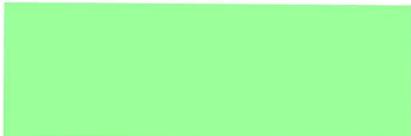




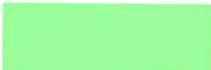
U.S. Citizenship
and Immigration
Services

(b)(6)



Date: **MAR 25 2013**

Office: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Skilled 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). On October 27, 2011, the AAO dismissed the appeal. Counsel filed a motion to reopen and reconsider the AAO decision. The motions will be granted and the AAO decision dismissing the appeal will be reversed in part and affirmed in part. The appeal will remain dismissed and the petition will remain denied.

The petitioner describes itself as an environmental drilling company. It seeks to employ the beneficiary permanently in the United States as a drilling assistant. On the Form I-140, the petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL).

The director's decision denying the petition concluded that the petitioner had failed to establish its ability to pay the proffered wage. The AAO affirmed this determination on appeal and also concluded that the petition could not be approved in the requested skilled worker classification because the labor certification does not require at least two years of training or experience.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or United States Citizenship and Immigration Services (USCIS) policy. The instant motion to reopen and motion to reconsider satisfy these requirements and are therefore granted.

The first issue on motion is whether the petitioner has established its continuing ability to pay the proffered wage from the priority date. *See* 8 C.F.R. § 204.5(g)(2). On motion, the counsel submitted new evidence to resolve an inconsistency in the record that the AAO raised in its decision dismissing the appeal. Following a review of the entire record of proceeding, including the new evidence submitted on motion, it is concluded that the petitioner has established by a preponderance of the evidence that it possessed the continuing ability to pay the proffered wage to the beneficiary from the priority date of the petition. Therefore, the AAO's decision on this issue is reversed.

The second issue on motion is whether the petitioner can change the requested employment-based immigrant visa preference classification after the director has denied the petition.

On Part 2 of the Form I-140 (Rev. 04/01/06), the petitioner indicated that it was filing the petition for a skilled worker. Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable 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. *See also* 8 C.F.R. § 204.5(l)(2).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) states:

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 [labor certification]. The minimum requirements for this classification are at least two years of training or experience.

The determination of whether a petition may be approved for a skilled worker is based on the requirements of the job offered as set forth on the labor certification. *See* 8 C.F.R. § 204.5(l)(4). The labor certification must require at least two years of training and/or experience. Relevant post-secondary education may be considered as training. *See* 8 C.F.R. § 204.5(l)(2).

Accordingly, a petition for a skilled worker must establish that the job offer portion of the labor certification requires at least two years of training, experience and/or relevant post-secondary education.

In the instant case, the labor certification does not require any training, experience and/or relevant post-secondary education. Therefore, the petition cannot be approved in the skilled worker classification.

On motion, counsel states that “due to strains put on my staff and on me” by an unusually heavy workload, she incorrectly requested classification of the beneficiary as a skilled worker on the Form I-140. However, the AAO will not readjudicate a petition under a different visa classification in response to a petitioner’s request to change it, once the director’s 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’r 1988). Therefore, AAO’s decision dismissing the appeal is affirmed on this issue.

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 for this issue.

ORDER: The motion to reopen and the motion to reconsider are granted. The prior decision dismissing the appeal is reversed in part and affirmed in part. The appeal remains dismissed and the petition remains denied.

¹ The proper classification in the instant matter would be unskilled worker under section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), which grants preference classification to immigrants who are capable of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.