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FILE: [REDACTED] TEXAS SERVICE CENTER Date: NOV 25 2009  
WAC 06 021 52405

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

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:**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The matter will be remanded to the director for review of the three approved I-140 petitions in the record and revocation of two of these documents.<sup>1</sup>

The petitioner is a software consulting firm. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, a Form ETA 750,<sup>2</sup> Application for Alien Employment Certification, approved by the Department of Labor (DOL), accompanied the petition.<sup>3</sup>

In the prior petition that was denied by the director and dismissed by the AAO, the petitioner established that it substituted the current beneficiary for another beneficiary. In the instant petition, the petitioner submitted the same Part A of the Form ETA 750 as was submitted with the prior petition with the priority date of November 30, 2001. In the prior petition, the director determined

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<sup>1</sup> Based on either USCIS computer records or the record of proceedings, the petitioner has filed at least six I-140 petitions for the beneficiary:

- A) SRC 06 173 50656 Approved by Texas Service Center on June 19, 2006 as a member of the professionals holding an advanced degree or an alien of exceptional ability. (In record of proceedings.)
- B) LIN 08 078 50523 Approved by Nebraska Service Center on April 8, 2009 (In record of proceedings.)
- C) WAC 06 125 52079 Approved by California Service Center on August 31, 2009 (Initially undeliverable as of September 22, 2009, but subsequently delivered.) Approval notice is in record of proceedings.
- D) LIN 092 2052539 Received at Nebraska Service Center on August 14, 2009. USCIS records show Data Change as of September 25, 2009. More current status not documented in USCIS computer record. Petition is not in record of proceedings.
- E) WAC 05 05050335 Received at California Service Center on December 27, 2004. Prior petition denied by the California Service Center and subsequently dismissed by the AAO. May 11, 2007.
- F) WAC 06 021 52405. Received at the California Service Center on October 25, 2005. The instant petition on appeal to the AAO.

<sup>2</sup> After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089. In the instant matter, the petitioner submitted a partial copy of the Form ETA 750 previously submitted with a prior I-140 petition for the beneficiary.. (WAC 05 050 50335). The Form ETA 750 identifies the original beneficiary on Part B as Arturo Labso.

<sup>3</sup> In the instant matter, the petitioner submitted a partial copy of a Form ETA 750 previously submitted with a prior I-140 petition for the beneficiary. (WAC 05 050 50335). The Form ETA 750 identifies the original beneficiary on Part B as [REDACTED]. USCIS computer records do not reflect [REDACTED] current status. The prior petition was denied by the director and subsequently dismissed by the AAO. The same priority date on the Form ETA 750, November 30, 2001, applies to the instant petition.

that the petitioner had not established it was offering full time, permanent employment to the beneficiary. On April 24, 2007, the AAO determined that the petitioner was the actual employer of the beneficiary, but that the petitioner had not sufficiently established that it could offer the beneficiary sufficient consulting positions as of the 2001 priority date of the Form ETA 750 for the proffered position to be considered fulltime permanent employment. The AAO dismissed the appeal.

Upon reviewing the instant petition, on November 7, 2007, the director determined that the petitioner had filed a duplicate petition for the beneficiary and that the petitioner had not submitted any evidence that would persuade the Service Center to make a different determination from the prior AAO dismissal of the earlier petition. The director accordingly denied the petition.

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).<sup>4</sup>

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on November 30, 2001.<sup>5</sup> The Immigrant Petition for Alien Worker (Form I-140) was filed on October 25, 2005.

The record contains an I-140 petition signed by the petitioner on September 27, 2005. The contents of the instant petition are identical to the previous I-140 petition (WAC 05 050 50335) that the

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<sup>4</sup> The submission of additional evidence on appeal is allowed by the instructions to 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).

<sup>5</sup> If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

director denied and the AAO dismissed previously, with two exceptions: the petitioner indicated a higher number of employees and a higher gross net income in the instant I-140 petition. The petitioner also submitted and counsel refers to a letter dated September 9, 2005 signed by Mr. [REDACTED]. The original of this letter is in the record having been submitted to the record on appeal to the AAO for the previous denied petition. In his letter, [REDACTED] states that the beneficiary has worked for the petitioner since 2001 to the date he signed the letter, namely September 9, 2005.

