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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

[REDACTED]

B6

FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: FEB 28 2011
IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. 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 maintenance carpenter. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the minimum requirements reflected on the labor certification were less than the requirements of the classification sought, which is limited to those aliens who will be performing skilled labor requiring at least two years training or experience. The director denied the petition accordingly.

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 denial dated June 28, 2010, the issue in this case is whether or not the minimum requirements reflected on the labor certification were less than the requirements of the classification sought, which is limited to those aliens who will be performing skilled labor requiring at least two years training or experience.¹

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)(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.

In the instant matter, the Form I-140 was filed on March 3, 2010. On Part 2.f. of the Form I-140, the petitioner indicated that it was filing the petition for a skilled worker (requiring at least two years of training or experience). In contrast, the petitioner submitted a Form ETA 9089 labor certification which indicated at part H-6 that it required two years experience in the job offered, and at part H-8 where it asks the petitioner to list an alternate combination of education and experience that is acceptable, the petitioner indicated a high school diploma and one year experience in the job offered.

¹ The record shows that the petitioner previously filed a Form I-140 petition on July 23, 2007. The petitioner filed that petition for a professional or skilled worker. The director denied the petition for the same reason that he denied the petition now before the AAO on appeal. The status of that petition is a matter of record and therefore, will not be discussed further.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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 labor certification indicates that there is a two year training or experience requirement for the proffered position, and in the alternative, a high school diploma and one year training or experience. However, the petitioner requested on the Form I-140 the visa classification for a skilled worker (requiring at least two years of training or experience).

On appeal, counsel asserts that although the petitioner indicated its willingness to consider an applicant with less than the required two years experience for the job offered as carpenter, it does not mean that the position requires less than two years of experience; counsel asserts that the "Specific Vocational Preparation (SVP)" found in the information and guidelines of the *Dictionary of Occupational Titles* establishes that the occupational requirement for the position of Carpenter is two to three years of experience, notwithstanding that the employer may be willing to consider less experience. The AAO finds that because the employer is willing to accept a high school diploma and one year experience in the position, that the position is classified as unskilled under the Act. *See* Section 203(b)(3)(A)(i) and (iii) of the Act, 8 USC § 1153(b)(3)(A)(i) and (iii), which indicate that skilled labor requires at least two years training or experience, and that unskilled labor has no such requirement.

Contrary to counsel's claim, there is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to re-adjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. Counsel argues on appeal that the job as carpenter requires at least two years experience, based upon occupational standards, and that although the petitioner was willing to consider an applicant with less experience the minimum requirements of two years is what takes precedence. A petitioner may not make material changes to a petition 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).

The evidence submitted does not establish that the position requires a minimum of 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.