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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: MAR 30 2010  
LIN 07 028 52497

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

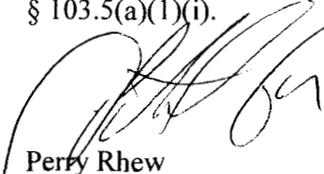
PETITION: Immigrant Petition for Alien as a Professional or Skilled Worker Pursuant to Section  
203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:  
[Redacted]

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 fence manufacturer. It seeks to employ the beneficiary permanently in the United States as a fence maker. 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. The director further denied the petition because of inconsistencies contained in the record related to the beneficiary's employment history.

On appeal, the petitioner, through counsel, submits additional evidence relevant to the beneficiary's employment history and additionally asserts that the designation of the wrong visa classification was a typographical error. Counsel asserts that the petition should be approved.

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(1)(3) further provides:

(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.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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.

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date, which is the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this matter, the ETA 750 indicates that the priority date is March 28, 2001.

Part 5 of the Immigrant Petition for Alien Worker, (I-140), filed on November 7, 2006, indicates that the petitioner was established on August 29, 1986 and currently employs seventeen 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 requirement is one year 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.

The director additionally noted some inconsistencies in the record related to the beneficiary's employment history. On Part B of the ETA 750 signed by the beneficiary and submitted to DOL as of the March 28, 2001 priority date, the beneficiary lists three previous jobs.<sup>1</sup> From January 1989 to

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<sup>1</sup> The instructions to Part B of the ETA 750 direct the applicant to list all jobs held during the last three years, and also to list any job(s) related to the occupation for which the applicant is being

March 1992, he states that he worked as a fence maker for [REDACTED] of Quito, Ecuador who manufactured fences.<sup>2</sup> From February 1996 to February 1998, the beneficiary states that he worked for "[REDACTED]" of Smithtown, New York.<sup>3</sup> No street address is given for either of these employers. The beneficiary also states that he worked as a fence maker, erecting and repairing metal and wooden fences and fence gates around industrial establishments, residences or farms. From February 1998 to the present (date of signing the ETA 750 B) the beneficiary claims to have been employed by the petitioner as a fence maker.

The director noted in his decision that the beneficiary had previously signed a biographic questionnaire (Form G-325) submitted in connection with another application that contained conflicting information regarding past employment and noted that this unresolved inconsistency cast doubt on the reliability of the petitioner's other evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591(BIA 1988).

On appeal, the petitioner offers a statement from the beneficiary in which he states that he did not understand English at the time the previous immigration filing was made and his desperation to get a work permit caused him to trust an individual who presented erroneous information and failed to ask about the beneficiary's employment history. The beneficiary claims that he worked for [REDACTED] as a fencemaker from January 1989 to March 1992. The petitioner also submits a letter from [REDACTED] dated February 15, 2001 in which he states that he employed the beneficiary from January 1989 to March 1992 in which the beneficiary "executed various activities related to our work, such as metallic gates, sheds and installation of fences for the public." For the purpose of clarifying the beneficiary's employment history as a fence maker, the AAO accepts that this letter and the beneficiary's statement satisfactorily resolves the inconsistency cited by the director in his decision.

With regard to the visa classification sought, the petitioner, through counsel, 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. 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

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certified.

<sup>2</sup> His date of arrival claimed on the I-140 is November 1993. It is unclear whether the beneficiary was employed in the United States from this date until February 1996.

<sup>3</sup> The notarized employment verification letter corroborating this employment was submitted to the record by the beneficiary's supervisor. The letter states that the beneficiary was employed from February 2, 1996 to February 27, 1998 as a fence maker. The letter, dated October 10, 2006, states that the employer was "[REDACTED]" of Smithtown, New York, not "[REDACTED]" custom homes.

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. 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. 1988). In this matter, the appropriate remedy would be to file another petition with the proper fee and required documentation.

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.

The petition is not eligible for approvable under the visa classification sought.

**ORDER:** The appeal is dismissed.