

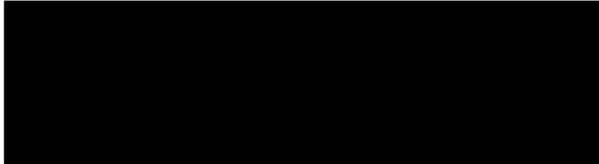


U.S. Citizenship  
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FILE: [REDACTED]  
LIN 08 015 51277

Office: NEBRASKA SERVICE CENTER

Date: NOV 02 2009

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2) as a member of the professions holding an advanced degree or an alien of exceptional ability (who is not seeking a National Interest Waiver). As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).<sup>1</sup> The director determined that the petitioner had not established that the petition requires at least a bachelor degree or equivalent and five years of experience in the job offered or five years experience in a related occupation and, therefore, that the beneficiary cannot be found qualified for classification as a member of the professions with an advanced degree. The director denied the petition accordingly.

On appeal, counsel stated:

In accordance with Part 2(B) of this application form, [the petitioner] hereby files notice of its appeal of the cited decision and requests 30 days to submit its brief and/or additional evidence.

Counsel stated that a brief and/or additional evidence would be submitted to the AAO within 30 days. The AAO received the appeal on July 7, 2008. As of this date, more than 15 months later, the AAO has received nothing further.

The regulation at 8 C.F.R. § 103.3(a)(2)(vii) states in pertinent part:

*Additional time to submit a brief.* The affected party may make a written request to the AAO for additional time to submit a brief. The AAO may, for good cause shown, allow the affected party additional time to submit one.

The regulation at 8 C.F.R. § 103.3(a)(2)(viii) states in pertinent part:

*Where to submit supporting brief if additional time is granted.* If the AAO grants additional time, the affected party shall submit the brief directly to the AAO.

Counsel, here, did not request any additional time beyond the 30 days listed on Form I-290B.

As stated in 8 C.F.R. § 103.3(a)(1)(v), an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

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<sup>1</sup> The ETA Form 9089 indicates that the position requires a Bachelor's degree in Business Administration and two years of experience in the job offered of business analyst.

Counsel here has not specifically identified any erroneous conclusion of law or statement of fact and has not provided any additional evidence on appeal to demonstrate the petitioner's proffered position of business analyst requires at least a bachelor degree or equivalent and five years of experience in the job offered or five years experience in a related occupation so that the beneficiary can be found qualified for classification as a member of the professions with an advanced degree. The appeal must therefore be summarily dismissed.

The AAO also notes that if the appeal were not summarily dismissed, it would have still been dismissed since the petitioner has not established that the petition requires at least a bachelor degree or equivalent and five years of experience in the job offered or five years experience in a related occupation such that the beneficiary may be found qualified for classification as a member of the professions with an advanced degree.

Section 203(b)(2)(A)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to qualified members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

Here, the Form I-140 was filed with U.S. Citizenship and Immigration Services (USCIS) on August 13, 2007. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a "member of the professions holding an advanced degree or an alien of exceptional ability (who is NOT seeking a National Interest Waiver)."

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

On appeal, counsel submits no evidence.

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

- (1) Any United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(2) of the Act as an alien

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<sup>2</sup> 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).

who is a member of professions holding an advanced degree or an alien of exceptional ability in the sciences, arts or business. . . .

- (2) Definitions. As used in this section: Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree. . . .

Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

- (3) Initial evidence. The petition must be accompanied by documentation showing that the alien is a professional holding an advanced degree or an alien of exceptional ability in the sciences, the arts, or business.

(i) To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

(A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or

(B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In this case, the ETA Form 9089, Application for Permanent Employment Certification, indicates that a Bachelor's degree in business administration and two years of experience are the requirements for the proffered position. However, the petitioner requested classification on Form I-140 as a "member of the professions holding an advanced degree or an alien of exceptional ability (who is NOT seeking a National Interest Waiver)."

There is no provision in statute or regulation that compels 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. 1988). In this matter, the appropriate remedy would be to file another petition with the proper fee and required documentation.

The evidence submitted does not establish that the petition requires at least a bachelor degree or equivalent and five years of experience in the job offered or five years experience in a related occupation such that the beneficiary may be found qualified for classification as “a member of the professions holding an advanced degree or an alien of exceptional ability (who is NOT seeking a National Interest Waiver) worker.” Therefore, the petition may not be approved.

**ORDER:** The appeal is dismissed.