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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

[redacted]

DATE: MAY 07 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO), and the AAO dismissed the appeal. The petitioner filed a motion to reopen and to reconsider the AAO's decision. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The record shows that the motion is properly filed and timely. 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.

The regulation at 8 C.F.R. § 103.2(a)(2) states in pertinent part:

> *Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . . .

The regulation at 8 C.F.R. § 103.2(a)(3) states:

> *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [U.S. Citizenship and Immigration Services (USCIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In this case, the motion will be treated as a motion to reopen as counsel contends that the submission of new evidence demonstrates that the petitioner has established that prior to the adjudication of the petition (the director's decision), a corrected Form I-140, Immigrant Petition for Alien Worker, was submitted to the Nebraska Service Center in order to correct the requested classification.[1]

As set forth in the AAO's June 5, 2009 dismissal, the issue in this case was whether or not the petitioner had established that the petition requires at least a bachelor degree or equivalent and five years of experience in the job offered or five years of experience in a related occupation such that the beneficiary may be found qualified for classification as a member of the professions with an advanced degree.

In its decision, the AAO informed the petitioner of the following:

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[1] The director denied the Form I-140 because the petitioner had marked Part "D" under Part 2 of the visa petition: and therefore, found that the petitioner had not established that the position sought requires at least a bachelor's degree or equivalent and five years of experience in the job offered or five years of experience in a related occupation. Counsel claimed that marking Part "D" was a mistake and that the petitioner intended to mark Part "E" under Part 2 of the visa petition.

> There is no provision in statute or regulation that compels the 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). In this matter, the appropriate remedy would be to file another petition with the proper fee and required documentation.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

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.

On motion, counsel submitted a copy of an AILA Infonet Document No. 0931167 (Summary of NSC Liaison Committee Fall Meeting Questions and Answers with NSC on October 29 and 30, 2008). Counsel states:

> In the minutes of the meeting, it is clearly stated that "if the I-140 remains pending (not adjudicated, no RFE has been issued) and no benefit was gained by filing the I-140 in the originally requested category rather than the now requested category, then NSC has made the change based on the attorney's written request."

Counsel's reliance on the American Immigration Lawyers Association (AILA) minutes is misplaced. The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals within the circuit where the action arose. *See N.L.R.B. v. Askkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd,* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

However, even if the AAO were to accept counsel's request to change the marked category (Part D), the petition would not be approvable as neither counsel nor the petitioner have provided evidence to overcome the additional issues in the AAO's decision of June 5, 2009.[2]

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 sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition remains denied.

ORDER: The motion to reopen is granted. The AAO's decision of June 5, 2009 is affirmed. The petition remains denied.

[2] The issues include the lack of signatures of the petitioner, beneficiary, and counsel on the ETA Form 9089, Application for Permanent Employment Certification; and the insufficiency of the experience letter submitted as evidence that the beneficiary met the four years of experience at the priority date of April 11, 2006. In addition, if the petitioner wished to pursue the instant petition, it would need to provide additional evidence to establish its continuing ability to pay the proffered wage from the priority date. The evidence would need to include complete copies of the petitioner's federal income tax returns for the years 2006 through 2010 and the return for 2011, if available.