



U.S. Citizenship
and Immigration
Services

Non-Precedent Decision of the
Administrative Appeals Office

MATTER OF A-P-, INC.

DATE: FEB. 16, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an operator of a residential group facility for developmentally disabled people, seeks to permanently employ the Beneficiary as a certified nurse assistant under the immigrant classification of skilled worker. *See* Immigration and Nationality Act (the Act) § 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). Jobs in the skilled worker immigrant visa classification require at least two years of training or experience.

The Director, Nebraska Service Center, denied the petition. The Director concluded that the offered position does not require the services of a skilled worker as requested on the Form I-140, Immigrant Petition for Alien Worker. Accordingly, the Director denied the petition on June 3, 2015.

The matter is now before us on appeal. The Petitioner asserts that the Director erroneously denied its request to amend the petition, and that it intended to request immigrant classification as an “other worker” under section 203(b)(3)(iii) of the Act, but inadvertently marked the wrong box on the Form I-140. Upon *de novo* review, we will dismiss the appeal.

“Any employer desiring and intending to employ within the United States an alien entitled to classification under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) [of the Act] may file a petition . . . for such classification.” INA § 204(a)(1)(F), 8 U.S.C. § 1154(a)(1)(F).

A petitioner must indicate the immigrant classification sought in Part 2 of Form I-140. *See* U.S. Citizenship & Immigration Servs., Form I-140, *available at* <http://www.uscis.gov/sites/default/files/files/form/i-140.pdf> (stating: “**This petition is being filed for:** (select **only one** box)”) (emphasis in original) (accessed Jan. 15, 2016); *see also* 8 C.F.R. § 103.2(a)(1) (incorporating form instructions into the regulations). A petitioner may not materially change a petition in an effort to make a deficient petition conform to USCIS requirements. *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm’r 1988).

A petition for a skilled or other worker must be accompanied by an individual labor certification from the U.S. Department of Labor (DOL), an application for Schedule A designation, or evidence of a beneficiary’s qualifications for a shortage occupation. 8 C.F.R. § 204.5(l)(3)(i). If accompanied by an individual labor certification, the petition must also be accompanied by evidence that a

beneficiary meets the educational, training, or experience requirements of the labor certification. 8 C.F.R. §§ 204.5(l)(3)(ii)(B), (D).

“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.” 8 C.F.R. § 204.5(l)(4).

The minimum requirements for skilled worker classification are at least two years of training or experience. INA § 203(b)(3)(A)(i); 8 C.F.R. § 204.5(l)(3)(ii)(B). An “other worker” is a foreign national qualified to perform unskilled labor requiring less than two years of training or experience. 8 C.F.R. § 204.5(l)(2).

In the instant case, the accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the DOL, states the minimum requirements of the offered position of certified nurse assistant as a “Certified Nurse Assistant [CNA] Certificate.” The labor certification does not require any training or experience for the offered position.

Box 1.f. in Part 2 of the Petitioner’s Form I-140 is marked, indicating a request to classify the Beneficiary as “[a] skilled worker (requiring at least 2 years of specialized training or experience).”

As the Director found, the record does not establish the offered position’s need for the services of a skilled worker. The minimum job requirements stated on the accompanying labor certification do not require at least two years of training or experience as required for skilled worker classification.

We may consider relevant post-secondary education as training for purposes of skilled worker classification. 8 C.F.R. § 204.5(l)(2). However, the record does not establish a high school diploma as a prerequisite for CNA certification. Thus, the record does not establish that CNA certification constitutes post-secondary education. Also, on appeal, the Petitioner submitted evidence of the Beneficiary’s completion of CNA certification coursework in less than one month. Thus, even if CNA certification constitutes post-secondary education, the record indicates that the duration of a CNA program is less than the two years required for skilled worker classification.¹

In response to the Director’s notice of intent to deny (NOID) of April 24, 2015, counsel indicated an error on the Form I-140. Counsel stated: “[T]here was a mistake for petition type at page 1, part 2 [of the form]. The CORRECT category should be 1.g.” The Petitioner submitted an amended Form I-140. In Part 2 of the amended form, box 1.g., rather than box 1.f., is marked, indicating a request for “[a]ny other worker (requiring less than 2 years of training or experience)”.

