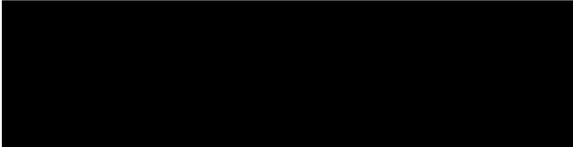


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



ci

FILE:

EAC 05 164 50765

Office: VERMONT SERVICE CENTER

Date: **AUG 28 2007**

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary¹ permanently in the United States as a chef. The director determined that the petitioner had not established that the position requires the minimum of two years experience or training for the skilled worker category sought, and denied the petition accordingly.

The record shows that the appeal is properly filed and timely. 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.

As set forth in the director's denial dated March 9, 2006, the single issue in this case is whether or not the petitioner had established that the position requires the minimum of two years experience or training for the category sought. Specifically the director stated that the record contains no evidence of Labor Certification by the Secretary of Labor or his designated representative that requires the minimum two years of experience or training for the position.

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.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on April 30, 2001.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal².

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

(ii) *Other documentation*—

¹ The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996). The AAO also notes that a Petition for Alien Relative (Citizenship and Immigration Services (CIS) form I-130) was filed by a United States Citizen, Denise Nekile Baker for the beneficiary. The petition was denied on March 19, 2002.

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).

The beneficiary set forth his credentials on Form ETA-750B and signed his name On April 20, 2001 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he had no work experience.

He does not provide any additional information concerning his employment background on that form.

Counsel submitted a Form I-290B appeal filed April 1, 2006, in this matter. In the Form I-290B section reserved for the basis of the appeal, counsel stated "See attached Letter." Further counsel selected on the appeal form filed April 1, 2006, the statement that indicated that counsel was submitting a brief and/or evidence with the form.

On appeal, counsel submits an explanatory letter dated April 6, 2006 and copies of the director's decision in the matter along with the labor certification. Counsel in a letter dated April 6, 2006, stated that the labor certification requires the beneficiary to have eight months of experience but then also states that the labor certification does not require any experience.³ No other explanation accompanied this contradictory statement.

The petitioner had selected box "e." under Part 2 of the petition I-140 that states in pertinent part "... a skilled worker (requiring at least two years of specialized training or experience)." As stated above on the labor certification, the applicant must have eight months of experience in the job offered not two years. As the director already stated in her decision Section 203(b)(3)(A)(i) of the Act (8 U.S.C. § 1153(b)(3)(A)(i)), the preference classification "skilled labor" requires at least two years training or experience. It is clear that the petitioner's labor certification does not support the I-140 petition since the former references an unskilled worker requirement (i.e. eight months of work experience) whereas the latter requests a skilled worker preference position (i.e. at least two years of training or experience).

We note that a request for evidence by the director concerned this deficiency in the petition and specifically referenced Section 203(b)(3)(A)(i) of the Act. As found in the record of proceeding, in response to the director's request the petitioner or counsel reiterated its request that consideration be given in the review under the skilled worker classification of the third preference immigrant visa category.

While it is not clear what counsel's contradictory statements made in the letter dated April 6, 2006 purport to mean, if the petitioner desires at this late date to change the petition and the category of benefits applied there under, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

In light of the absence of any evidence in the record prior to the appeal reflecting an intent to seek a lesser classification, we cannot conclude that the director committed reversible error by considering the petition under the classification checked on the petition and as restated in a response to a request for evidence mentioned above.

Where the director determines that the petitioner has not established a beneficiary's eligibility under the classification sought, the director need not inquire as to whether the beneficiary might be eligible for a lesser

³ Counsel is mistaken. The terms of the job offer as initially set forth before USDOL had "0" (i.e. zero) under the years of experience required. However, prior to the USDOL's certification of the Application for Alien Employment, the petitioner amended the experience requirement to eight months and initialed and dated the change, which was accepted by USDOL according to the stamped acceptance found next to that change on the labor certification.

classification. In this instance the director gave the petitioner the opportunity to amend the petition and choose another preference classification, but the petitioner re-affirmed its selection of the "skilled labor" classification. Even on appeal, counsel again requests the petitioner's classification under section 203 (b)(3)(A), but this time adds an "(ii)," which is for the professional "prong" of the third preference category reserved for "professionals who hold baccalaureate degrees and are members of the professions." Counsel is mistaken again, as the terms of the job offer do not require a bachelor degree so the petition would fail under that category even if such an amendment to the petition could be made on appeal.

The AAO thus affirms the director's decision that the preponderance of the evidence does not demonstrate that the petitioner had established that the position requires the minimum of two years experience or training for the skilled worker third preference category sought. The record contains no evidence of a Labor Certification by the Secretary of Labor or his designated representative that requires the minimum two years of experience or training for the position offered.

ORDER: The appeal is dismissed.