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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

**U.S. Citizenship
and Immigration
Services**

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FILE:

LIN 06 244 52629

Office: NEBRASKA SERVICE CENTER

Date: JUN 01 2009

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:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom

Acting Chief, Administrative Appeals Office

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

The petitioner is an architectural firm. It seeks to employ the beneficiary permanently in the United States as an architectural designer. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).¹ The director determined that the petitioner had not established that the position requires at least two years of training or experience and, therefore, the beneficiary cannot be found qualified for classification as a skilled worker. 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 October 29, 2007 denial, the single issue in this case is whether or not the petitioner has established that the position requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

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 with U.S. Citizenship and Immigration Services (USCIS) on July 31, 2006. 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 maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d

¹ The labor certification states the qualifications of the position of architectural designer, as certified by DOL, are: Some post high school training related to Design, 6 months training in Architectural Design, and 12 months experience in the job offered.

997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

On appeal, the petitioner submits a brief and a letters regarding the beneficiary's experience and recommendations from the beneficiary's previous employers. On appeal, the petitioner asserts:

Upon receiving the denial from I-140, Immigration Petition for Alien Worker, for [the beneficiary], I reviewed the original application 9089 that was certified through the Department of Labor. The experience and training required was stated as at least 6 months of post high school training related to design and at least 12 months of additional experience in the field of architecture and design. These requirements were intended for applicants who were interested in applying for the position during the recruitment period conducted before the application was submitted. This was the minimal experience accepted in order to qualify for a job interview or be considered for the position. This amount of experience was not intended to state the amount of training or experience that [the beneficiary] has. Please allow me to clarify this matter. [The beneficiary] is a skilled worker in the field of architectural design and has well over 4 years of experience in this field. [The beneficiary] has also worked for [the petitioner] from December 2004 through March 2006 and has gained exceptional experience in U.S. architectural standards and design. [The beneficiary] is a great asset to this company and has much needed skills and abilities that the company is in need of. I truly look forward to [the beneficiary's] future activities in the office. I respectfully request that the decision of denial would be reconsidered based on these evidences and facts. The position that [the beneficiary] would occupy is a difficult position to fill and requires a skilled worker with many years of experience such as the experience [the beneficiary] possesses.

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.

The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

(ii) *Other documentation* – (A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported

² 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).

by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.

(D) *Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

In this case, the ETA Form 9089, Application for Permanent Employment Certification, indicates that the requirements are some post high school training related to Design, 6 months training in Architectural Design, and 12 months experience in the job offered for the proffered position. Accordingly, based on the labor certification requirements, which are less than two years, the petitioner could only file the Form I-140 under 2 "g" for an "other worker" requiring less than two years of training or experience. However, the petitioner requested the skilled/professional worker classification on the Form I-140. 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. 1988). In this matter, the appropriate remedy would be to file another petition, select the proper classification, and submit the proper required fee and documentation.

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.

For the reasons discussed above, the assertions of counsel on appeal do not overcome the decision of the director.

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.