U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 16 2009
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IN RE: Petitioner:
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:

[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 immigrant visa petition was denied by the Director, Nebraska Service Center, on October 26, 2007. On November 28, 2007, the petitioner filed an appeal. The director treated the appeal as a motion and, on December 13, 2007, granted favorable relief, but did not approve the petition. On January 11, 2008, the petitioner filed an appeal with the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a skilled nursing facility. It seeks to employ the beneficiary permanently in the United States as a licensed vocational nurse. As required by statute, the petition is accompanied by Form ETA 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). 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 also determined that the petitioner failed to establish that it has the ability to pay the proffered wage. The director denied the petition accordingly.

On November 28, 2007, the petitioner filed an appeal. The director treated the appeal as a motion and issued a new decision on December 13, 2007.[1] Although the director concluded that the petitioner established that it had the ability to pay the proffered wage, the director again determined that, because the Form ETA 9089 only requires 12 months of experience in the job offered with no minimum education or training level, the petition will not permit the beneficiary to be found qualified for the skilled worker classification. The petition was again denied.

On January 11, 2008, counsel to the petitioner filed an appeal reiterating his prior arguments. Primarily, counsel argues that the requirement in the Form ETA 9089 that the worker be licensed as a California vocational nurse in fact requires two years of relevant training.

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.

Accordingly, the single issue in this case is whether or not the petitioner has established 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.

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

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[1]It is noted that the director indicated in his December 13, 2007 decision that the petitioner's November 28, 2007 appeal was untimely. However, this appears to be erroneous as November 28, 2007 is 33 days after the issuance of the October 26, 2007 decision. *See* 8 C.F.R. § 103.5. The appeal was therefore timely, and this statement by the director shall be withdrawn. However, as the director was permitted to treat this appeal as a motion because he elected to provide favorable relief, albeit partial favorable relief, this error was harmless. 8 C.F.R. § 103.3(a)(2)(iii).

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 on April 23, 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 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

The regulation at 8 C.F.R. 204.5(i) 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.

In this case, the Form ETA 9089 indicates that there is a one-year experience requirement in the proffered position. There are no training or education requirements. United States Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See e.g. Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). Although the position requires licensure as a California vocational nurse, the record is devoid of evidence equating this requirement to two years of training or experience. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Regardless, as the Form ETA 9089 clearly does not require any training for the position, it is not reasonable that this vague licensure requirement be used to glean a training requirement which could have been unambiguously expressed in Block H-5. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Accordingly, the petitioner requested the skilled worker classification on the Form I-140 even though the Form ETA 9089 does not require a skilled worker for the position. 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.

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.