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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: APR 25 2013 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

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:

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 M'Cormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner appealed to the Administrative Appeals Office (AAO). The AAO dismissed the appeal. Counsel to the petitioner filed a motion to reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted, and the appeal will be dismissed on its merits. The petition remains denied.

The petitioner is an asbestos removal business. It seeks to employ the beneficiary permanently in the United States as asbestos removal handler pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). 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 determined that the Form ETA 750 failed to demonstrate that the job requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker and, therefore, the beneficiary cannot be found qualified for classification as a skilled worker. 8 C.F.R. § 204.5(l). The director denied the petition accordingly. The AAO affirmed the director's decision and dismissed the appeal.

The issue on motion is whether the petitioner has established that the job requires a skilled worker such that the beneficiary may be found qualified for classification as a skilled worker.

On motion, counsel asserts that although the Form ETA 750 states that the requirement for the position of an "Asbestos Handler" is one month experience in the job offered, this requirement should not matter in that the beneficiary possesses more than what the Form ETA 750 requires. Counsel further asserts on motion that although the Form I-140 requirement is that the beneficiary be qualified as a skilled worker (requiring at least two years of specialized training or experience); that selection is a typographical error, and that the petitioner intended for the beneficiary to qualify as an unskilled worker as is evidenced from the evidence in the record of proceeding.

Contrary to counsel's claims, the job offer portion of the Form ETA 750 indicates that the minimum level of experience required for the position is one month. It is the job requirements of the Form ETA 750 which determine the proper category under which to seek classification. 8 C.F.R. § 204.5(k)(4). The beneficiary must then meet the requirements of the labor certification by the priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Accordingly, the job offer portion of the Form ETA 750 does not require two years of experience in the job offered. However, the petitioner requested classification as a skilled worker on the Form I-140. Although counsel claims that there is no discrepancy in that the beneficiary more than qualifies for the position at issue, the petitioner did not list such a requirement on the Form ETA 750. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to re-adjudicate a petition under a different visa classification in response to a petitioner's request to do so. 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).

The minimum job experience requirement found in the Form ETA 750, one month, falls below the minimum permitted for a skilled worker. 8 C.F.R. § 204.5(l). The evidence submitted does not establish that the Form ETA 750 requires a skilled worker, and 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.

ORDER: The AAO's prior decision, dated October 4, 2011, is affirmed. The petition remains denied.