

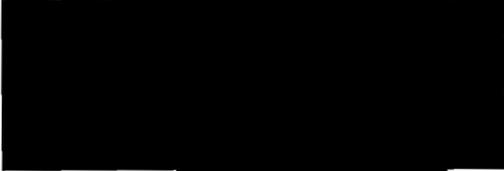


U.S. Citizenship  
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FILE: [REDACTED]  
LIN 07 096 52042

Office: NEBRASKA SERVICE CENTER

Date: **NOV 18 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)

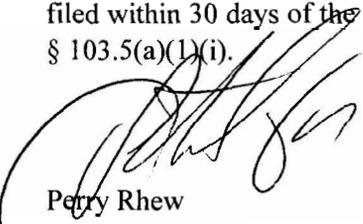
ON BEHALF OF PETITIONER:



**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 Mexican bakery. It seeks to employ the beneficiary permanently in the United States as a cake decorator. 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, asserts that the designation of the wrong visa classification was a typographical error and 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).

Counsel indicates on the notice of appeal (Form I-290B) that a brief and/or evidence will be submitted to the AAO within thirty days. As of this date, more than sixteen months later, this office has received nothing further.

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 February 13, 2007, indicates that the petitioner was established on February 6, 1977 and currently employs twenty-four workers. 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.

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 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 on this basis because the petitioner did not demonstrate that the position required at least two years training or experience.<sup>1</sup>

The petitioner 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 typographical error and requests reconsideration. Counsel asserts that the director should have issued a request for evidence to resolve the matter. The AAO does not concur. 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 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.

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<sup>1</sup>We additionally note that the record contains insufficient evidence of the petitioner's continuing ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2). The petition was filed on February 13, 2007. No federal tax return, annual report or audited financial statement was submitted relating to 2006. The payroll records, state quarterly wage reports and the beneficiary's individual tax returns fail to indicate that the petitioner employed him during any of the relevant period. The petition could have been denied on this basis as well. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, at 1002 n. 9. As set forth in 8 C.F.R. § 103.2(b)(1) and 8 C.F.R. § 103.2(b)(8)(ii), an application or petition may be denied where the required initial evidence is not submitted with the application or petition or where eligibility for the requested benefit is not demonstrated.

Based on a review of the underlying record and the argument and evidence submitted on appeal, 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.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025 at 1043; *see also Dor v. INS*, 891 F.2d 997 at 1002 n. 9..

The petition is not eligible for approvable under the visa classification sought. The petition is also denied based on the lack of evidence supporting the petitioner's *continuing* ability to pay the proffered wage as set forth in the labor certification. Each reason is considered as an independent and alternative basis for denial.

**ORDER:** The appeal is dismissed.