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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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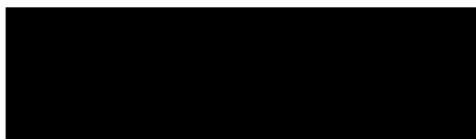


IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant petition for Alien Worker as an Other, Unskilled 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:

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 preference visa petition was denied by the Director, Nebraska Service Center (director). The matter was before the Administrative Appeals Office (AAO) on appeal. The AAO withdrew the director's decision and remanded the case back to the director for consideration on two issues. The director again denied the petition and certified the case to the AAO on appeal. The matter is currently before the AAO on certification. The director's decision will be affirmed.¹

¹ Certifications by field office or 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 as follows: "*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: "*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 in pertinent part:

(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 petition was denied by the director, therefore 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 denial decision therefore was 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).

The petitioner is a beauty salon. It seeks to employ the beneficiary permanently in the United States as a hair stylist. 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 determined that the petitioner filed the petition seeking an unskilled worker, which is the wrong classification for the job certified on the Form ETA 750, and that the petitioner had failed to establish that the beneficiary met the requirement of one year work experience in the job offered. The director denied the petition accordingly.

As set forth in the director's June 6, 2011 certified denial, the issues in this case are whether the petitioner filed the petition under the wrong category, and whether the petitioner has submitted sufficient evidence to demonstrate that the beneficiary had the qualifications stated on the labor certification application prior to the priority date.

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

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). Here, the labor certification application was accepted on April 30, 2001.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

On certification, counsel asserts that the correct category was selected on the petition and that, therefore, the labor certification is not invalid. The petitioner filed the petition seeking an unskilled worker classification, which is the wrong classification for the job offered on the labor certification. An unskilled worker is an alien who is capable of performing labor requiring less than two years training or experience. 8 C.F.R. § 204.5(l)(2). A skilled worker is an alien who is capable of performing labor requiring at least two years of training or experience. *Id.* The determination of whether a worker is 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). In the instant case, the labor certification states that the offered position requires one year training (beauty school diploma) and one year of experience in the job offered as a hair stylist. Since the offered position requires at least two years of training and/or experience, it is properly classified as a skilled worker and not as an unskilled worker.

The petitioner however requested on its Form I-140, at part 2(g), classification of the beneficiary as an unskilled worker pursuant to section 203(b)(3)(A)(iii) of the Act. 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). The evidence submitted does not establish that the labor certification requires an unskilled worker.

The petition may also not be approved because the petitioner has failed to submit sufficient evidence to demonstrate that the beneficiary had the qualifications stated on its labor certification application prior to the priority date.

On certification, counsel asserts that affidavits, declarations, and other evidence with reference to this issue are forthcoming. However, to date no additional evidence has been provided. The record contains a translated employment letter.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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'r 1986). *See also, Madany 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. Coomey*, 661 F.2d 1 (1st Cir. 1981). According to the plain terms of the labor certification, the applicant must have one year of experience in the job offered.

The beneficiary set forth her credentials on the labor certification and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, she represented that she has been employed as a hair stylist at [REDACTED] from 1997 through 1999, and as a hair stylist at [REDACTED] from 1999 through 2003. She does not provide any additional information concerning her employment background on that form.

The record of proceeding also contains a Form G-325, Biographic Information, sheet submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form under a section eliciting information about the beneficiary's employment history, she represented that she was employed by the petitioner since January 1999 above a warning for knowingly and willfully falsifying or concealing a material fact. For her last occupation abroad, the beneficiary listed her experience as a hair styling student from 1990 to 1992. She did not list any experience foreign or domestic work experience.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

- (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.
- (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.

On the Form ETA 750 and Form I-140, the petitioner described the specific job duties to be performed by the beneficiary as a hair stylist. The petitioner submitted a translated letter dated June 25, 2001 from [REDACTED] who stated that the beneficiary had provided services from December 1994 through February 1997. Here, the declarant does not specify her title, she does not indicate what service was performed by the beneficiary, she does not indicate the number of hours the beneficiary worked, and she does not provide a specific description of the beneficiary's job duties. See 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is April 30, 2001. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Also, as noted above, the beneficiary failed to list this purported experience with [REDACTED] the Form ETA 750 or on her Form 325A. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon 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 lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. The petitioner failed to resolve this inconsistency.

The AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired one year of training and/or one year of experience from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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 director's decision is affirmed. The petition is denied.