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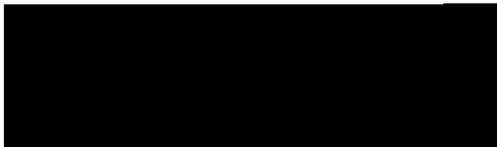
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington DC 20529-2090



U.S. Citizenship  
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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **OCT 02 2009**  
LIN 08 061 50613

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker 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).

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 stone fabrication firm. It seeks to employ the beneficiary permanently in the United States as a stone cutter. 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. The director denied the petition on January 22, 2009.

On appeal, the petitioner, asserts that the designation of the wrong visa classification was a simple error and requests reconsideration.

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 17, 2007, indicates that the petitioner was established on May 31, 1991 and currently employs five workers. The petitioner sought visa classification (Part 2, paragraph g of I-140) of the beneficiary as an unskilled

worker (requiring less than two years of training or experience) under section 203(b)(3)(A)(iii) of the Act.

Citing 8 C.F.R. § 204.5(l), the director determined that in order to classify the alien as an unskilled worker under section 203(b)(3)(A)(iii) of the Act, the certified position as set forth on the Form ETA 750 must require less than two years of training or experience. As Item 14 of the labor certification establishes that the position's minimum requirements are five years of training (field work), as well as five years of experience in the job offered or eight years of experience in a related occupation described as construction with stone installation, the beneficiary can only be classified as a "skilled worker" under section 203(b)(3)(A)(i). The director denied the petition on this basis because the petitioner did not demonstrate that the position required less than two years training or experience.<sup>1</sup>

The petitioner states on appeal that the designation of the visa classification as an unskilled worker on paragraph g of the I-140 rather than paragraph e for a skilled worker was a simple error and requests reconsideration. Accompanying the appeal is a letter from [REDACTED] who assumes responsibility for preparing the I-140 and also requests reconsideration.<sup>2</sup> 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

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<sup>1</sup>We additionally note that the record contains no evidence of the petitioner's ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2), or that the beneficiary has the experience and training required by the Form ETA 750. 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.

<sup>2</sup> It is noted that under 8 C.F.R. § 292.1 and 1292.1, persons entitled to represent individuals in matters before the Department of Homeland Security ("DHS"), and the Immigration Courts and Board of Immigration Appeals ("Board"), or the DHS alone, include, among others, accredited representatives. Any such representatives must be designated by a qualified organization, as recognized by the Board. A recognized organization must apply to the Board for accreditation of such a representative or representatives. The rules respecting qualification of organizations, requests for recognition, withdrawal of recognition, and accreditation of representatives, may be found at 8 C.F.R. § 292.2 and 1292.2. Neither [REDACTED] nor [REDACTED] appears on the accreditation roster. *See* <http://www.usdoj.gov/eoir/statspub/raroster.htm> (accessed 9/16/09).

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.

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 less than 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 any evidence supporting the petitioner's ability to pay the proffered wage and the petitioner's failure to provide evidence verifying that the beneficiary possessed the required training and experience set forth in the terms of the labor certification. Each reason is considered as an independent and alternative basis for denial.

**ORDER:** The appeal is dismissed.