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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**



B6

Date: **AUG 14 2012**

Office: TEXAS SERVICE CENTER FILE: 

IN RE:           Petitioner:   
                  Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a 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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment based visa petition was denied by the Director, Texas Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a computer software engineering firm. It seeks to employ the beneficiary permanently in the United States as a Programmer Analyst- Micro/Web. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had failed to demonstrate that the labor certification supported the visa classification sought.

The AAO conducts appellate review<sup>1</sup> on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The determination of whether a worker is a professional or skilled 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.<sup>2</sup>

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)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), also 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 H of the ETA Form 9089 sets forth the minimum requirements of the certified position as a Bachelor's degree in Computer Science, Mathematics, Engineering, Science or Business/Commerce. and twelve months of experience in the job offered, or twelve months of experience in an alternate occupation defined as "Software Engineer, Systems Analyst, Software Developer, QA Engineer or."<sup>3</sup> Part H-8 indicates that an alternate combination of education and experience is acceptable and defines it as "Bachelor's Degree or equivalent in education, training and/or experience." Part H-8C indicates that 3 years of experience is applicable to Part H-8. As noted by the director, the visa classification sought on the Form I-140 petition designates the professional category (paragraph e). The petitioner affirmed

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<sup>1</sup> 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.

<sup>2</sup> The regulation at 8 C.F.R. § 204.5(l) also states 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.

<sup>3</sup>There is no addendum with the ETA Form 9089 that continues the statement after the word "or."

this selection in response to the director's request for evidence issued on March 1, 2011, which specifically requested, "please state whether you desire to petition for the beneficiary as an E32 professional or an E31 skilled worker."

On appeal, the petitioner asserts that United States Citizenship and Immigration Services (USCIS) has historically evaluated a petition for both the professional and skilled worker category and states that the petition should have been approved in the skilled worker visa classification. Form I-140 (Rev. 11/23/10) now separates box "e." for professional, and box "f." for skilled worker. Prior versions combined the choice of professional and skilled worker in box "e." Therefore, United States Citizenship and Immigration Services (USCIS) would, historically, if filed on the prior form version that combined both professional and skilled workers in one box choice, in appropriate circumstances evaluate a petition as a professional or as a skilled worker. Here, the petitioner clearly selected box e for professional and confirmed that selection in response to the director's request for evidence.

The petitioner specifically designated the professional category of visa classification sought. The Form I-140 petition is not approvable because it is not supported by the appropriate ETA Form 9089. In order to be classified as a professional, the ETA Form 9089 must require a minimum of a baccalaureate degree pursuant to section 203(b)(3)(A)(ii) of the Act. Because the petitioner states that it will accept some kind of experiential substitute for a full baccalaureate degree,<sup>4</sup> the position's description on the ETA Form 9089 indicates that the minimum requirement is less than a full bachelor's degree and thus does not comply with section 203(b)(3)(A)(ii) of the Act. There is no provision in statute or regulation that compels USCIS to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. 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'r 1988).

Based on the foregoing, the record failed to establish that the labor certification supports the visa classification sought.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

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<sup>4</sup> Experience equivalencies may be applicable in non-immigrant H1B petitions, but not in immigrant petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5).