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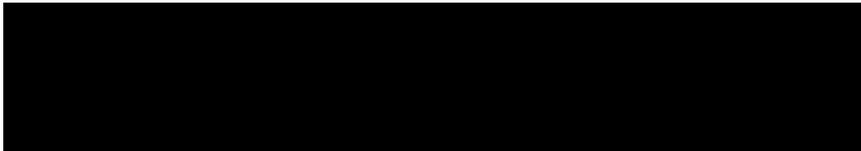
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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FILE:



Office: NEBRASKA SERVICE CENTER

Date: SEP 29 2010

IN RE:

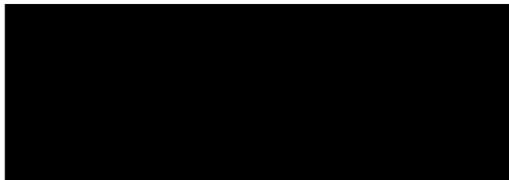
Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), 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, 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 preference 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 pipe bending distributor. It intends to employ the beneficiary permanently in the United States as a machine operator/pipe bender. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director found that the petitioner filed the preference visa petition for an unskilled worker but the Form ETA 750 accompanying the petition was for a skilled (requiring at least 2 years of specialized experience) worker. Accordingly, the director denied the petition pursuant to 8 C.F.R. § 103.2(b)(8) of the Act.¹ The director also found that the beneficiary was not qualified to perform the duties of the position on the approved labor certification.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. 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 issues in this proceeding are:

- a) Whether or not the petitioner has established that the petition requires less than two years training or experience, and
- b) Whether the beneficiary had at least two years of specialized experience in the job offered or as a pipe bender on the priority date.

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.

Whereas, 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.

For both sections 203(b)(3)(A)(i) and 203(b)(3)(A)(iii) of the Act, the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 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).

¹ Title 8 of the Code of Federal Regulation section 103.2(b)(8) in pertinent part states, "If the record of evidence establishes ineligibility, the application or petition will be denied on that basis."

Here, the Form ETA 750 was accepted for processing by the DOL on April 30, 2001. The position as stated on the approved Form ETA 750 required the beneficiary to have at least 2 years of work experience in the job offered or as a pipe bender before April 30, 2001. However, when filing the petition, the petitioner marked box 2.g on the Form I-140, indicating that it was filing the petition for any other worker (requiring less than two years of training or experience).

On appeal, counsel for the petitioner asserts that the petitioner, at the time of filing the petition, intended to mark box 2.e (for a professional with a bachelor's degree or a skilled worker with at least 2 years of specialized experience) but erroneously marked box 2.g.

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

The regulation at 8 C.F.R. § 204.5(l)(4) provides in pertinent part:

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 this case, the petitioner requested the unskilled worker classification (less than two years of experience) on the Form I-140. However, the Form ETA 750 labor certification indicates that the beneficiary must have at least two years experience in the job offered as of April 30, 2001. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. 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.

The director also found that the beneficiary did not have the required two years experience as set forth on the approved labor certification. To show that the beneficiary had more than two years of specialized experience in pipe bending, the petitioner initially submitted a letter dated July 30, 2002 from ██████████ in which Mr. ██████████ stated that '██████████'³ worked as a machine

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 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).

³ In reviewing the letter from ██████████, the AAO finds that this letter was not written for the beneficiary but for another individual named ██████████ a. The director did not make any

operator/pipe bender for 2 years and 9 months (from 10/1998 to 07/2001) at Fabworks. The director noted before denying the petition that the evidence submitted did not establish that the beneficiary had the required two years of experience in the job offered and requested additional evidence.

No additional evidence pertaining to the beneficiary's past work experience was submitted, however; and the director concluded that the beneficiary lacked the prerequisite two years of specialized training or experience in the job offered as of April 30, 2001. The letter from [REDACTED], according to the director, did not comply with the regulation at 8 C.F.R. § 204.5(1)(3)(ii) in that the author ([REDACTED]) did not specify his relationship with the beneficiary, nor did he include his title or position in the company.

On appeal, the petitioner resubmits the letter from [REDACTED] but this time the author included the word "manager" as his title, changed the period of employment from 2 years and 9 months to 3 years and 2 months (from 05/1998 to July 2001), and replaced the name [REDACTED] with the name of the beneficiary.

The evidence does not establish that the beneficiary has two years work experience as a pipe bender. Further, the AAO observes that the petitioner did not include any work experience of the beneficiary at part B of the Form ETA 750. The letters from [REDACTED] are inconsistent as to the dates of employment and the names of the workers. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner in this case has failed to submit independent objective evidence such as payroll records, paystubs, or other evidence to show that the beneficiary had at least two years experience in the job offered or as a pipe bender prior to April 30, 2001. For these reasons, the AAO is not persuaded that the beneficiary had at least two years experience as a pipe bender as of the priority date.

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.