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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

PUBLIC COPY

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[REDACTED]

FILE:

[REDACTED]

Office: NEBRASKA SERVICE CENTER

Date: OCT 05 2010

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

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:

[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 our 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 \$630. 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 Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an individual. He seeks to permanently employ the beneficiary in the United States as a domestic cook. On the petition, the petitioner requests classification of the beneficiary as a *skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).*¹ The petition is accompanied by a certified duplicate copy of Form ETA 750, Application for Alien Employment Certification (labor certification), issued by the U.S. Department of Labor (DOL) to the Nebraska Service Center. The priority date of the petition is April 30, 2001, which is the date the labor certification was accepted for processing by the DOL. *See 8 C.F.R. § 204.5(d).*

As set forth in the director's May 15, 2008 denial, the primary issue in this case is whether the beneficiary can be classified as a skilled worker.

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. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

A skilled worker is an alien who is capable of performing labor requiring at least two years of training or experience 8 C.F.R. § 204.5(l)(2). An unskilled worker is an alien who is capable of performing labor requiring less than two years training or experience. *Id.* The determination of whether a beneficiary is properly classified as a skilled worker or unskilled worker is based on the training and/or experience requirements of the offered position as set forth in the labor certification. 8 C.F.R. § 204.5(l)(4).

The minimum education, training, experience and skills required to perform the duties of the offered position are set forth on Part A of the labor certification. In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION: Grade School: 6 years

TRAINING: None required

¹ Section 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.

² The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

EXPERIENCE: Three (3) months in the job offered

OTHER SPECIAL REQUIREMENTS: None

Since the offered position requires less than two years of training and/or experience, the beneficiary is properly classified as an unskilled worker and not as a skilled worker.

On appeal, counsel claims that the labor certification in the record does not state the correct experience requirements for the offered position. Counsel claims that in June 2006, he submitted a Request for Reduction in Recruitment Conversion (Conversion Request) for the labor certification. Counsel claims that the Conversion Request instructed the DOL to amend the experience requirement for the offered position on the labor certification from three months to two years. In support of this claim, counsel submits the following documents:

- FedEx airbill and delivery confirmation, indicating that a package from counsel's office was delivered to the DOL Employment and Training Administration office in Dallas, Texas on July 5, 2006.
- Reduction in Recruitment Conversion Request dated June 15, 2006.
- Letter dated June 19, 2006, addressed to the DOL Employment and Training Administration office in Dallas, Texas, requesting that Item 14, Part A of the labor certification be changed to require two years of experience in the job offered.
- Prevailing Wage Determination, dated January 3, 2006. The job description on the PWD states that the offered position requires two years of experience in the job offered.
- Copies of newspaper advertisements for the offered position published in the [REDACTED] on December 29, 2005, January 26, 2006, February 23, 2006, March 23, 2006, and April 27, 2006. The advertisement text states that the offered position requires "2 yrs.exp."
- Copies of the online placement of the print advertisements on the [REDACTED] website. The online advertisement text states that the offered position requires "2 yrs.exp."
- Job Order placed with the [REDACTED] website on March 23, 2006. The position description states that the offered position requires two years of experience.

On appeal, counsel claims that the DOL would not have certified a reduction in recruitment labor certification containing recruitment stating that the offered position requires two years of experience unless it had also amended the labor certification application to state that the offered position required two years of experience instead of the originally stated three months of experience.

The plain language of the labor certification unequivocally requires an individual with six years of grade school education and three months of experience in the job offered.

At this point, it is important to provide an overview of the general process of procuring an employment-based immigrant visa and the respective roles of DOL and U.S. Citizenship and Immigration Services (USCIS).

As noted above, the labor certification is certified by the DOL. The DOL's role in this process is defined by section 212(a)(5)(A)(i) of the Act, which states:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the responsibilities assigned to the DOL by the Act or the implementing regulations at 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by Federal Circuit Courts.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).³ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

³ Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the *alien is entitled to sixth preference status.*

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to certify the terms of the labor certification, but it is the responsibility of USCIS (formerly INS) to determine if the petition and the alien beneficiary are eligible for the classification sought.

In carrying out this responsibility, USCIS is obligated to "examine the certified job offer *exactly as it is completed* by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve "reading and applying the plain language of the [labor

certification]." *Id.* at 834. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Rest.*, 19 I&N Dec. 401, 406 (Comm. 1986).

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. "To require USCIS to go beyond the [labor] certification's plain language [would] undermine the agency's role in independently determining whether the alien meets the specified requirements." *Id.*

The requirements of the offered position as set forth on the labor certification are unequivocal. USCIS cannot change or modify the labor certification. Even if counsel submits evidence demonstrating that the labor certification states something different than what the petitioner intended it to say, the USCIS is bound by the plain language of the labor certification. When the terms of a labor certification are ambiguous, USCIS may consult additional evidence of the petitioner's intent to determining the meaning of that term. However, there is no ambiguity here. The labor certification states that the job offered requires an individual with only six years of grade school education and three months of experience in the job offered.

Accordingly, the director's decision to deny the petition because the labor certification does not require a skilled worker is correct. If the DOL issued a labor certification containing an error, counsel must resolve this issue with the DOL.

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.