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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: SEP 2 6 2014 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Professional Pursuant to Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(ii)

ON BEHALF OF PETITIONER:

[redacted]

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 Director, Texas Service Center (director), denied the employment-based immigrant visa petition and the Administrative Appeals Office (AAO) dismissed the appeal. We dismissed a subsequent motion to reopen and motion to reconsider. The matter is before us on a second motion to reopen and motion to reconsider. The motions will be dismissed, the previous decisions of the AAO will be affirmed, and the petition will remain denied

The petitioner is a commission financial services business. It seeks to employ the beneficiary permanently in the United States as an IT director. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The petitioner seeks to classify the beneficiary as a professional pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii). The director determined that the petitioner had not established that the petition requires a bachelor's degree or foreign equivalent and, therefore, that the beneficiary cannot be found qualified for classification as a professional worker. The director denied the petition accordingly.

Our March 6, 2014 decision affirmed the director's finding that the petition does not require at least a bachelor's degree or foreign equivalent such that the beneficiary may be found qualified for classification as a professional worker. Our July 15, 2014 decision affirmed our and the director's finding that the petition does not require at least a bachelor's degree or foreign equivalent such that the beneficiary may be found qualified for classification as a professional worker. Both of our March 6, 2014 and July 15, 2014 decisions raised the issue of whether the beneficiary meets the minimum requirements for the proffered position as stated on the labor certification.

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[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."

On motion counsel contends that the petition should be considered under the skilled worker category and that the beneficiary qualified for classification as a skilled worker, meeting the minimum requirements of the labor certification at the time of filing. In support of these assertions counsel submits copies of documentation previously provided and in the record.

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). All evidence submitted was previously available and could have been discovered or presented in the previous proceeding. Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion to reopen will be dismissed.

The Roles of the DOL and USCIS in the Immigrant Visa Process

At the outset, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
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> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[1] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> . . .
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

[1] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

> The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and the beneficiary are eligible for the requested employment-based immigrant visa classification.

Counsel references *Hoosier Care, Inc. v. Chertoff*, 482 F.3d 987 (7th Cir., 2007), for the premise that DOL determines the requirements of the proffered position. *Hoosier Care* stands for the limited interpretation of what constitutes "relevant" post-secondary education under the skilled worker regulation and has no applicability to the facts of the current case.

Counsel also references *Grace Korean United Methodist Church v. Chertoff,* 437 F. Supp. 2d 1174 (D. Or. 2005), for the premise that DOL certification precludes USCIS from considering whether the alien meets the educational requirements specified in the labor certification. In *Grace Korean* a federal district court held that USCIS "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." *Id.* at 1179. However, this decision was entered prior to the amendments to the Form I-140 immigrant petition splitting professional and skilled worker classifications, the instant case is not in the same jurisdiction as *Grace Korean*, and the analysis does not have to be followed as a matter of law. *See Matter of K-S-*, 20 I&N Dec. 715, 719 (BIA 1993). Further, a judge in the same district subsequently held that the assertion that DOL certification precludes USCIS from considering whether the alien meets the educational requirements specified in the labor certification is wrong. *Snapnames.com, Inc. v. Chertoff*, 2006 WL 3491005 at 5 (D. Or. Nov. 30, 2006).

On motion, counsel continues to assert that the petitioner made a clerical error on the Form I-140 and that the petitioner intended to check Part 2.f. indicating that it was filing the petition for a skilled worker. We found that 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.

8 C.F.R. § 103.5(a) provides, in pertinent part:

> (3) *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 Service 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.

On motion, counsel contends that the director erroneously misapplied the law and policy in failing to permit the petitioner to convert the instant Form I-140 immigrant petition under the professional classification to one under the skilled worker classification. Specifically, counsel asserts that the petitioner's response to the director's Notice of Intent to Deny (NOID) requested that the Form I-140 immigrant petition be considered under the skilled worker category. To support this assertion counsel cites its September 11, 2013 response letter which requested that the classification of the Form I-140 immigrant petition be amended from professional to skilled worker. However, the letter does not state that a clerical error had been made and that the petitioner was seeking to correct the clerical error to permit adjudication under the skilled worker classification.

Even if the response to the NOID did constitute a request to correct a clerical error, the director was within his discretion to deny such a request. On motion, counsel contends that we incorrectly cited to

Matter of Katigbak, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971) because the requested change is not a material change and that we were inconsistent with USCIS policies regarding adjudication of such requests. In support of this assertion counsel cites to non-precedent AAO decisions, *Matter of Katigbak,* and American Immigration Lawyers Association (AILA) teleconference liaison meetings with the Nebraska Service Center (NSC) on April 30, 2008 and May 5, 2011.

Counsel refers to our non-precedent decisions issued concerning the adjudication of Form I-140 immigrant petitions filed under the professional classification as skilled workers, but does not provide published citations. Counsel contends that even though our decisions are non-precedent and precede the separation of the professional worker and skilled worker categories on the Form I-140 immigrant petition, the underlying policy behind the non-precedent decisions remains unchanged as both classifications fall under the EB-3 classification. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel goes on to cite the AILA liaison meetings which indicate that such a change for a clerical error may be made prior to adjudication of the Form I-140 immigrant. Again, we are 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). Further, the AILA liaison meeting made it clear that a request for evidence (RFE) constituted an adjudication of the case, at which time the clerical error change request would not be permitted. The record reflects that such a request was not made until after a NOID was issued by the director. As an RFE is an adjudication of the case, so is a NOID.

Counsel incorrectly asserts that we cited *Matter of Katigbak* to find that the change in classification was material. However, our March 6, 2014 decision cited to *Matter of Izummi* to find that 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'r 1988). We cited to *Matter of Katigbak* to hold that a petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). In the instant case, the petitioner did not establish at the time of filing that the petition was eligible for approval under classification as a professional.

Neither the law nor the regulations require the director to consider lesser classifications if the petitioner does not establish the beneficiary's eligibility for the classification requested. We cannot conclude that the director committed reversible error by adjudicating the petition under the classification requested by the petitioner. There are no provisions permitting the petitioner to amend the petition on appeal in order to establish eligibility under a lesser classification. Counsel cites to no authority or precedent decision to support the assertion that the petitioner's request to change the requested classification should have been accepted. Further, nothing in the record demonstrates that

the original selection of the professional classification on the Form I-140 immigrant petition was a clerical error.

Counsel contends that our March 6, 2014 decision held that the petitioner had failed to establish the beneficiary was employed by [redacted] from March 1, 1997 to September 1, 2007 and that the inconsistencies we pointed out regarding the beneficiary's termination of employment were simply due to the qualifying employer's conflicting records. However, the petitioner provides no evidence to support of the assertion that the inconsistency was a result of the employer's record keeping. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

While counsel states reasons for the motion, the petitioner has not established that the decision was based on an incorrect application of law or Service policy based on the evidence of record at the time of the initial decision. Accordingly, the petitioner's motion to reconsider will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden. 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motions are dismissed. The previous decisions of the AAO and the director are affirmed. The petition remains denied.