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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

PUBLIC COPY



U.S. Citizenship
and Immigration
Services



B6

FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

JAN 10 2011

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 \$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 preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a general construction company. It seeks to employ the beneficiary permanently in the United States as a plumber/foreman. The Form I-140, Immigrant Petition for Alien Worker, is accompanied by a Form ETA 750, Parts A & B, Application for Alien Employment Certification, approved by the United States Department of Labor (USDOL).

On Part 2.g. of the Form I-140, the petitioner indicated that it was filing the petition for "Any other worker (requiring less than two years of training or experience)." On Part 14 of the Form ETA Part A, the petitioner indicated that the minimum job requirements are two years experience in the job offered or two years experience in a related occupation. The director determined that the petitioner was not eligible to file the petition based on the accompanying individual labor certification. Although the petition was denied for this reason, the director noted two other deficiencies: (1) that the beneficiary had not met the experience requirements of the labor certification; and (2) that the petitioner had not established it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and continuing until the beneficiary obtains lawful permanent residence.

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 petition was filed on November 23, 2007. As stated by the director, on Part 2.g. of the Form I-140, the petitioner indicated that it was filing the petition for "Any other worker (requiring less than two years of training or experience).

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

On appeal, the petitioner does not address the fact that it applied for a visa classification incongruous to the Form ETA 750. However, the petitioner submits three pay stubs for the beneficiary dated October 2, 2007, August 2, 2008 and January 9, 2009, and an employment letter from [REDACTED] who states that the beneficiary worked for him as a plumber from 1992 through 1995 in Mexico. The petitioner resubmits its financial documents for 2001 through 2005. The petitioner states:

I am attaching check stubs as proof that I do have the ability to pay the proffered wage and income tax returns for prior years since the commencement of this case. He is presently self employed due to the fact that he does not possess a valid working card and this is the reason that I prompted to legalize his status. I am also enclosing a letter indicating that he indeed has the three year experience or more for this required

occupation and a person with less would cause my company loss of money. I need a trust worthy person in performing of the tasks as well as honesty because at times they are left alone in luxurious residences and with customers that trust my company. I am also submitting an amended I-140 petition for your review and consideration and he will be placed in payroll as soon as he is legally admitted.

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

In this case, the labor certification indicates that the position requires two years experience in the job offered or two years experience in a related occupation for the offered position. However, the petitioner requested the unskilled worker classification on the Form I-140 which is for unskilled workers requiring less than two years training or experience. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to adjudicate a petition under the wrong classification. Additionally, 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 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.¹

ORDER: The appeal is dismissed.

¹ It is noted that, according to the publically available website of the California Department of State, the petitioner's corporate status in California is currently "suspended." Accordingly, it appears that the petitioner is no longer an active business and, thus, the job offer to the beneficiary is no longer bona fide. If the appeal were not being dismissed for reasons set forth herein, this would call into question the petitioner's eligibility for the benefit sought.