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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

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 23 2010

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), 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:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a tile installation company. It intends to employ the beneficiary permanently in the United States as a tile setter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director found that the petitioner filed the preference visa petition for an unskilled worker but the Form ETA 750 accompanying the petition was for a skilled worker (requiring at least four years of specialized experience as a tile setter). 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.[1] 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, the single issue in this case is whether or not the petitioner has established that the petition is for an unskilled worker (requiring less than two years of training or experience).

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 ETA 750 was accepted for processing by the DOL on April 30, 2001. The position as stated on the approved Form ETA 750 required the beneficiary to have at least four years of work experience in the job offered or as a tile setter before April 30, 2001. When filing the petition, the petitioner, however, marked box 2.g on the Form I-140, indicating that it was filing the petition for any other worker (requiring less than two years of training or experience).

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[1] The Form I-290B Notice of Appeal erroneously lists the receipt number of the beneficiary's Form I-485 Application to Register Permanent Residence or Adjust Status, LIN 08 112 51720, which was denied on the same day as the current petition. Counsel's brief indicates that the appeal relates to the Form I-140 Immigrant Petition for Alien Worker (LIN 08 020 50136). The AAO will accept the appeal of the Form I-140.

The AAO conducts appellate review on a *de novo* basis, *see Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004), and considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

The regulation at 8 C.F.R. § 204.5(l)(4), in pertinent part, provides:

> *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 petitioner requested the unskilled worker classification (less than two years of experience) on the Form I-140 petition. However, the Form ETA 750 labor certification indicates that the beneficiary must have at least four years experience in the job offered as of April 30, 2001. 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. 1988). In this matter, the appropriate remedy would be to file another petition with the proper fee and required documentation.

On appeal, counsel for the petitioner claims that neither he nor the petitioner has received the director's decision denying the preference visa petition. Counsel states that the petitioner and the beneficiary only became aware of the director's preference visa denial when counsel received a notice of denial for the beneficiary's application to register permanent residence or adjust status. The director, according to counsel, must send all notices regarding the beneficiary's immigration matters to all of his attorneys of record.

The record shows that [redacted] represented the petitioner in filing the Form I-140 preference visa petition. The beneficiary, on February 28, 2008 consented to have the law offices of [redacted] represent him in his Form I-485 adjustment of status.[3] On September 30, 2008 the director issued his decisions denying both the Form I-140 and the Form I-485. The director sent the preference visa decision to [redacted] and the adjustment of status denial to [redacted]

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[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).

[3] On February 27, 2009, [redacted] was suspended from practicing before USCIS for one year and has not been reinstated.

[5] The AAO attaches a copy of the director's September 3, 2008 decision, by mail to the petitioner.

Upon *de novo* review, the AAO finds that the director properly sent the preference visa decision to Mr. Rose, the petitioner's attorney of record. The beneficiary was not and is not a recognized party to the proceedings. 8 C.F.R. § 103.2(a)(2). The record contains no notice of change of counsel until October 24, 2008, when named counsel above entered an appearance on behalf of both the petitioner and the beneficiary. Since current counsel was not the petitioner's attorney of record on or before September 30, 2008 the director properly notified previous counsel of the decision.

The AAO finds that the director erred, however, in not sending the petitioner a separate copy of the decision. Nevertheless, the AAO will not remand for the reissuance of the director's decision. As noted in this decision, the petitioner filed a Form I-140 under the wrong classification, the remedy for which is to file a new petition under the correct classification, with the proper fee. Considering the narrow remedy available to the petitioner, it would serve no useful purpose to give the petitioner the opportunity to respond to the director's decision through the appellate process.[5] Upon receipt of this decision, the petitioner may file a motion to reopen or reconsider under 8 C.F.R. § 103.5.

On appeal, counsel also argues that the petitioner had ineffective assistance of counsel. A due process violation against the petitioner, according to counsel, has occurred since Mr. [redacted] retired, closed his office, and moved to New York without informing the petitioner of the status of his case.

Although counsel claims that Mr. [redacted] was incompetent, in this matter, counsel did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988). A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant appeal does not address these requirements. In addition, counsel does not explain the facts surrounding the preparation of the petition or the engagement of the representative. Accordingly, counsel did not adequately articulate a proper claim based upon ineffective assistance of counsel.

The petitioner has not established that the petition is for an unskilled worker, especially when the evidence submitted (the approved Form ETA 750) shows that the petitioner required the beneficiary to have at least four years experience in the job offered as of April 30, 2001.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.