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

U.S. Citizenship and Immigration Services

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JUL 10 2009

FILE: LIN 06 130 51719 Office: NEBRASKA SERVICE CENTER Date:

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 employment-based immigrant 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 systems and business consulting firm. It seeks to employ the beneficiary permanently in the United States as a senior application analyst programmer pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). The petition is accompanied by a Form ETA 9089, Application for Permanent Employment Certification, which was certified by the Department of Labor.

The director determined that the Form ETA 9089 failed to demonstrate that the acceptable alternate combination of education and experience requires at minimum at least two years training or experience necessary for filing the petition as a skilled worker, the category which the petitioner selected on Form I-140. The director denied the petition accordingly.

On appeal, counsel asserts that the designation selected in Part H-8 of the ETA Form 9089 was intended to be consistent with the prior parts of the ETA Form 9089 in requiring a bachelor's degree in electronic engineering plus one year of experience except that the one year of experience could be in a alternate occupation of an application analyst programmer.

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.

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).

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 March 30, 2006. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional (at minimum, possessing a bachelor's

degree or a foreign degree equivalent to a U.S. bachelor's degree) or a skilled worker (requiring at least two years of specialized training or experience).

On Part 2.g. of the I-140, a petitioner may designate its visa classification for any other worker (requiring less than two years of training or experience).

In this case, the job offer portion of the Form ETA 9089 initially indicates that the minimum level of education required for the position is a bachelor's degree in electronic engineering (Part H-4, and H-4B). Part H-6 and H-6A indicate that 12 months of experience in the job is required.

Part 8 asks the employer if there is an alternate combination of education and experience required. The petitioner answered this question "yes." On Part 8-A when asked to designate the alternate level of education, the petitioner stated "none." The alternate experience is designated in Part H-8-C as one year of experience. In part 10, the petitioner designates that 12 months of experience in the alternate occupation of an application analyst programmer is acceptable.

Accordingly, the minimum requirements of the job offer portion of the Form ETA 9089 do not consistently require a professional with the minimum requirements of a bachelor's degree, nor does it consistently require a skilled worker with the stated minimum requirements of at least two years of specialized training or experience. As the alternate combination of education was designated as no education with one year of experience in an alternate occupation, the Form ETA 9089 is not consistent with the visa category selected on the Form I-140.[1] The only category that would fit the petitioner's alternate combination of education and experience is paragraph g of Part 2 of the Form I-140 designating an "other, unskilled worker" requiring less than two years of training or experience. Counsel's assertion that the Form ETA 9089 reflects the employer's intention that "none" meant that it did not desire to change the original minimum requirement of a bachelor's degree is not persuasive.[2] 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 Form ETA 9089 consistently supports the visa classification as a professional or as a skilled worker. The appeal must be dismissed.

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.

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[1] The petitioner submitted a letter which states that the beneficiary has experience in the alternate occupation and would, therefore, qualify for the position based on the alternate job requirements.

[2] In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the alien 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*, *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

ORDER: The appeal is dismissed.