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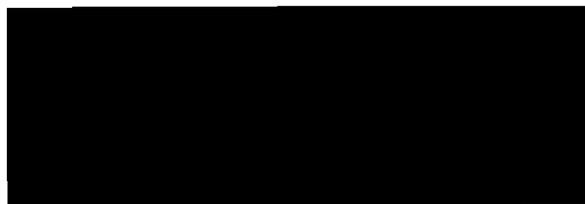
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: **MAY 10 2010**

IN RE:

Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), certified the denial of the immigrant visa petition to the Administrative Appeals Office (AAO). The director's decision to deny the petition will be affirmed.

The petitioner claims to be a beauty salon. It seeks to employ the beneficiary permanently in the United States as a hairdresser. The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).¹ The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of instant petition is April 30, 2001, the date the labor certification was filed with the DOL. *See* 8 C.F.R. § 204.5(d).

The director initially denied the petition on May 19, 2007. The decision states that the petitioner failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The petitioner appealed the decision to the AAO on June 21, 2007. On September 11, 2009, the AAO remanded the case to the director for further consideration. The AAO's decision states that the evidence submitted on appeal established the petitioner's ability to pay the proffered wage, however, beyond the decision of the director, the evidence in the record did not establish that the beneficiary qualified for the offered position as of the priority date.²

On December 17, 2009, after issuing a Request for Evidence to the petitioner and reviewing the response, the director concluded that petitioner failed to establish that the beneficiary met the minimum requirements of the offered position as set forth in the labor certification, and certified the decision to the AAO.³

¹Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

²An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

³Certifications by regional service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1). The regulation at 8 C.F.R. § 103.4(a)(4) states: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows:

In evaluating the beneficiary's qualifications, 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. Coorney*, 661 F.2d 1 (1st Cir. 1981). To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

The minimum required education, training, experience and special requirements for the offered position are set forth at Part A, Items 14 and 15, of Form ETA 750. Item 14 relates to education, training and experience, and Item 15 relates to other special requirements for the offered position. In the instant case, Part A, Item 15 of the labor certification states that the offered position requires an

"Certification to [AAO]. A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

The regulation at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) states:

(iii) Appellate Authorities. In addition, the Associate Commissioner for Examinations exercises appellate jurisdiction over decisions on;

...

(B) Petitions for immigrant visa classification based on employment or as a special immigrant or entrepreneur under Secs. 204.5 and 204.6 of this chapter except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act;

Pursuant to the delegation cited above, the AAO exercises the appellate jurisdiction formerly exercised by the Associate Commissioner for Examinations.

In the instant case, the decision does not fall within the exception clause in subparagraph (B) in the regulation quoted above, which pertains only to a denial based upon a lack of a certification by the Secretary of Labor. The decision therefore is within the appellate jurisdiction of the AAO. Therefore, the certification of the denial decision is authorized by the regulation at 8 C.F.R. § 103.4(a)(5).

individual with a "[l]icense or ability to obtain [a] license in cosmetology."

The petitioner and the address where the beneficiary will work are located in the Commonwealth of Virginia. The administrative regulations governing the licensing of cosmetologists in Virginia are located at 18 Va. Admin. Code 41-20-10 to 41-20-280 (2003). In order to be eligible to sit for the Virginia cosmetology license examination, the applicant must complete an approved training program in Virginia. 18 Va. Admin. Code 41-20-20 (2003).

The record contains a diploma issued by Arlington Public Schools Career Center Program certifying that the beneficiary completed courses in Cosmetology Skills I and II from September 6, 2001 to June 20, 2003. The record also contains a letter from [REDACTED] of Arlington Public Schools Career Center Program, dated May 7, 2003, stating that the beneficiary's "inception date was September 6, 2001 and her anticipated completion date is June 23, 2003." The letter further states that the beneficiary "will complete all State Board Requirements and be eligible to take the State Board Examination at the end of the school year."

Therefore, on the April 30, 2001 priority date, the beneficiary had not completed the required courses for her cosmetology license examination. She would not be eligible to even take the examination for over two years after the filing of the labor certification. Accordingly, the evidence in the record does not establish that the beneficiary possessed a "license or ability to obtain [a] license in cosmetology" by the priority date.

Counsel argues that the beneficiary only needs to satisfy the requirements of the job offered set forth at Part A, Item 14 of the labor certification by the priority date; and that the requirements at Part A, Item 15 only need to be satisfied "prior to the approval of the visa petition and adjustment of status not at the time of filing the labor certification." In support of this claim, counsel states that *Matter of Wing's Tea House* and *Matter of Katigbak* only addressed the beneficiary's lack of employment experience, not any "other special requirements." Counsel also notes that § 22.2(b) of the USCIS Adjudicator's Field Manual (AFM) states:

You must determine whether the beneficiary has met the minimum education, training, and experience requirements of the labor certification at the time the application for labor certification was filed with DOL. You cannot approve a petition for a preference classification if the beneficiary was not fully qualified for the preference by the priority date of the labor certification. *See Matter of Katigbak*, 14 I&N 45 (R.C. 1971); *Matter of Wing's Tea House*, 16 I&N 158 (Acting R.C. 1977).

Counsel claims that, since the AFM does not mention "other special requirements" in this paragraph, the petitioner is not required to establish that the beneficiary met all of the "other special requirements" set forth at Part A, Item 15 of the labor certification by the priority date.

Section 203(b)(3)(A)(i) of the Act 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.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, *and any other requirements* of the individual labor certification" (emphasis added).

Although the facts of *Matter of Wing's Tea House* concern the beneficiary's experience and not any special requirements, the Commissioner explicitly noted that the filing date of the petition in this immigrant visa preference category means the date the labor certification was filed with the DOL. *Matter of Wing's Tea House*, 16 I&N Dec. at 160. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). "To do otherwise would make a farce of the preference [s]ystem and priorities set up by statute and regulation." *Id.*

In *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983), the labor certification job description included the requirement that the prospective employee be able to obtain, or already have, a Virginia nursing license. Because the beneficiary did not possess a Virginia nursing license by the priority date, the court focused on the meaning of the phrase "able to obtain." The beneficiary argued that this language means being "eligible to sit" for the examination, and that she satisfied this requirement through her foreign nursing education. The court found that, in that case, merely being eligible to sit for an exam was not sufficient. In the instant case, the beneficiary was not even able to sit for the cosmetology license examination. In fact, she did not start taking the Virginia cosmetology courses until over four months after the priority date.

In summary, the petitioner must establish that the beneficiary meets all of the requirements of the job offered by the priority date, including the "other special requirements" for the offered position set forth at Part A, Items 15 of Form ETA 750. Further, the evidence in the record does not establish that the beneficiary had the "ability to obtain" a license in cosmetology in Virginia as of the priority date.

Even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* at *7.

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 met that burden.

ORDER: The director's decision to deny the petition is affirmed.