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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

B4



FILE:



Office: NEBRASKA SERVICE CENTER

Date: **SEP 24 2010**

IN RE:

Petitioner:

Beneficiary:



Petition: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 \$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 Director, Nebraska Service Center, denied the preference visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A).

The petitioner is a design and marble setting business. It seeks to employ the beneficiary permanently in the United States as a marble setter. As required by statute, a labor certification approved by the Department of Labor accompanied the petition. The director determined that the labor certification in this case, requiring six years of grade school, one year of high school, and three years of experience in the job offered plus the ability to use the following tools: GA 7911 Grinder; 6'Angle; 7', 9' Angle sander; 80-60-24 Grinder Stone; and a 80-120-220-320 Pader Disc does not support an unskilled or other worker position as designated by the petitioner on the Form I-140. The director further determined that the petitioner failed to establish the beneficiary's qualifications to perform the duties of the position, and that the petitioner failed to establish the ability to pay the proffered wage beginning on the priority date of the visa petition and the director denied the petition accordingly.

The record of proceeding contains a properly executed Form G-28 (Form G-28), Notice of Entry of Appearance as Attorney or Representative, for the beneficiary's representative. The record of proceeding contains three Form G-28s, all of which are signed by the beneficiary authorizing counsel to represent him. The record does not contain, however, a Form G-28 signed by any representative of the petitioner. U.S. Citizenship and Immigration Services' (USCIS) regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B). No evidence suggests that the petitioner consented to the filing of the appeal. The appeal will, accordingly, be rejected.

If the appeal were not rejected for the reasons set forth above, it would be dismissed because the petitioner does not require less than two years of training or experience so that the beneficiary may be found qualified as an unskilled worker. 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 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.

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 an unskilled worker. The regulation at 8 C.F.R. § 204.5(i) provides 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 education, job experience and other special requirements for the proffered position set forth above require a skilled worker (requiring at least two years training or experience) for the position offered. As such, the Form I-140 requesting the services of an unskilled worker is not supported by a valid labor certification.¹ In this matter, the appropriate remedy would be to file another petition with the proper fee and required documentation.

As the appeal was not properly filed, and it is unclear whether or not the petitioner consented to having an appeal filed on its behalf, it will be rejected. 8 C.F.R. § 103.3(a)(2)(v)(A)(1).

ORDER: The appeal is rejected as improperly filed.

¹ Additionally, the director noted that the petitioner failed to establish its ability to pay or that the beneficiary had the required qualifications on the labor certification. Counsel failed to submit required evidence of the petitioner's ability to pay from 2001 onward and did not submit regulatory prescribed evidence of its ability to pay on appeal. Further, although counsel asserts that letters were sent to document the beneficiary's experience, the record contains no evidence of such. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, the petitioner has not established its ability to pay or that the beneficiary has the experience required for the position.