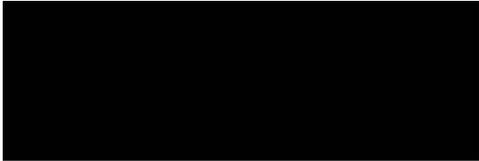




U.S. Citizenship
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Services

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File: LIN 07 217 53950 Office: NEBRASKA SERVICE CENTER Date: SEP 02 2009

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, 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 a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 9089 Application for Permanent Employment Certification certified by the U.S. Department of Labor (DOL). The director determined that the petitioner had indicated the wrong visa classification for the beneficiary on the petition. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, was timely, and made 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 denial dated November 24, 2008, the primary issue in this case involves the visa classification sought. On Part 2 of the Form I-140 petition, the petitioner checked box "g," indicating that it seeks to classify the beneficiary pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), as an alien capable of performing unskilled labor. The director determined that the petitioner incorrectly indicated that the position requires work from an alien capable of performing unskilled labor.

The AAO will affirm the director's denial and dismiss the appeal. Upon review, the director's decision was proper under the law and regulations. As will be discussed in detail, a petitioner may not make material changes to a petition after adjudication in order to establish eligibility. Additionally, the Act prohibits U.S. Citizenship and Immigration Services (USCIS) from providing a petitioner with multiple adjudications for a single petition with a single fee. The petitioner claims that it erroneously requested classification of a cook as an alien who is an unskilled worker.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), specifically 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 unskilled labor, not of a temporary nature, for which qualified workers are not available in the United States.

The specific requirements for supporting documents to establish that an alien has gained sufficient experience are set forth in the regulation at 8 C.F.R. § 204.5(l)(3):

Initial evidence—

- (i) *Labor certification or evidence that alien qualifies for Labor Market Information Pilot Program.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation, or by documentation to establish that the alien qualifies

for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is a shortage occupation with the Labor Market Pilot Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. The job offer portion of an individual labor certification, Schedule A application, or Pilot Program application for a professional must demonstrate that the job requires the minimum of a baccalaureate degree.

(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.

On November 24, 2008, the director denied the petition finding that the petitioner incorrectly indicated that the position requires work from an alien capable of performing unskilled labor.

On appeal, the petitioner submitted a brief stating that, on the Form I-140 petition, “[b]ox [“g”] was marked incorrectly” and that box “e” should have instead been marked for a skilled worker. The petitioner requested on appeal that the petition now be adjudicated pursuant to section 203(b)(3)(A)(i) of the Act.

As discussed, the Form I-140 petition was clearly marked under Part 2 as a petition filed for classification as an unskilled worker. The petitioner signed the Form I-140 petition under penalty of perjury, attesting that the information on the form was correct. As the petition was unaccompanied by instructions from the petitioner specifying otherwise, the director properly adjudicated the petition pursuant to section 203(b)(3)(A)(iii) of the Act. Since the director’s decision was not in error, the petitioner is precluded from requesting a change of classification on appeal. A request for a change of classification will not be entertained for a petition that has already been adjudicated. A post-adjudication alteration of the requested visa classification constitutes a material change. 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. 1998).

The initial filing fee for the Form I-140 petition covered the cost of the director’s adjudication of the Form I-140 petition. Pursuant to section 286(m) of the Act, 8 U.S.C. § 1356, USCIS is required to recover the full cost of adjudication. In addition to the statutory requirement, Office of Management and Budget (OMB) Circular A-25 requires that USCIS recover all direct and indirect costs of providing a good, resource, or service.¹ If the petitioner now seeks to classify the beneficiary as a

¹ See <http://www.whitehouse.gov/omb/circulars/a025/a025.html> (last visited August 5, 2009).

skilled worker pursuant to section 203(b)(3)(A)(i) of the Act, then it must file a separate Form I-140 petition requesting the new classification. On appeal, the petitioner has cited no statute, regulation, or standing precedent that permits a petitioner to change the classification of a petition once a decision has been rendered by the director.

In this matter, the petitioner's appellate submission did not address the beneficiary's eligibility pursuant to section 203(b)(3)(A)(iii) of the Act. With regard to regulatory requirements at 8 C.F.R. § 204.5(l), the petitioner has not specifically challenged the reasons stated for denial and has not provided any additional evidence to overcome the director's decision.

Review of the record does not establish that the beneficiary is capable of performing unskilled labor. Therefore, the petitioner has not established the beneficiary's eligibility pursuant to section 203(b)(3)(A)(iii) of the Act, and the petition may not be approved.

Additionally, the petitioner has failed to establish its continuing ability to pay beginning on the priority date. The tax returns in the record of proceeding for 2001 to 2003 are not those of the owner of the petitioning business and thus do not evidence that the petitioning business has the ability to pay the proffered salary. *See* 8 C.F.R. 204.5(g)(2).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.