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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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FILE:

LIN 07 140 53148

Office: NEBRASKA SERVICE CENTER

Date: **MAR 25 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)

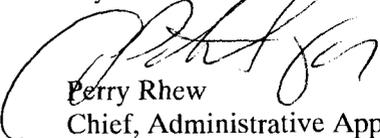
ON BEHALF OF PETITIONER:

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, 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 private household (family residence). It seeks to employ the beneficiary permanently in the United States as a live-in child monitor. 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.

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 5, 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 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 April 16, 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.

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).

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.²

On appeal, the petitioner indicated that a typographical 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.

The labor certification indicates that there are no training or experience requirements for the proffered position, and no education requirements beyond high school.³ 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

² 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).

³ The AAO notes that the petitioner did not document for the record that the beneficiary had acquired some high school education 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 educational requirements and any other requirements of the labor certification.)

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 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.

⁴ The record indicates that the priority date in this matter is April 23, 2001. The AAO would underscore that for the petitioner to demonstrate that it has the ability to pay the proffered wage each year from the priority date onwards in accordance with 8 C.F.R. § 204.5(g)(2), it must submit documentation regarding its ability to pay (such as its federal tax returns, annual reports and/or audited financial statements) for each year from 2001 onwards. With the present filing, the petitioner submitted the tax return for only one year in the relevant period of analysis. Thus, the record, as it currently stands, cannot establish the petitioner's continued ability to pay the wage. In any future filings, the petitioner must correct this deficiency in the evidence.