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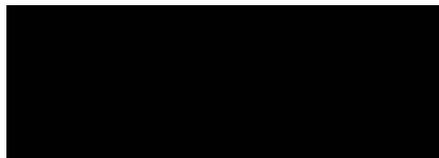
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **SEP 03 2009**  
SRC 08 066 50735

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:



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.

John F. Grissom,  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference 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 remanded for further consideration and entry of a new decision.

The petitioner is a home improvement business. It seeks to employ the beneficiary permanently in the United States as a framer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the position requires an individual with two years experience, thereby, making the beneficiary ineligible 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original December 22, 2008, the single issue in this case is whether or not the petitioner has established that the position listed in the labor certification requires an individual with two years experience.

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 or seasonal nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

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<sup>1</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).

Relevant evidence submitted on appeal includes counsel's brief, a copy of a letter from counsel, dated May 8, 2008, to the director, and a copy of a FedEx Express Airbill. The record does not contain any other evidence relevant to the position's requirements.

The copy of the FedEx Express Airbill shows that a package was mailed by counsel to the director on May 9, 2008. In addition, the FedEx Customer Service Trace shows that the same package was delivered and received by the director on May 13, 2008.

The letter dated, May 8, 2008 states:

This I-140 petition was miscategorized as EB3, skilled worker, instead of its correct categorization, other worker. Please correct this typographical error and downgrade the petition so it may be properly adjudicated.

Box "e" in Part 2 (Petition Type) was inadvertently checked on the first page of the I-140. Box "g" should have been checked. My staff became confused because O-Net score for framer has changed several times. It is currently and EB3 position, but was not when the ETA 750 was filed 4/30/01. Framer was approved as an "other worker," not [sic] requiring less than two years of experience, not as a "skilled worker." All material included with the I-140, especially Form ETA 750 and the lack of a letter of experience are consistent with an "other worker" position.

On appeal, counsel states:

This application was wrongly categorized as a "skilled worker" instead of its correct category, "other worker." I requested in my 5/8/08 Federal Expressed letter to correct this typographical error and downgrade the petition. The proffered position, framer, did not require any experience according to the certified ETA 750. Now it does.

\* \* \*

Because of USCIS' negligence, the beneficiary and his wife are \$4020 poorer. The petitioner lost \$475 and cannot resubmit another I-140 because his labor certification approval expired long ago under the new rules promulgated in 7/07.

\* \* \*

The petitioner has also lost a much needed employee because of USCIS' incompetence. Because it was corrected, the small typographical error should not be the basis for a denial. We were never even sent an RFE requesting which category the alien should be adjusted as, only a summary denial. Our correction letter was just ignored. . . .

From the outset, it should be noted that the U. S. Citizenship and Immigration Services (USCIS) is not obligated to issue a request for evidence (RFE) if all required initial evidence has been submitted,

but the evidence submitted does not establish eligibility. The regulation at 8 C.F.R. § 103.2(b)(8) states in pertinent part:

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

(iii) **Other evidence.** If all required initial evidence has been submitted but the evidence submitted does not establish eligibility, USCIS may: deny the application or petition for ineligibility; . . .

The regulation does not state that the USCIS is obligated to allow the petitioner to make a material change to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. *See also Matter of Izummi*, 22 I&N Dec.169, 175 (1998).

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 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.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in

the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is April 30, 2001.

USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In this case, the ETA Form 750, Application for Alien Employment Certification, as certified, indicates that there are no education, training, or experience requirements in the job offered of framer for the proffered position. Accordingly, based on the labor certification requirements, as certified, the petitioner could only file the 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. However, as counsel, on behalf of the petitioner, attempted to correct the "typographical error" regarding the petition type before the director adjudicated the petition, the change should be accepted.

In the instant case, the petition is being remanded to the director to be adjudicated based on its merits as an other worker. The director may request any evidence the he deems appropriate. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's December 22, 2008 decision is withdrawn. The petition is remanded to the director to be adjudicated on its merits as an other worker and for entry of a new decision.