the ETA 750, signed by the beneficiary on February 28, 2005, the beneficiary claims to be working for the petitioner but no commencement date is stated. Additionally, no federal tax returns, audited financial statements, annual reports, W-2s, paystubs or any other evidence of the petitioner's ability to pay the certified wage was contained in the record.