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U.S. Citizenship
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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **NOV 17 2009**
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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:

[REDACTED]

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 dismissed.

The petitioner is a broadband connectivity solution provider firm. It seeks to employ the beneficiary permanently in the United States as a hardware design engineer 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 9089, Application for Permanent Employment Certification, which was certified by the Department of Labor.

The director determined that the Form ETA 9089 demonstrated that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability and, therefore, the beneficiary cannot be found qualified for classification as a member of the professions holding an advanced degree or an alien of exceptional ability.¹ 8 C.F.R. § 204.5(k)(4). The director denied the petition accordingly.

On appeal, counsel argues that the petitioner sought classification as an advanced degree professional or alien of exceptional ability by mistakenly checking block "d" in Part 2 of the Form I-140. Counsel asserts that the petitioner should have checked block "e" for a professional or skilled worker pursuant to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A), and asks that USCIS change the petition.

The record shows that the appeal is properly filed and timely. 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.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "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." *Id.*

Section 203(b)(2) of the Act also includes aliens "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." The regulation at 8 C.F.R. § 204.5(k)(2)

¹ The record indicates that the beneficiary possesses a four-year bachelor of engineering from Hankuk Aviation University, Korea. The Form ETA 9089 indicates the petitioner's minimum educational requirements are a Master's degree in hardware engineering, telecom and information engineering or related. Section H-8, indicates that an alternate combination of education and experience is not acceptable.

defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

Here, the Form I-140 was filed on August 15, 2007. On Part 2.d. 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.

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. On appeal, counsel submits a brief in which he argues that the petitioner committed a "typing error" by marking Part 2.d. and that the petitioner intended to seek classification as a professional or skilled worker. Counsel also refers to minutes of an AILA Liaison meeting with the California Service Center dated 2006 that address issues arising from typographical errors on submitted Forms I-140.²

The regulation at 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability."

In this case, the job offer portion of the Form ETA 9089 indicates that the minimum level of education required for the position is a master's degree in hardware engineering, telecom and information engineering or a related field and that experience in the job is not required. Accordingly, the job offer portion of the Form ETA 9089 requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability. The petitioner requested classification as a member of the professions holding an advanced degree or an alien of exceptional ability although the beneficiary does not possess a master's degree. On appeal, counsel attempts to change this request to that of a skilled worker or professional. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to United States Citizenship and Immigration Services 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 establish that the Form ETA 9089 requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability. It also establishes that the beneficiary does not possess a master's degree in the relevant fields. The AAO notes that the beneficiary and the proffered position must meet the requirements of the preference classification

² The AAO notes that the minutes of AILA Liaison meetings are not precedent and thus, are not binding on the AAO.

sought and that regardless of the preference classification sought, the beneficiary must meet the terms of the labor certification.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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. 1986). *See also, Mandany 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).

According to the plain terms of the labor certification, the applicant must have a master's degree in hardware engineering, telecom and information, engineering or a related field. In the instant matter, the beneficiary possesses a four year bachelor's of engineering degree and thus does not meet the requirements of the labor certification. Further the beneficiary would not be qualified to perform the proffered position under the employment-based professional or skilled worker classification, as the labor certification requires a master's degree as the minimum educational credential. 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 appeal is dismissed.