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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**

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date **APR 05 2010**

IN RE:

Petitioner:

Beneficiary:

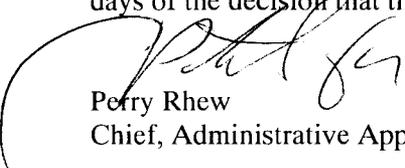
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

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, Nebraska 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 painting and drywall business. It seeks to employ the beneficiary permanently in the United States as a first-line supervisor/manager of construction trades and extraction worker (foreman/painter). The petitioner requested that the beneficiary in this matter be classified as a skilled worker or a professional. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director indicated that the petitioner had not established that the labor certification in this matter requires at least two years of training or experience, or that it requires a baccalaureate degree.<sup>1</sup> As such, the United States Citizenship and Immigration Services (USCIS) may not find that the instant beneficiary qualifies for classification as a skilled worker or a professional.

The director also indicated that, according to the instructions on the Form I-140, Immigrant Petition for Alien Worker, and the regulations, the petitioner must submit with the petition for a skilled worker or professional a labor certification application certified by the DOL, evidence that the alien meets the educational, training, experience and any other requirements of the labor certification, and evidence of the petitioner's ability to pay the proffered wage. The director stated that the instant petitioner submitted the petition without all the required initial evidence. Therefore, the director denied the petition in accordance with 8 C.F.R. § 103.2(b)(8)(ii)(which states in relevant part that where the required initial evidence is not submitted with the petition, USCIS may deny the application for lack of initial evidence.)

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 January 28, 2009 denial, at issue in this case is whether the petitioner submitted the required initial evidence such as evidence that the petitioner has the ability to pay the proffered wage from the priority date onwards. Also, at issue is whether the petitioner has established that the labor certification in this matter requires at least two years of training or experience such that USCIS may find that the instant beneficiary qualifies for classification as a skilled worker, or requires at least a baccalaureate degree such that USCIS might find that the beneficiary qualifies for classification as a professional.

On appeal, counsel asserted that USCIS should find that the labor certification submitted with the petition is valid. Counsel misstated the issue. The labor certification is valid. The petitioner has failed to request the proper visa classification or submit the initial required evidence.

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<sup>1</sup> 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).

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.<sup>2</sup>

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)(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.

The regulation 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.

First, as stated by the director, the petitioner failed to submit the required initial evidence with the petition. For example, there is no evidence in the record regarding the petitioner’s ability to pay the beneficiary the proffered wage of \$25.82 per hour (or \$53,705.60 per year) from the July 14, 2003 priority date onwards. The appeal will be dismissed on this basis. *See* 8 C.F.R. § 103.2(b)(8)(ii).

Further, the Form I-140 in this matter was filed on August 20, 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 requirements for a skilled worker: two years training or experience; or at least the minimum requirements for a professional: a baccalaureate degree.

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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 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 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.

The labor certification indicates that the proffered position requires only one year of experience in the proffered position or one year of experience in the related position of painter.<sup>3</sup> 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 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. The appeal must be dismissed on this basis.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

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<sup>3</sup> The AAO notes that the petitioner did not document for the record that the beneficiary had acquired one year of experience in the proffered position or the related position of painter as of the priority date as required by the Form ETA 750. See 8 C.F.R. § 204.5(l)(3)(ii)(B)(which indicates that if the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the experience requirements and any other requirements of the labor certification.)