U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 02 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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:

[redacted]

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, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the request for a motion to reopen *sua sponte* will be rejected.

The petitioner is a nursing home. It seeks to employ the beneficiary permanently in the United States as a lead practical nurse. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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 or seasonal nature, for which qualified workers are not available in the United States.

The Form ETA 750 indicated that the position of lead practical nurse required three (3) months of experience in the job offered as of the priority date. Eligibility turns on whether the beneficiary met the petitioner's qualifications as of the priority date. *See* 8 C.F.R. 204.5(d). It is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is October 3, 2000.

The petitioner filed the Immigrant Petition for Alien Worker (I-140) on February 14, 2003 and claimed the status of a skilled worker for the beneficiary. The director determined that requirements of training an experience determine differentiate a skilled worker from an other, unskilled worker.[1] The classification of skilled workers requires at least two (2) years of training an experience, but other workers need none. *See* 8 C.F.R. 204.5(l)(5).

Since the petitioner did not establish that the position requires at least two (2) years of training and experience, the petitioner could never qualify the beneficiary under the terms of Part A, block 14, of Form ETA 750. The director denied the petition in a decision dated August 11, 2003 (NOD). The petitioner appealed on August 27, 2003. Negotiations with the service center director's Problem Resolution Unit ensued, but, ultimately, on March 31, 2004, the director notified counsel that the service center had forwarded the case to the AAO and to await its decision.

Counsel requests the AAO to exercise its discretion to fashion its own motion *sua sponte* and reopen the NOD in a letter of April 22, 2004 (MTR *sua sponte*). Counsel states the basis of the appeal and the request for the MTR *sua sponte*:

> The I-140 visa petition was denied due to the inadvertent check mark placed in the "skilled worker" requiring two (2) years of experience box when in fact the proper box to have been checked was the "any other worker" box. The position in question supported by the approved labor certification requires only three (3) months of experience. It is clear that your petitioner,, through counsel, erred in checking the incorrect box on form I-140. It should be added that at the time of filing and presently, the visa priority date is "current" for each employment based category.

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[1] The other worker category provides immigrant visas for qualified aliens 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. *See* Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii).

> By way of this "appeal" and, if appropriate, in the instant manner, as a Motion to Reopen, your Petitioner prays that the form I-140 be amended as requested, instanter, and that the I-140 thus be adjudicated under the "other worker" category
>
> Your petitioner, through counsel attaches duplicate I-140, with amendments, made accordingly for the purposes stated.

The appeal specifies no error in the application of law, precedent decision, or policy on the part of Citizenship and Immigration Services (CIS), formerly the Service or INS. *See* 8 C.F.R. § 103.5(a)(3). The proceedings do not show that CIS has committed an error. Counsel stipulates that "this entire issue arose due to a typographical error acknowledged by our offices."

The record contains no ambiguities as to the type of classification initially sought. For example, the record contains no evidence that counsel submitted a cover letter with the initial petition requesting a lesser classification. While the director could have inquired as to whether the petitioner had intended to seek a lesser classification, he was under no obligation to do so. No error of CIS appearing, the appeal must, therefore, be dismissed.

The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii). Counsel provides no authority for this office to reopen a decision of the director *sua sponte*. Thus, counsel's request is rejected.

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 and the request for a MTR *sua sponte* is rejected.