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

DATE: FEB 28 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Professional Pursuant to Section 203(b)(3)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(ii)

ON BEHALF OF PETITIONER:

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the preference visa petition. The petitioner filed two motions to reopen or reconsider. The director affirmed his previous two decisions. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a contract manufacturer. It seeks to employ the beneficiary permanently in the United States as a product development analyst. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The petitioner elected to file the petition for a professional pursuant to Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), signaling that the minimum educational requirement for the proffer job is a bachelor's degree. However, when completing the ETA Form 9089, Part H-8, the petitioner responded as follows:

8. Is there an alternate combination of education and experience that is acceptable? Yes
8-A. If Yes, specify the alternate level of education required: Other
8-B. If Other is indicated in question 8-A, indicate the alternate level of education or experience required: "any suitable combination of education training or experience."

The director found that by the terms of the labor certification, an applicant could qualify for the proffered job without a bachelor's degree. The director found that a labor certification whose terms do not require a bachelor's degree cannot support a petition for a professional worker. The director denied the petition for a professional 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, an issue in this case is whether or not the petitioner has established that the petition requires at least a bachelor's degree so that the beneficiary may be found qualified for classification as a professional.

Section 203(b)(3)(A)(i) of the 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)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to professional immigrants who possess at a minimum bachelor's degrees, for which qualified workers are not available in the United States.

Here, the Form I-140 was filed on May 7, 2010. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional.[1]

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[1] When USCIS revised the I-140 petition as of January 6, 2010, it separated the professional (now box "e") and skilled worker (now box "f") categories. Previously, the two categories were combined

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.[2] On appeal, counsel submits a brief explaining that the language on the application for labor certification was a clerical error, for which the law firm takes responsibility. Counsel asks that the petition be adjudicated on the totality of the circumstances.

The application for labor certification was certified by the Department of Labor based upon the terms used by the petitioner. Upon certification, the petitioner requested immigrant status for the beneficiary under Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii). In this case, the labor certification indicates that the primary requirements for the proffered position are a bachelor's degree in economics and twelve months of experience in the job offered. The labor certification further indicates in Part H.8 that the employer will accept an alternate combination of education and experience. In Part H.8-B and H.14, the employer indicates that any suitable combination of education, training, or experience coupled with twelve months of experience will be accepted. No training is required for the proffered position. Thus, the minimum requirements for the proffered position as indicated on the labor certification are a combination of education, training, and experience, and not a single bachelor's degree. Accordingly, the job offer portion of the labor certification does not require a professional holding a bachelor's degree or foreign equivalent, but rather the lesser alternate combination of education, training, and experience. However, the petitioner requested classification as a member of the professions holding a bachelor's degree or foreign equivalent.

The evidence submitted does not establish that the ETA Form 9089 requires a professional holding a bachelor's degree or foreign equivalent, and the appeal must be dismissed.

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).

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.

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into one box (box "e").

[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).