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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

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 25 2010

IN RE: Petitioner: 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:

[redacted]

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,

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 Roman Catholic abbey. It seeks to employ the beneficiary permanently in the United States as a Korean specialty cook. As required by statute, an ETA 9089, Application for Permanent 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 September 30, 2008.

On appeal, the petitioner, through former counsel, asserts that the designation of the wrong visa classification was a simple error and submits copies of advertisements reflecting the position was advertised with two years of experience required and that the position is for a skilled worker.

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).

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.

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 August 16, 2007, indicates that the petitioner was established in 1924 and states that it is a non-profit. 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)(2), 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 ETA Form 9089 must require less than two years of training or experience. As Part H, 6, of the labor certification establishes that the position's minimum requirements are 24 months (two 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.

Former counsel submits an amended Form I-140 on appeal, which indicates the correct visa category. He also submits a copy of the prevailing wage determination made by the New Jersey Labor and Workforce agency, as well as a copy of a newspaper advertisement that shows the requirement for two years of experience.[1] He contends that the petitioner should be allowed to amend the I-140 to reflect a request for a skilled worker designated on Part 2, paragraph e of the I-140.

The AAO does not concur. 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. 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. As the labor certification required two years of experience, the petition may not be filed as an unskilled worker petition. The proper remedy would be to submit a new petition, select the proper category, and submit the required fee and documentation.[2]

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.

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[1]It is noted that a copy of a New Jersey Department of Labor job order form and a copy of an internal posting both state proffered hourly wages that are not consistent with the certified job in this case, so it is unclear if they relate to the certified position herein.

[2]US Citizenship and Immigration Services (USCIS) electronic records indicate that on March 9, 2010, the petitioner filed another Form I-140 on the beneficiary's behalf.

ORDER: The appeal is dismissed.