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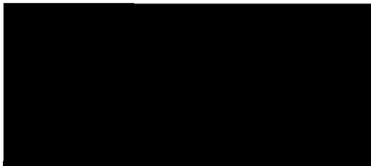
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date:

OCT 15 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:



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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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 immigrant 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 restaurant cook pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was certified by the Department of Labor, but it was not signed by the petitioner, the beneficiary, or the preparer.

The director determined that the ETA Form 9089 submitted does not support an unskilled or other worker position, and, therefore, the beneficiary cannot be found to be qualified for classification as a member of a preference classification to qualified immigrants who are capable of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are unavailable, and the director found that the ETA Form 9089 that was submitted was not signed in Section L by the alien, or in Section N by the employer. Therefore, the director denied the petition accordingly.

On appeal,¹ counsel argues that "The petitioner is eligible to file the instant petition based on the accompanying [sic] individual labor certification." On appeal, counsel does not speak to the director's determination that a labor certification requiring 24 months of job experience does not support the petition that was filed for the unskilled labor preference category. The AAO, after a close reading of the appeal statements and arguments in counsel's brief, could not find that counsel argued against the director's determination in this regard.

The record shows that the appeal is properly filed and timely. 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.

In pertinent part, 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 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 unavailable.

¹ Counsel contends by implication the director violated 8 C.F.R. § 103.2(b)(8), because the director did not request additional evidence. Counsel therefore asserts the petitioner was denied the opportunity to submit evidence (although the petitioner submitted no evidence with the petition and labor certification). However, counsel fails to recognize that 8 C.F.R. § 103.2(b)(8) was amended effective June 18, 2007, prior to the filing of the instant petition on July 31, 2007. At the time the instant petition was filed, the director was permitted to deny the petition in his discretion if the evidence submitted did not establish eligibility for the benefit sought. In this matter, as the petitioner requested a classification which is not supported by the accompanying (unsigned) labor certification, the director properly denied the petition without first requesting additional evidence.

Here, the Form I-140 was filed on July 31, 2007. On Part 2.g. of the Form I-140, the petitioner indicated that it was filing the petition for the other worker category, requiring less than two years of training or experience.

The AAO maintains plenary power to review each appeal on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

On appeal, counsel submits a brief in which she argues, *inter alia*, that relevant to the missing signatures on the ETA Form 9089, (Sections L and N) the director's finding that the ETA Form 9089 was not signed "is complete error," and it "is not within the jurisdiction of the [director] to invalidate a document that has already been approved by the Department of Labor [the DOL]."

The regulation at 8 § 204.5(l)(3)(ii) requires in pertinent part:

(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.

* * *

(D) Other workers. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

(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. In the case of a Schedule A occupation or a shortage occupation within the Labor Market Pilot Program, the petitioner will be required to establish to the director that the job is a skilled job, i.e., one which requires at least two years of training and/or experience.

In this case, the job offer portion of the ETA Form 9089 indicates that the minimum level of education required for the position of restaurant cook is a high school education and twenty four months of experience in the job. Accordingly, the job offer portion of the ETA Form 9089 requires at least two years of experience. However, the petitioner requested classification as a member of a

preference classification to qualified immigrants who are capable of performing unskilled labor and it is not now attempting to change this request to that of a skilled worker on appeal. In this matter, the appropriate remedy would be to file another petition with the proper fee and required documentation.

The evidence submitted does not establish that the ETA Form 9089 requires a member of a preference classification to qualified immigrants who are capable of performing unskilled labor, and therefore, the appeal must be dismissed.

An additional reason for ineligibility for the benefit sought is that ETA Form 9089 was not signed in Section L by the alien, or in Section N by the employer (nor by the preparer in Section M).

According to counsel, based upon the above fact finding, the director's decision in this matter is erroneous as only the Department of Labor (the DOL) can invalidate or revoke the approved labor certification. Counsel's assertion is misplaced. The AAO notes that the director has not invalidated or revoked the approved labor certification.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 750, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The regulation at 20 C.F.R. § 656.3 states, in part:

Employer means:

(1) A person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN). For purposes of this definition, an "authorized representative" means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters. A labor certification can not be granted for an Application for Permanent Employment Certification filed on behalf of an independent contractor.

The regulation at 20 C.F.R. § 656.3 further states, in part:

Employment means:

(1) Permanent, full-time work by an employee for an employer other than oneself. For purposes of this definition, an investor is not an employee. In the event of an audit, the employer must be prepared to document the permanent and full-time nature

of the position by furnishing position descriptions and payroll records for the job opportunity involved in the Application for Permanent Employment Certification.

The petition is not supported by evidence of a labor certification as required by the regulations at 8 C.F.R. § 204.5(l)(3) and at 20 C.F.R. § 656.30(C)(2). The former regulation states in pertinent part that a petition under the "Skilled Worker" classification (that is under Section 203(b)(3)(A)(i) of the Act) must be accompanied by a labor certification from the DOL. To complete the certification procedure, the ETA Form 9089 must be signed and attested by all parties (petitioner, beneficiary and preparer) when it is received by the petitioner after certification. There is no evidence that the petitioner, beneficiary and preparer, attested the labor certification, and no signed and attested labor certification was submitted into evidence.

The petitioner's and beneficiary's signatures are not present on the certified labor certification in the record and there is no correlative proof that the petitioner signed and affirmed the ten conditions stated in the original ETA Form 9089, or that the beneficiary evidenced his intention to accept the job position offered in Section H of the Application for Permanent Employment Certification. A signed and properly attested labor certification is the document required by the regulations, not an employment contract or offer letter.² See 20 C.F.R. § 656.21, et seq.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

² Moreover, there is no letter by the petitioner in the record offering the beneficiary a permanent full-time job, and no correlative acceptance of this offer by the beneficiary in the record.