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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

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 25 2010

LIN 07 211 53241

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 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 construction business. It seeks to employ the beneficiary permanently in the United States as a cement mason (mason laborer.) 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.[1]] 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. Therefore, the director denied the petition.

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.

Counsel indicated on the Form I-290B, Notice of Appeal or Motion, received on January 20, 2009, that he would be submitting a brief or additional evidence to the AAO within 30 days. The record indicates that, as of the date of this decision, no brief or additional evidence has been submitted. The AAO will consider the record complete.[2]

As set forth in the director's December 17, 2008 denial, at issue in this case 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.

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[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 AAO also could have dismissed this appeal based on the petitioner's failure to submit any evidence on appeal to overcome the basis for denial set forth by the director. As stated in 8 C.F.R. § 103.3(a)(1)(v), an appeal shall be dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact as the basis for the appeal. *See* 8 C.F.R. § 103.3(a)(2)(vii)(which indicates that the affected party may make a written request to the AAO for additional time to submit a brief, and that the AAO may, for good cause shown, allow the affected party additional time to submit one.) *See also* 8 C.F.R. § 103.3(a)(2)(viii)(which indicates that if the AAO grants additional time, the affected party shall submit the brief directly to the AAO.) Counsel did not request any additional time beyond the 30 days listed on Form I-290B. Counsel here has not directly addressed the director's stated reasons for denial, has not specifically identified any factual or legal errors in the director's decision and has not provided any additional evidence.

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.

Here, the Form I-140, Immigrant Petition for Alien Worker, was filed on July 18, 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.

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 through counsel that the director erred and abused his discretion when he denied the petition because the petitioner "allegedly indicated [it] would accept less than two years of experience to qualify for the [proffered] position."

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.

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[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 education, 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.[4]

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.

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.

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[4] USCIS records indicate that during the relevant period of analysis (from the April 30, 2001 priority date onwards) the petitioner has had eight additional petitions approved for eight additional sponsored workers. USCIS records also suggest that six of these sponsored workers have not yet adjusted to lawful permanent resident status. Two of these beneficiaries did adjust to lawful permanent resident status (one on October 22, 2009 and one on January 12, 2010) based on the petitioner's filings. In order to show its ability to pay, the petitioner must establish in any further filings in accordance with 8 C.F.R. § 204.5 (g)(2) that, from the priority date onwards it had the ability to pay the instant proffered wage and the wages of all its other sponsored workers whose petitions were pending during that period (for the specific years that each was, indeed, pending.)