

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

(b)(6)

DATE: **MAY 03 2013** OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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

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,

Rachel M. Jones
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), revoked approval of 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 private golf club. It seeks to employ the beneficiary permanently in the United States as a maintenance worker. Although the director initially approved the petition, he, thereafter, determined that the petitioner had not established that the offered position required a skilled worker or that it had the ability to pay the proffered wage. The director revoked the approval of the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence found in the record.

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)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions. 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.

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.

The petitioner filed the Form I-140 on December 18, 2007 and indicated in Part 2.e. that it was filing the petition for a professional or skilled worker. The director approved the Form I-140 on May 8, 2009, but on October 21, 2009, issued a Notice of Intent to Revoke, stating that the petitioner had not established that the proffered position required the two years of training or experience required by the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B). He also indicated that the evidence of record did not demonstrate that the petitioner had the continuing ability to pay the proffered wage as of the petition's priority date and continuing until the beneficiary's adjustment of status. On May 17, 2010, the director revoked the approval of the Form I-140.¹

¹ Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary] may, at any time, for what he deems to be good and sufficient case, revoke the approval of any

The AAO notes that, in her November 17, 2009 response to the director's Notice of Intent to Revoke, the petitioner's prior counsel submitted an amended first page of the Form I-140 indicating that the petitioner wished to employ the beneficiary as an unskilled worker. However, 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'r 1988).

The record contains the ETA 750, Application for Alien Employment Certification, underlying the Form I-140, which indicates that the position for which the petitioner seeks to hire the beneficiary requires only one month of training in the job of maintenance worker.² Accordingly, the petitioner may not seek to fill the offered position of maintenance worker by filing a Form I-140 for a professional or skilled worker under section 203(b)(3)(A)(ii) of the Act. Therefore, the AAO finds the director to have appropriately revoked the approval of the Form I-140 on this basis.

The AAO also concurs with the director's finding that the petitioner has failed to demonstrate a continuing ability to pay the beneficiary the proffered wage of \$14.41 per hour (\$576.40 per week or \$29,972.80 per year based on 40 hours per week) from the priority date of April 27, 2001.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence

While the AAO finds the record to establish that the petitioner is a viable business with significant resources, the Form I-140 indicates that it will pay the beneficiary \$320.00 per week, a wage that falls below that certified by the Department of Labor (DOL) in the Form ETA 750. Prior counsel, in responding to the director's Notice of Intent to Revoke, also states that the wage to be paid the beneficiary is "the prevailing wage of \$320 [per] week."

In that the Form I-140 indicates that the wage the petitioner intends to pay the beneficiary is less than that reflected on the Form ETA 750, the petitioner cannot establish its ability to pay the

petition approved by him under section 204." The realization by the director that a petition has been approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 18 I&N Dec. 582, 590 (BIA 1988).

² USCIS does not and cannot alter the terms of the labor certification. It may only interpret and apply the terms of the labor certification to determine if the petition qualifies under a requested preference category.

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proffered wage pursuant to 8 C.F.R. § 204.5(g)(2). Accordingly, the director has appropriately revoked the approval of the Form I-140 on this basis as well.

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 appeal is dismissed.