

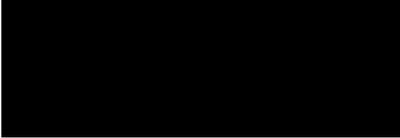
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington DC 20529-2090

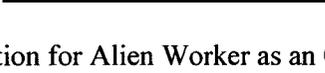


U.S. Citizenship
and Immigration
Services

B6



FILE:  Office: NEBRASKA SERVICE CENTER Date: **AUG 23 2010**

IN RE: Petitioner: 
Beneficiary: 

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:

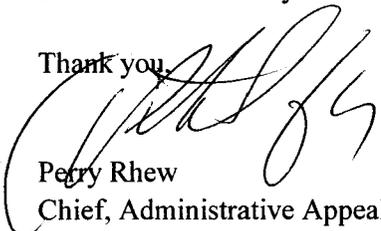
SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you


Petry 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a baker. 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 October 28, 2008.

On appeal, the petitioner asserts that the labor certification had been corrected to conform to the correct visa classification and submits copies of recruitment advertisements to support its contention.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).¹

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 July 27, 2007, indicates that the petitioner was established on July 13, 1986 and currently employs twelve workers. The petitioner

¹The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

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 at less than two years of training or experience. As item 14 of Form ETA 750 establishes that the position's minimum requirements are 12 years of experience in the job offered, 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.

On appeal, the petitioner claims that item 14 of Part A of the Form ETA 750 was corrected to indicate one year of experience required. The petitioner submits copies of three newspaper advertisements for the position, which ran on June 9, 2007, June 10, 2007 and June 11, 2007 as evidence that DOL had acknowledged the correction on the approved labor certification. The petitioner requests that the petition be approved.

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. It further noted that the petitioner failed to provide a copy of the corrected Form ETA 750 to the director or on appeal. U.S. 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, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). We cannot conclude that the director committed reversible error by adjudicating the petition under the classification requested by the petitioner on the I-140. Moreover, 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 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.

ORDER: The appeal is dismissed.