

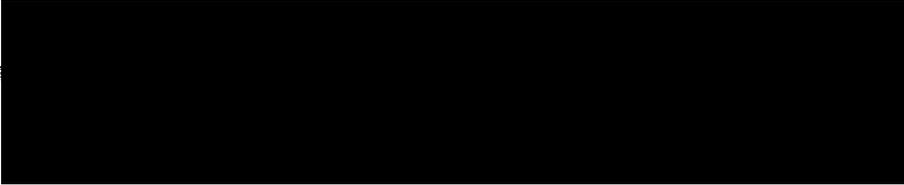
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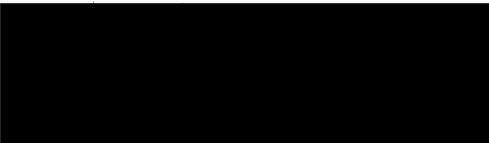
FILE: EAC-01-246-52819 Office: VERMONT SERVICE CENTER Date:

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:



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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the Vermont Service Center denied the immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is before the AAO on motion to reconsider. The motion will be dismissed.

The petitioner provides software development and computer consultancy services. The director denied the petition on the basis that the petitioner failed to prove its continuing ability to pay the proffered wage beginning on the priority date. The AAO affirmed the director's decision, noting that the record of proceeding lacked evidence that [REDACTED] was and/or had any relationship to the petitioning entity, since the Form ETA 750, certified by the Department of Labor (DOL), listed Optima Systems, Inc. as the petitioning entity. The AAO also noted that the petitioner failed to respond to the director's request as to whether the proffered position was new or not.

On motion, counsel reiterates past assertions that [REDACTED] took over Optima Systems Inc. and own 100% shares of the company by a merger that took place sometime in 2001 and is the reason why all regulatory-prescribed evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date contained in the record of proceeding is in [REDACTED] name and not [REDACTED]. Additionally, on motion counsel states that contrary to the AAO's decision, the petitioner did respond to the director's request and explained that the proffered position is not a newly created position. Counsel did not cite any precedent or submit any additional documentation or evidence into the record of proceeding.

The content of counsel's motion does not satisfy the requirements of a motion to reconsider under 8 C.F.R. § 103.5(a)(3) because counsel fails to assert that the director and the AAO made an erroneous decision through misapplication of law or policy.

The AAO notes that only counsel provided a substantive response to the director's request for evidence with respect to the issue of the nature of the proffered position. Counsel stated that the proffered position was not new. No statement was submitted from the petitioner. The assertions of counsel do not constitute evidence. *Matter of Obaiqbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Thus, although the AAO's prior decision erred in determining that no response was submitted at all, the outcome was correct since counsel's assertions do not constitute evidence that the proffered position is not new.

Additionally, the record of proceeding still does not contain any evidence that [REDACTED] took over Optima Systems Inc. and own 100% shares of the company by a merger that took place sometime in 2001 other than unsupported statements by an individual by the name of [REDACTED] in response to the director's request for evidence, which was reviewed by and discussed in the prior AAO decision, and counsel on motion to reconsider. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

On motion, counsel never explains how the AAO misapplied law or policy on motion other than reiterating prior assertions without citation to law, policy, regulation, or other source of legal authority. Thus, the motion to reconsider is defective.

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion is dismissed. The previous decision of the AAO, dated January 14, 2004, is affirmed. The petition is denied.