The instant petition was also filed with a copy of a letter from the Employment Development Department, State of California dated December 12, 2002 with regard to the prevailing wage for Mr. [REDACTED] the previous beneficiary, as well as the instant beneficiary's academic credentials from India.<sup>6</sup>

In response to the director's RFE dated April 7, 2006, counsel submitted a copy of a Credential Evaluation Report written by [REDACTED] Universal Evaluations and Consulting, Fremont, California, dated April 27, 2006 that reiterates [REDACTED] previous evaluation that the beneficiary had the equivalent of a Master of Science in Computer Information Systems, based on his university level studies at Guru Nanak Dev University and relevant work experience.<sup>7</sup> The petitioner also submitted a letter from [REDACTED] the petitioner's president, dated April 24, 2006, that stated the petitioner has 275 employees and a gross annual revenue of \$20 million.

On appeal, counsel states that the director assumed that the new I-140 petition is identical to the previous I-10 petition. Counsel asserts that the instant petition is a "fresh" new petition with a new offer,<sup>8</sup> and that the director did not make an effort to look at the new petition. Counsel apparently refers to [REDACTED] letter and states that this letter clearly states the petitioner is offering a fulltime permanent position. Counsel notes that no other information with regard to the petitioner's projects was submitted with the instant petition as discussed in the denial of the prior petition. Counsel asks how the petitioner could be reiterating its offer, when the new offer letter was

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<sup>6</sup> Although counsel only submitted one page of the beneficiary's course transcript from [REDACTED] Jalandhar, India, reflecting one four semester of university-level studies, the record contains the beneficiary's complete course transcript and his diploma that establishes he studied for four years and received a Bachelor of Technology in electronic and Communication Engineering in 1993. The petitioner in the instant petition also submitted copies of the beneficiary's semester reports for his studies at the Punjab Agricultural University for a Master's in Business Administration and his diploma given in October 1997.

<sup>7</sup> This document appears to be prepared for the petitioner's employment based petition for a professional with advanced degree. [REDACTED] uses the beneficiary's work experience as an equivalency to a higher educational degree; however that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. See 8 CFR § 214.2(h)(4)(iii)(D)(5).

<sup>8</sup> The AAO notes that the job offer is identical to the prior petition as it is based on the same Form ETA 750.

submitted with the instant petition. Counsel notes that the petitioner clearly states it was offering a full time permanent position on the Form I-140 at Part 6, Items 5, 7, and 8.

Although counsel in a cover letter for the instant petition states that the petitioner is filing a concurrent I-485 application for Adjustment of Status, this document indicates that it is filed for an employment based petition based on the EB2 professional with advanced degree classification. While the record contains earlier medical documentation and a Form G-325A, Biographic Information for Applicant, signed by the beneficiary on November 29, 2004, the AAO does not find any other more recent medical records submitted to the record. The record also contains extensive documentation on the petitioner's business contracts and subcontracts, primarily dated 2005 submitted with the petitioner's previous I-140 petition. Thus, the AAO finds that the only new evidence submitted to the record with the instant petition is [REDACTED]' letter that updated the petitioner's number of employees and gross net income.

To date the petitioner has not addressed the issue raised by the AAO in its dismissal of the previous I-140 petition, namely, has the petitioner established that it had sufficient fulltime employment for the beneficiary as of the 2001 priority date. Since the current petition is filed with the previous ETA Form 750 and the same 2001 priority date, the director's and the AAO's question remains relevant and unanswered with regard to fulltime employment for the beneficiary as of 2001. The petitioner has not submitted any further documentation of consulting contracts open to the beneficiary of this period of time in the petitioner's business operations, or submitted any further clarification of the petitioner's claimed employment of the beneficiary in 2001.<sup>9</sup> Thus, the AAO affirms the director's decision.

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 met that burden.

**ORDER:** The appeal is dismissed. The AAO will also remand the matter to the California Service Center for further review of approved I-140 petitions found in the record or in computer records, and revocation of multiple approved petitions.

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<sup>9</sup> The AAO finds that the letter from [REDACTED] submitted on appeal with the instant petition and on appeal with the previous I-140, is in conflict with other documentation in the record. [REDACTED] states that the beneficiary has worked with the petitioner since 2001. However, the beneficiary in the Form G-325 submitted to the record in 2004, notes that he was unemployed from 2001 to July 2003, and began working for the petitioner in August 2003. The AAO referred to this inconsistency based on other documentation in its dismissal of a prior petition. In the instant matter, there is no further clarification of this inconsistency regarding the petitioner's claimed 2001 employment of the beneficiary.

