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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: FEB 10 2012

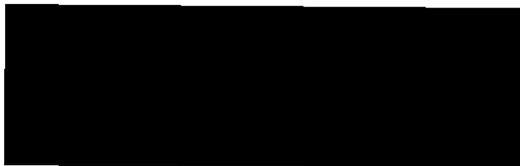
Office: TEXAS SERVICE CENTER

FILE: 

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:

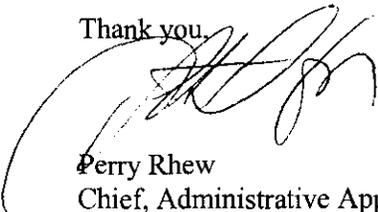


INSTRUCTIONS:

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.

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a cook/kosher. As required by statute, the petition is accompanied by labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the petition requires at least two years of training or experience and, therefore, that the beneficiary cannot be found qualified for classification as a skilled worker. The director denied the petition accordingly on January 13, 2009.

The AAO conducts appellate review 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 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>1</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)(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 was filed on May 15, 2008. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional or a skilled worker.

The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup> On appeal, counsel asserts that the designation of a skilled worker was an inadvertent error on Form I-140 and that the petitioner intended to check Part 2.g. indicating that it was filing the petition for an unskilled worker. Counsel asserts that the director should have requested further

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<sup>1</sup>It is additionally noted that subsequent to the filing of the instant appeal asserting that the petitioner should have been allowed to amend the beneficiary's classification to "other worker" on the Form I-140 petition, a different Form I-140 that the petitioner filed on the beneficiary's behalf based on the same labor certification was approved for the other worker visa classification on March 6, 2009.

<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 by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant 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).

evidence and allowed the petitioner to amend the visa designation to paragraph g (other worker) on the Form I-140.

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 no education or training required for the offered position, but twelve months of experience in the job offered of kosher cook is required. However, the petitioner requested the skilled worker classification on the Form I-140. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (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. 1988). Further, the AAO does not find that the director was obliged to solicit the petitioner to confirm its choice of visa classifications. The regulation at 8 C.F.R. §§ 103.2(b)(8)(i) and (ii) clearly allow the denial of an application or petition, notwithstanding any lack of required initial evidence, if evidence of ineligibility is present.<sup>3</sup>

The evidence submitted does not establish that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

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<sup>3</sup>8 C.F.R. § 103.2(b) provides in relevant part:

8) *Request for Evidence; Notice of Intent to Deny* —(i) *Evidence of eligibility or ineligibility*. If the evidence submitted with the benefit request establishes eligibility, USCIS will approve the benefit request, except that in any case in which the applicable statute or regulation makes the approval of a benefit request a matter entrusted to USCIS discretion, USCIS will approve the benefit request only if the evidence of record establishes both eligibility and that the petitioner or applicant warrants a favorable exercise of discretion. If the record evidence establishes ineligibility, the benefit request will be denied on that basis.

(ii) *Initial evidence*. If all required initial evidence is not submitted with the benefit request or does not demonstrate eligibility, USCIS in its discretion may deny the benefit request for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

Beyond the decision of the director, it is additionally noted that subsequent to the filing of the instant appeal asserting that the petitioner should have been allowed to amend the beneficiary's classification to "other worker" on the Form I-140 petition, a different Form I-140 that the petitioner filed on the beneficiary's behalf based on the same underlying certified labor certification was approved on March 6, 2009. The approved petition requested the "other worker" visa classification for the beneficiary. As this Form I-140 petition (SRC 09 095 51115) was premised on the same certified labor certification (ETA Form 9089) as in the instant matter, and which confers the same priority date of February 20, 2008, the issue upon which this appeal is based is now moot.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683; *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(AAO *de novo* authority is well recognized.)

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