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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

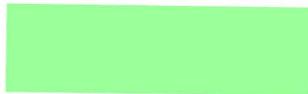


DATE: **FEB 28 2014**

OFFICE: TEXAS SERVICE CENTER FILE:



IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



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, denied the immigrant visa petition and dismissed two motions to reopen and reconsider the denial. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The petitioner filed a motion to reconsider and the AAO dismissed the motion. The petitioner filed two subsequent motions to reopen and reconsider. The AAO dismissed those motions as untimely and improperly filed.¹ The petitioner has filed a fourth motion to reopen and reconsider. The motion will be dismissed.

The petitioner describes itself as a CPA office. It seeks to permanently employ the beneficiary in the United States as an accountant. On the Form I-140, Immigrant Petition for Alien Worker, the petitioner requested classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).

The director's decision denying the petition concluded that the petition cannot be approved because the labor certification does not require a member of the professions holding an advanced degree.

The motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted. On motion, current counsel states that the petitioner's previous counsel mistakenly classified the beneficiary's position as one requiring an advanced degree on the Form I-140. Current counsel states that the position only requires a bachelor's degree. Although previous counsel described the mistake as a typographical error, current counsel states that previous counsel's mistake amounts to ineffective assistance of counsel. Current counsel states that the petitioner was prejudiced by ineffective assistance of counsel and asserts that previous counsel's performance impinged upon the fundamental fairness of the petitioner's immigration matter and as such was a violation of the fifth amendment's due process clause.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and

¹ 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.

- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

On motion, current counsel submits an affidavit, a photocopy of a complaint, and a photocopy of a U.S. Postal Service receipt and tracking information for a package sent to previous counsel. In his brief, current counsel states that the petitioner mailed previous counsel a copy of the complaint. Although counsel states that the instant motion meets the requirements in *Matter of Lozada*, the complaint filed with the disciplinary board of the Supreme Court of Pennsylvania lists the complainant as [the beneficiary's name] and the affidavit submitted on motion was signed by the beneficiary. A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant motion does not address these requirements. The term "affected party" means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition. 8 C.F.R. § 103.3(a)(1)(iii)(B). The party affected in visa petition cases is the petitioner, and the beneficiary does not have standing to move to reopen the proceedings. *Matter of Dabaase*, 16 I&N Dec. 720 (BIA 1979). Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel.

Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. 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

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

- (A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or
- (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the regulation at 8 C.F.R. § 204.5(k)(4)(i) states, in part:

The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

In summary, a petition for an advanced degree professional must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Specifically, for the offered position, the petitioner must establish that the labor certification requires no less than a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

In the instant case, Part H of the labor certification submitted with the petition states that the offered position has the following minimum requirements:

- H.4. Education: Bachelor's degree in accounting.
- H.5. Training: None required.
- H.6. Experience in the job offered: 3 months.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: None.

Since an individual can qualify for the offered position with less than a degree above a baccalaureate, or a baccalaureate followed by five years of progressive experience in the specialty, the petition does not qualify for advanced degree professional classification

There is no provision in statute or regulation that compels U.S. Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different preference classification once the director has rendered a decision. 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).

In summary, the offered position does not require an advanced degree. Therefore, the petition cannot be approved for a member of the professions holding an advanced degree under section 203(b)(2) of the Act. The director's decision denying the petition is affirmed.

Even if the petition qualified for advanced degree professional classification, it could not be approved for reasons noted in the AAO's May 22, 2013 decision. As noted by the AAO in page 6 of the decision, the petitioner has not established its ability to pay the proffered wage in 2006, 2007, and 2008. The AAO also noted that evidence in the record called into question the *bona fides* of the job offer and the decision stated on page 7 that "the petitioner must address this issue in any further proceedings." The petitioner did not address either concern in the instant motion.

The AAO further notes that the petitioner filed a second Form I-140 on behalf of the instant beneficiary based upon the same labor certification used in the instant Form I-140. This petition was approved on April 14, 2010 for classification as a professional or skilled worker pursuant to Section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3). On appeal and motion, current counsel and former counsel request that the Form I-140 be amended and approved for classification as a professional pursuant to Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii). As the petitioner already has an approved petition in this classification, further pursuit of the instant appeal is moot.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion to reopen and reconsider is dismissed. The previous decisions of the AAO are affirmed. The petition remains denied.