(b)(6)

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

Date: MAY 24 2012 Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
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:

SELF-REPRESENTED

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 with the field office or service center that originally decided your case by filing a 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,

for
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) rejected the subsequently filed appeal. The matter is now again before the AAO as a motion to reopen and motion to reconsider pursuant to 8 C.F.R. § 103.5.[1] The motion to reopen and reconsider is dismissed. The appeal remains rejected and the petition remains denied.

The petitioner is a veterinary hospital. It seeks to employ the beneficiary permanently in the United States as a veterinary technician. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (the DOL). 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 also noted that the petitioner failed to establish that the beneficiary had successfully met the requirements of one year of experience in the job offered and completion of high school before the priority date. The director denied the petition accordingly.

On March 10, 2008 the beneficiary of the instant petition filed an appeal of the director's February 11, 2008 denial. The AAO rejected the appeal on April 3, 2009, noting that the appeal was not properly filed, as it was filed by the beneficiary and not an affected party.[2] On April 27, 2009, the petitioner filed a motion to reopen and reconsider the AAO's decision to reject the appeal.[3]

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.

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[1] Although the instant Form I-290B indicates that the application is both an appeal (Box B) and a motion to reopen and reconsider (Box F), the AAO will treat the instant application as a motion to reopen and reconsider its earlier rejection of the appeal.

[2] The term "affected party" means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition. 8 C.F.R. § 103.3(a)(1)(iii)(B). The party affected in visa petition cases is the petitioner, and the beneficiary does not have standing to move to reopen the proceedings. *Matter of Dabaase*, 16 I&N Dec. 720 (BIA 1979).

[3] The AAO notes that, although the petitioner signed Form I-290B for the instant motion, the petitioner's brief dated April 23, 2009 includes the following statement from the beneficiary, "I, Hugo Piedrasanta, am requesting the Administrative Appeals Office in the interest of justice to take this evidence in to consideration and grant the approval of the I-140 Immigration Application for Alien Worker."

Here, the Form ETA 750 was accepted on June 16, 2003. The proffered wage as stated on the Form ETA 750 is $14.00 per hour ($29,120 per year based on forty hours per week). The Form ETA 750 states that the position requires completion of high school and one year of experience in the job offered as a veterinary technician.

Here, the Form I-140 was filed on January 3, 2007. 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. In the brief submitted with the motion the petitioner asserted that its former attorney, erred by submitting that the beneficiary's employment with occurred from February 1991 until 1994.[4] The petitioner asserts that because the beneficiary had more than two years of experience, Mr. should have indicated on the Form ETA 750 that two years of experience is a requirement for the position of veterinary technician. The petitioner also informed the AAO that its former attorney, has been suspended by the California State Bar.[5] The petitioner claims ineffective assistance of counsel based on *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988).

The regulation at 8 C.F.R. § 204.5(l) 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 the instant case, the labor certification requires less than two years of experience for the proffered position. 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'r 1986). *See also, Madany* 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). 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).

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[4] The labor certification lists the beneficiary's experience at from February 1991 to April 1992. The record of proceeding contains a letter dated April 12, 1993, signed by in the capacity of President of In this letter, Mr. attested to the beneficiary's full-time employment as a veterinary technician from February 1990 until April 1992.

[5] The State Bar of California website indicates that was given an interim suspension after conviction on April 22, 2006, and later resigned with charges pending on June 9, 2006, and is currently ineligible to practice law. *See* http://members.calbar.ca.gov/fal/Member/Detail/113900 (accessed April 26, 2012).

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.

Although the petitioner claims that its counsel was incompetent, in this matter, the petitioner 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 motion does not address these requirements. The petitioner does not explain the facts surrounding the preparation of the petition or the engagement of the representative. Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel.

Furthermore, the motion shall be dismissed for failing to meet an applicable requirement. The regulation at 8 C.F.R. § 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Section 103.5(a)(1)(iii)(C) requires that motions be "[a]accompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 motion is dismissed. The petition remains denied.