U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 0 6 2009

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IN RE: Petitioner: [redacted]
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:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

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.

The petitioner is a skilled nursing facility. It seeks to employ the beneficiary permanently in the United States as a licensed vocational nurse. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).[1] The director determined that the petitioner had not established that the petition requires at least two years of training or experience and, therefore, that the beneficiary cannot be found qualified for classification as a skilled worker. The director denied 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 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 January 29, 2008 denial, the single issue in this case is whether or not the petitioner has established that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

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)(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 Form I-140 was filed on November 13, 2006. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional or a skilled worker.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2] On appeal, counsel submits a brief. On appeal, counsel asserts

[1] The ETA Form 9089 indicates that there are no education, training or experience requirements for the proffered position.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-

that the petitioner requires a valid California Vocational Nurse license at Section H-14 of ETA Form 9089, and that licensed vocational nurses must have completed a two year training course.[3] Counsel also notes the continuing education requirements for licensed vocational nurses in California; that the position of licensed vocational nurse is listed under Job Zone 3 on O*Net, DOL's public online database, which requires previous work-related skill, knowledge or experience;[4] and that the director

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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).

[3] According to the website of the California Board of Vocational Nursing & Psychiatric Technicians at http://www.bvnpt.ca.gov/licensing/licensed_vocational_nurses.shtml (accessed July 8, 2009), there are four methods by which one may qualify for the California vocational nurse licensure examination. Each method is designed to provide an individual access into the job market as an entry-level practitioner:

> Method #1: Graduation from a California "accredited" Vocational Nursing Program.
>
> Method #2: Graduation from an Out-of-State "accredited" Practical/Vocational Nursing Program.
>
> Method #3: Completion of equivalent education and experience.
>
> - Pharmacology - 54 Hours
> - **Paid Bedside Nursing Experience** - 51 Months
> - Verification of Skill Proficiency.
>
> Method #4: Completion of education and experience as a corpsman in the United States military.
>
> - Twelve (12) months active duty rendering direct bedside patient care.
> - Completion of the basic course in nursing in a branch of the armed forces.
> - General honorable discharge from the military

Thus, counsel's assertion that licensed vocational nurses in California must have completed a two year training course is incorrect. The AAO notes that on ETA Form 9089, the beneficiary listed no prior work experience. She indicated that she completed the licensed vocational nursing program at the Preferred College of Nursing in Van Nuys, California in 1995. According to the website for the Preferred College of Nursing, http://www.pcnla.com/Programs.html (accessed July 9, 2009), the full-time vocational nursing program "meets 5 days a week and concludes in only 12 months." The part-time program "totals 18 months." Therefore, the beneficiary does not have at least two years of training or experience based on the information she listed on ETA Form 9089.

[4] According to DOL, one or two years of training involving both on-the-job experience and informal training with experienced workers are needed for Job Zone 3 occupations. DOL assigns a standard

should have issued a request for evidence (RFE) if he deemed the petition insufficient. Counsel states that if a RFE had been issued, he would have remedied the insufficiencies or, in the alternative, requested that the classification be modified to that of an unskilled worker.

The regulation at 8 C.F.R. 204.5(i) 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 ETA Form 9089, Application for Permanent Employment Certification, indicates that there are no education, training or experience requirements for the proffered position. However, the petitioner requested the skilled worker classification on the Form I-140. Despite counsel's assertions on appeal, the ETA Form 9089 does not state that an applicant must have at least two years of training or experience. Instead, the ETA Form 9089 states that an applicant must have a valid California vocational nurse license. In evaluating the beneficiary's qualifications, United States Citizenship and Immigration Services (USCIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). The AAO will not impose the additional requirement of two years of training, as it is not specifically stated on the labor certification application.

Counsel asserts on appeal that the director should have issued a RFE. The regulation at 8 C.F.R. § 103.2(b)(8) provides that a petition may be denied if there is clear evidence of ineligibility, notwithstanding the lack of initial evidence. In the instant case, the director determined that the initial evidence submitted by the petitioner supported a decision of denial, because the petitioner had

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vocational preparation (SVP) range of 6-7 to Job Zone 3 occupations, which means "[m]ost occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree. Some may require a bachelor's degree." *See* http://online.onetcenter.org/link/summary/29-2061.00 (accessed July 9, 2009). Additionally, DOL states the following concerning the training and overall experience required for Job Zone 3 occupations:

> Previous work-related skill, knowledge, or experience is required for these occupations. For example, an electrician must have completed three or four years of apprenticeship or several years of vocational training, and often must have passed a licensing exam, in order to perform the job.

See id. Thus, Job Zone 3 does not require at least two years of training or experience.

not established that the petition requires at least two years of training or experience. Therefore, the director's denial was proper without the issuance of an RFE.

Counsel further states on appeal that he would have requested that the classification be modified to that of an unskilled worker. However, there is no provision in statute or regulation that compels 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. 1988). In this matter, the appropriate remedy would be to file another petition with the proper fee and required documentation.

The evidence submitted does not establish that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

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.