U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B6

DATE: DEC 18 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a 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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,
Elizabeth A. McCormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is a surgical hair restoration company. It seeks to employ the beneficiary permanently in the United States as a project manager, telecom and predictive dialer data migration. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the petition requires at least a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree, and, therefore, that the beneficiary cannot be found qualified for classification as a professional. 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 denial, the single issue in this case is whether or not the petitioner has established that the petition requires at least a baccalaureate degree or its foreign equivalent, such that the beneficiary may be found qualified for classification as a professional.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. Section 203(b)(3)(A)(i) of 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.

Here, the Form I-140 was filed on June 14, 2010. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional (at a minimum, possessing a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1] On appeal, counsel and the petitioner assert that the director erred in finding that the minimum requested education required was two years. The petitioner states that its insertion of the language, "any suitable combination of education, training or experience is acceptable" is language required by the DOL to qualify a beneficiary on the basis of alternate

[1] 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).

experience, but does not take away from the minimum requirements of the labor certification, which is a bachelor's degree. The AAO disagrees.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Bachelor's of Commerce.
H.5. Training: None required.
H.6. Experience in the job offered: 24 months.
H.7. Alternate field of study: Management.
H.8. Alternate combination of education and experience: Accepted, any suitable combination of education, training or experience (at a minimum, 2 years of experience in the job offered).
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: Accepted, as project manager or call center manager or production manager.
H.14. Specific skills or other requirements: None.

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

> (3)(C) Professionals....To show that the alien is a member of the professions the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.
>
> (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.

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, 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).

In this case, the labor certification indicates that the minimum requirements for entry into the occupation are two years of experience in the job offered. These requirements apply to skilled workers at section 2.f. of the Form I-140. On appeal, the petitioner requests in the alternative that USCIS adjudicate the petition under the skilled worker category. However, the petitioner requested the professional worker classification on the Form I-140. 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'r 1988).

The evidence submitted does not establish that the petition requires at least a baccalaureate degree or its foreign equivalent such that the beneficiary may be found qualified for classification as a professional.

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.