



U.S. Citizenship
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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: NOV 06 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).

Perry Rhew
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 a delicatessen. It seeks to employ the beneficiary permanently in the United States as an assistant manager (food services manager). 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 petition requires at least two years of training or experience and, therefore, that the beneficiary cannot be found qualified for classification as a skilled worker.² 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 January 23, 2008 denial, the primary issue in this case is whether or not the petitioner has established 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.

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 on November 13, 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 Form ETA 750 indicates that the proffered position requires six years of grade school education, and one year of experience in the job offered or one year of experience in any management position. The Form ETA 750 also states that an applicant must be available for overtime and weekend and requires references.

² The director also noted that the petitioner would have to submit evidence of its ability to pay the proffered wage in 2004, 2005 and 2006. On appeal, the petitioner submits its IRS Forms 1040, U.S. Individual Income Tax Return, for 2005 and 2006, together with the petitioner's Schedule C to its IRS Form 1040 for 2004. The petitioner, a sole proprietor, has established its ability to pay the proffered wage for tax years 2003, 2004, 2005 and 2006.

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.³ On appeal, counsel submits a brief and the instructions to the Form ETA 750. On appeal, counsel asserts that the experience requirements of Item 14 on Form ETA 750 should be read cumulatively. Counsel asserts that the Form ETA 750 requires one year of experience in the proffered job "and" one year of experience in any management position and, therefore, that the Form ETA 750 requires a total of two years of experience. Counsel requests, in the alternative, that the classification requested on Form I-140 be modified to that of an unskilled worker.

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.

In this case, the petitioner requested the skilled worker classification on the Form I-140. However, the Form ETA 750 does not state that an applicant must have at least two years of training or experience. Instead, the Form 750 requires six years of grade school education, and one year of experience in the job offered or one year of experience in any management position. In evaluating the beneficiary's qualifications, United States Citizenship and Immigration Services (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).

Despite counsel's assertion to the contrary, Item 14 is read cumulatively (e.g., an employer is requiring that applicants for the job possess X years' education, plus X years' training, plus X years' experience). However, in the experience portion of item 14, the two blocks captioned "Job Offered"/"Related Occupation" are read as alternatives. The regulation at 8 C.F.R. § 204.5(1)(3)(B) provides that a petition for an alien in the skilled worker classification "must be accompanied by evidence that the alien meets the educational, training or experience, and other requirements of the individual labor certification." Thus, despite counsel's assertion that the petitioner intended to

³ 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).

require two years of experience for the proffered position, the plain language of the labor certification application does not provide for a combination of the alternative experience requirements.

Counsel further requests on appeal that the classification be modified to that of an unskilled worker. However, 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.

We also note that the Form ETA 750 indicates that the beneficiary will supervise two to four employees. The record does not support this claim, as the petitioner's tax returns indicate that it paid no wages in 2003, 2004, 2005 or 2006. The petitioner has not established that it has any employees. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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.