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: JUN 2 4 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

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, Texas 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 specialty produce company. It seeks to employ the beneficiary permanently in the United States as a customer service supervisor. As required by statute, the petition is accompanied by labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the position offered requires at least two years of training or experience; therefore, the director determined that the beneficiary could not be found qualified for classification as a skilled worker. 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 November 7, 2012 denial, one of the issues in this case is whether or not the petitioner has established that the position offered requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

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]

Employment-based immigrant visa petitions are filed on Form I-140, Immigrant Petition for Alien Worker. The petitioner indicates the requested classification by checking a box, in Part 2, "Petition Type," on the Form I-140. Here, the Form I-140 was filed on August 27, 2012. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a skilled worker.

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.

By comparison, 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] 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).

Part H. of the labor certification states that the minimum job requirements are a high school education, six (6) months experience in the job offered, and "bilingual Spanish/English communications skills necessary."[2]

On appeal, counsel submits a brief, a letter from the human resources department of the petitioner, business brochures for the entity, Occupational Outlook Handbook, O*NET, Specific Vocational Preparation information, and examples of internet job postings for customer service supervisors. Counsel and the petitioner assert that the USCIS made an error in narrowly focusing on the six months of experience required by the terms of the labor certification, and instead should have considered the job title, description of duties, and eligibility requirements for entry into the position as described on the labor certification. Counsel asserts that the AAO should impute an experience requirement of "two to five years" based on these provided resources.

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.

The labor certification requests information on the job requirements of the position offered, including the minimum education, training, and experience required for the position. In this case, the labor certification, as completed by the petitioner, indicates that there is a six month experience requirement for the position offered. The labor certification does not list any training requirements for the position offered, or any alternate acceptable combinations of education, training, or experience. However, the petitioner requested the skilled 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).

A skilled worker classification on Form I-140 requires two or more years of experience as required by regulation. *See* 8 C.F.R. § 204.5 in pertinent part:

> (2) Definitions
>
> Skilled worker means an alien who is capable at the time of performing skilled labor (requiring at least two years of training or experience).

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[2] Part H.14 of the labor certification again states the requirements for the job offered to be "minimum High School plus six months of experience as a Customer Service Supervisor," in addition to the language requirements.

(3) Initial Evidence-

> (B) Skilled Workers-If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training, or experience, and any other requirements of the individual labor certification. The minimum requirements are at least two years of training or experience.

Counsel's assertion that the experience requirement listed is not determinative of the position's minimum requirements is not supported by the record or by case law. In evaluating the position offered, 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 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).

Therefore, as the position offered as described on the labor certification requires less than two years of experience in the position offered, this labor certification cannot be accepted in support of a petition requesting classification under the skilled worker category, which requires at a minimum two years of experience in the position offered.

The petitioner also indicates that the director should have issued a request for evidence prior to denying the petition, in order to clarify the information submitted in the petition. However, in light of the absence of any evidence in the record prior to the appeal reflecting intent to seek a lesser classification, we cannot conclude that the director committed reversible error by considering the petition under the classification checked on the petition. Where the director determines that the petitioner has not established a beneficiary's eligibility under the classification sought, the director need not inquire as to whether the beneficiary might be eligible for a lesser classification. Counsel contends on appeal that the director violated 8 C.F.R. § 103.2(b)(8) by failing to request further evidence before denying the petition. The cited regulation requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." *Id.* The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. The director did not deny the petition based on insufficient evidence of eligibility, but rather on the grounds that the labor certification provided could not support a petition for a skilled worker.

Furthermore, even if the director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

The evidence submitted does not establish that the position offered requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker. Therefore, the appeal will be dismissed on this ground.

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.