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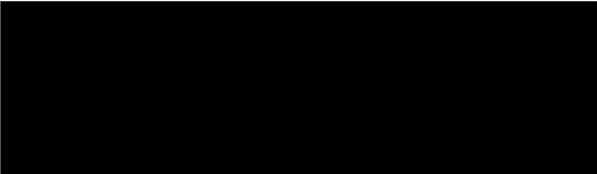
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



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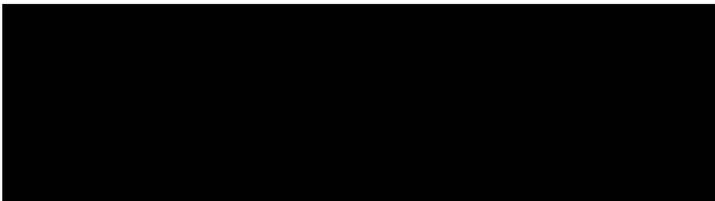
FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER  
LIN 07 085 50214

Date JUN 05 2009

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

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:



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).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference 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 cosmetic manufacturer. It seeks to employ the beneficiary permanently in the United States as a cosmetic products supervisor. As required by statute, the petition is accompanied by ETA Form 750, Application for Alien 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 position requires at least two years of training or experience and, therefore, the beneficiary cannot 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 August 7, 2007 denial, the single issue in this case is whether or not the petitioner has established that the position requires at least two years of training or experience such that the beneficiary may be found qualified for classification as 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.

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.

Here, the Form I-140 was filed with U.S. Citizenship and Immigration Services (USCIS) on January 24, 2007. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional or a skilled worker.

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

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<sup>1</sup> The labor certification states the qualifications of the position of cosmetic products supervisor, as certified by DOL, are one year of experience in the job offered.

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 a brief, a letter, dated March 25, 2003, from the Department of Labor, and a letter, dated March 15, 2001, from ██████████ General Manager, regarding the beneficiary's prior experience with Presevisa. On appeal, counsel states:

Originally, the beneficiary submitted his [sic] previous experience letter showing experience in excess of two years as a supervisor, cosmetics (see attached).

The DOT shows the job title, Cosmetics Supervisor to be SVP 7 requiring two years experience (DOT 550-131-010).

On March 25, 2003, the State of New York Department of Labor Alien Employment Certification Office sent a letter using the wrong DOT requesting the removal of Part A, Item 14, experience from 2 years under job offer as a restrictive requirement and requested that it be amended to one year.

The employer in the original submission, and in the advertising required two years experience as a Supervisor Cosmetic Products.

The Department of Labor arbitrarily deemed that the job requirement was restrictive, "tailored to the alien's background and not clearly open to any qualified U.S. worker."

The letter was intimidating; the implication that if the 750A was not amended to show 1 year experience, the case would not be approved (see attached).

After complying with Department of Labor's request, Item 14 was amended to one year.

The record unequivocally showed that the employer required two years experience (the advertisement indicated that); the beneficiary had over two (2) years experience as a supervisor of cosmetic manufacturing products. The DOT indicates job as requiring two years.

The regulation at 8 C.F.R. 204.5(i) provides in pertinent part:

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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).

(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 regulation at 8 C.F.R. § 204.5(1)(3) states, in pertinent part:

(ii) *Other documentation – (A) General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(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, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.

(D) *Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is April 24, 2001.

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).

In this case, the ETA Form 750, Application for Alien Employment Certification, as certified, indicates that the requirements are one year of experience in the job offered of cosmetic products supervisor for the proffered position. Accordingly, based on the labor certification requirements, as certified, the petitioner could only file the I-140 under 2 "g" for an "other worker" requiring less than two years of training or experience. However, the petitioner requested the skilled/professional worker classification on the Form I-140. 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 two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

For the reasons discussed above, the assertions of counsel on appeal do not overcome the decision of the director.

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.