¹ California law states that a CNA must be at least 16 years old, obtain criminal record clearance, and complete a pre-certification program consisting of at least 60 classroom hours and 100 hours of supervised clinical practice. Cal. Health & Safety Code §§ 1337.1, 1337.2.

On appeal, counsel reasserts an error on the Form I-140, stating: “[T]he petitioner maintains that the I-140 petition contained a clerical error in the check box and that the I-140 petition was meant to be filed for an ‘other worker’ rather than a ‘skilled worker.’”

However, the assertions of counsel do not constitute evidence. *See INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (noting that counsel’s unsupported assertions do not establish facts of record). The record lacks sufficient evidence of the Petitioner’s intention to request other worker classification.

The Petitioner argues that its statement of job requirements of less than two years’ training or experience on the accompanying labor certification demonstrates its intention to request other worker classification. However, the ETA Form 9089 requires an employer to state the “actual minimum requirements” of an offered position. *See* 20 C.F.R. § 656.17(i).² The form does not ask an employer to state the immigrant classification it intends to seek. *See K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983) (stating: “It does not appear that the DOL’s role extends to determining if the alien is qualified for the job for which he seeks . . . preference status”).

The record also does not establish the inadvertent nature of the Petitioner’s purported erroneous classification request on the Form I-140. The record does not indicate who prepared the Form I-140 or how the purported error occurred. If the Form I-140 mistakenly requested skilled worker classification, the record does not explain why an authorized official of the Petitioner signed the form, attesting to the truth and accuracy of its content under penalty of perjury.

In addition, the record does not establish the Petitioner’s authorization of the amended Form I-140. The amended form does not contain an updated signature by an authorized official of the Petitioner. Rather, it contains a photocopy of the original signature by the Petitioner’s authorized official, dated December 11, 2014.

Citing 8 C.F.R. § 204.5(l)(4), the Petitioner argues that “[t]he Labor Certification ETA form 9089 does not appear to require at least 2 years of experience and it is clear that the correct classification should be for ‘other worker.’” We agree. As previously indicated, pursuant to 8 C.F.R. § 204.5(l)(4), the Director properly classified the offered position in the other worker category “based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.”

² Evidence of record casts doubt on whether the accompanying labor certification states the Petitioner’s actual minimum requirements for the offered position pursuant to DOL regulations. The Beneficiary attested on the ETA Form 9089 to her employment by the Petitioner in the job duties of the offered position from October 1, 2005 until the petition’s priority date of January 10, 2014. The record does not establish the Beneficiary’s CNA certification until 2012. If the Beneficiary performed the job duties of the offered position from 2005 to 2012 without CNA certification, the offered position does not appear to require the certification. *See* 20 C.F.R. § 656.17(i)(2) (barring a labor certification employer from hiring workers with less training or experience for jobs “substantially comparable” to the job opportunity). Also, USCIS records indicate a prior labor certification application filed by the Petitioner for the Beneficiary in a position with the same job duties as the instant offered position. However, unlike the instant labor certification, the prior labor certification required CNA certification plus six months of training in the job opportunity.

Matter of A-P-, Inc.

The Petitioner appears to argue that the job requirements on the accompanying labor certification dictate the requested classification. However, such an argument ignores the instructions of the Form I-140, which require a petitioner to select the immigrant classification sought. *See* 8 C.F.R. § 103.2(a)(1) (incorporating form instructions into the regulations).

For the foregoing reasons, the record does not establish the offered position's need for the services of a skilled worker as requested on the Form I-140. The Petitioner has not demonstrated its claimed intention to seek immigrant classification in the other worker category or the inadvertent nature of its purported error in requesting skilled worker classification on the Form I-140. We will therefore affirm the Director's decision and dismiss the appeal.

ORDER: The appeal is dismissed.

Cite as *Matter of A-P-, Inc.*, ID# 15604 (AAO Feb. 16, 2016)