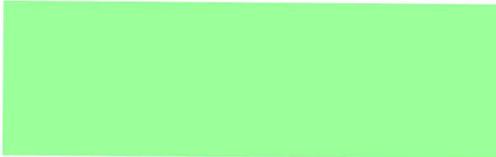
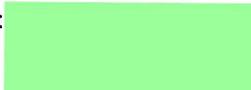


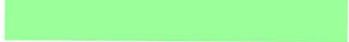


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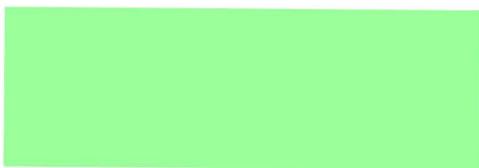


Date: **SEP 13 2013** Office: NEBRASKA SERVICE CENTER FILE: 

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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,



Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment based visa petition was denied by the Director, Nebraska Service Center. The director dismissed the petitioner's motion to reopen. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a county government. It seeks to employ the beneficiary permanently in the United States as a Master Application Developer-Oracle. 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 establish that the labor certification supported the visa classification of "professional" as designated on the Form I-140, Immigrant Petition for Alien Worker, and denied the petition, accordingly.

The AAO conducts appellate review¹ 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).

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. Part H.4 and H.4B state that the minimum educational requirement is an Associate's degree in Computer Science or Engineering. Part H.6 and H.6A state that 72 months (six years) in the job offered is also a requirement. The employer indicates that no alternate fields of study or alternate combinations of education and experience are acceptable.

The Form I-140 was filed on January 30, 2013. The visa classification sought on the Form I-140 petition designated the professional category (Part 2.1.e). 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. 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. The regulation at 8 C.F.R. § 204.5(l)(3)(i) states in pertinent part that the "job offer portion of an individual labor certification, Schedule A application, or Pilot Program application for a professional must demonstrate that the job requires the minimum of a baccalaureate degree."²

¹ 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.

² See also 8 C.F.R. § 204.5(l)(3)(ii)(C), which provides in relevant part that in order to show that the

As the ETA Form 9089 states that an Associate's degree is the minimum educational requirement, the Form I-140 petition is not approvable because it is not supported by an ETA Form 9089, which requires at minimum, a baccalaureate degree. The director denied the petition on this basis on May 2, 2013.

The petitioner, through counsel filed a motion to reopen the director's decision on May 22, 2013. With regard to the designation of the wrong visa category, counsel asserts that it was a typographical error and requests that the visa classification be changed to skilled worker. An amended page 1 of a Form I-140 is submitted on motion with a corrected visa classification designated as a skilled worker.

A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or USCIS policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. In this case, the director failed to find that the petitioner's own error in requesting the wrong visa designation qualified as a motion to reopen or a motion to reconsider. The director dismissed the motion on June 11, 2013.

The petitioner filed an appeal on July 12, 2013, reiterating the assertion that the petitioner's own submission of an amended page one of the Form I-140 should be considered "new evidence" sufficient to reopen the proceedings after the director's decision of May 2, 2013.³

alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

³ Counsel also submitted a copy of a "Rejection Notice," dated May 15, 2013, from the United States Citizenship and Immigration Services (USCIS) indicating that a Form I-140 [REDACTED] had been rejected because it was not accompanied by a "valid Labor Certification per the form instructions." The rejection notice also advised that the petition should be fully completed, submitted with the appropriate fees and should include all required supporting documentation. Counsel states on appeal that the petitioner requested USCIS obtain the duplicate and that a photocopy of the original ETA Form 9089 had been submitted with this petition [REDACTED]. Although the submission of another petition is not relevant to the adjudication of the petition in the instant proceeding, based on counsel's statement, it would appear that the petition [REDACTED] may have been improperly rejected. However, it is also observed that the prior filing, or documents submitted with the prior filing have not been submitted herein. Additionally, Part 4.7 of the Form I-140 petition permits the petitioner to indicate whether the original labor certification has been previously submitted in support of another Form I-140.

It is additionally noted that USCIS electronic records show that the petitioner submitted a third Form I-140 [REDACTED] for this beneficiary, which was submitted and rejected, but a fourth Form I-140 [REDACTED] was received for filing on July 30, 2013.

The AAO concurs with the director's decision. The petitioner's characterization of a new page one and a selection of a visa classification as a skilled worker as "new evidence" created by the petitioner following the director's adjudication of the petition, cannot be described as new evidence or establish that the decision was incorrect based upon the original record before the director. It is noted that the regulation at 8 C.F.R. § 103.2(b)(8)(ii) clearly allows the denial of an application or petition, notwithstanding any lack of required initial evidence, if evidence of ineligibility is present. It further noted that neither the law nor the regulations compel the director to consider other classifications if the petition is not approvable under the classification requested. The petition may not be amended on appeal. 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 job offer reflected on the ETA Form 9089 required a baccalaureate degree such that the beneficiary may be found qualified for classification as a professional. The AAO cannot conclude that the director committed reversible error by adjudicating the petition under the classification originally requested by the petitioner.

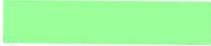
Based on the foregoing, the record failed to establish that the labor certification supports the visa classification sought.

Beyond the decision of the director, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) provides that any requirements for training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers identifying the trainer or employer by name, title and address and providing a description of the training or experience received.

In this case, the record fails to properly support the claim that the beneficiary obtained six years of experience in the job offered. It is noted that the petitioner submitted three employment verification letters in support of the beneficiary's work experience in the job offered. At most, the letters account for approximately four years and three months of experience, not six years. Further, with respect to the letter, dated January 11, 2013, from [REDACTED], the author is not identified by name or title and the signature is illegible. Additionally, the record contains a letter, dated January 1, 2013, from the beneficiary's supervisor at [REDACTED]. The letter does not identify the author by name and the signature is illegible. Finally, none of the letters document whether the work was part-time or full-time.

Based on the foregoing, the AAO concludes that the labor certification does not support the visa classification sought and the petitioner failed to establish that the beneficiary possessed six years of employment experience in the job offered as of the priority date of April 19, 2012.

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 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).



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NON-PRECEDENT DECISION

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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.