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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



U.S. Citizenship
and Immigration
Services

B6

FILE:

SRC 08 800 03826

Office: TEXAS SERVICE CENTER

Date:

APR 05 2010

IN RE:

Petitioner:

Beneficiary:

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)

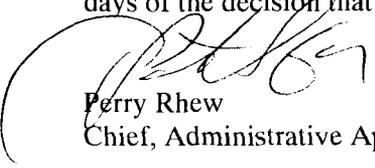
ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 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 contractor business. It seeks to employ the beneficiary permanently in the United States as a administrative assistant (assistant office manager). As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had not shown that the labor certification in this matter requires at least two years of training or experience, [or that it requires the beneficiary to be employed as a professional, to have at least a baccalaureate degree and to be a member of the professions.]¹ Thus, United States Citizenship and Immigration Services (USCIS) may not find that the instant beneficiary qualifies for classification as a skilled worker or a professional, as requested on the petition. Therefore, the director denied the petition.²

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 December 24, 2008 denial, at issue in this case is whether the petitioner has established that the labor certification in this matter requires either at least two years of training or experience such that USCIS might find that the instant beneficiary qualifies for classification as a skilled worker; or at least a baccalaureate degree such that USCIS might find that the beneficiary qualifies for classification as a professional.

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

¹ Specifically, the regulations state that to meet the definition of professional, in this section, the alien must be one who holds at least a U.S. baccalaureate degree or a foreign equivalent degree and who is a member of the professions. See 8 C.F.R. § 204.5(k)(2).

² The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In this case it is not clear from the documentation submitted that the petitioner could establish an ability to pay the wage from the priority date onwards. The petitioner would have to provide evidence that does establish its ability to pay the wage in any filings submitted in the future.

which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. 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, Immigrant Petition for Alien Worker, was filed on December 1, 2007. At Part 2.e. of that form, the petitioner indicated that it was filing the petition for a professional or a skilled worker. Thus, the labor certification which accompanies the petition must require at least the minimum requirement for a skilled worker: two years training or experience; or at least the minimum requirement for a professional: a baccalaureate degree or foreign equivalent degree.

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 on appeal.³

On appeal, the petitioner indicated that a clerical error was made on the Form I-140 and that the petitioner intended to check Part 2.g. to indicate that it was filing the petition for an unskilled worker or other worker. The petitioner requested that the AAO evaluate the petition as a filing for an unskilled worker or other worker.

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 petitioner requested the professional or skilled worker classification on the Form I-140. As noted, the skilled worker classification requires, at a minimum, two years training or experience, whereas the classification of professional requires at least a baccalaureate degree. *See* Sections 203(b)(3)(A)(i) and (A)(ii) of the Act.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in this 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).

The labor certification indicates that there are no educational requirements, and no training or experience requirements for the proffered position. Thus, the beneficiary in this matter may not be classified as a skilled worker or a professional. There is no provision in statute or regulation that compels USCIS to readjudicate a petition under a different visa classification, once the decision has been rendered. A petitioner may not make material changes to a petition, such as requesting that the visa classification be changed to that of unskilled worker or other worker, 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; to select the proper visa classification category; and to submit the required documentation.

The evidence submitted does not establish that the labor certification requires: at least two years of training or experience such that USCIS may find that the beneficiary in this matter qualifies for classification as a skilled worker; or at least a baccalaureate degree such that USCIS may find that the beneficiary qualifies for classification as a professional.

Therefore, the petition must be denied. 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.