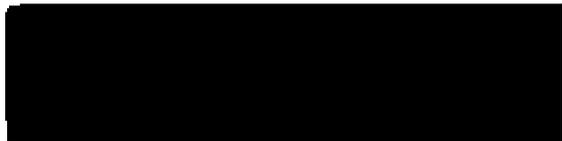


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
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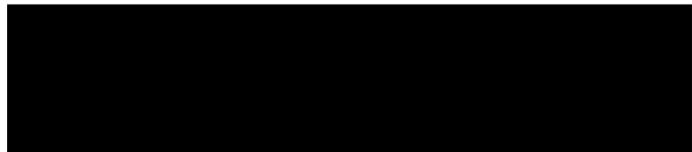
Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or a Professional pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

ON BEHALF OF PETITIONER:



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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). It is now on appeal before the Chief, Administrative Appeals Office (AAO). The Director's decision will be withdrawn and the case remanded for a new decision.

The petitioner is a producer of electrical connector accessories. It seeks to employ the beneficiary permanently in the United States as a Micro-D Production Planner and to classify him as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).¹ As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the Department of Labor (DOL), accompanied the petition.

In his decision the Director noted that the beneficiary had already been granted lawful permanent resident (LPR) status on April 4, 1997 as a spouse of a U.S. citizen (IR6). Since the instant petition encompasses a benefit and an immigrant visa that had already been accorded to the beneficiary, and finding no statutory or regulatory authority to approve a petition in this circumstance, the Director concluded that the beneficiary was ineligible for classification under section 203(b)(3)(A)(i) of the Act and denied the petition.

On appeal, counsel asserts that nothing in the regulations or the Adjudicator's Field Manual precludes U.S. Citizenship and Immigrations Services (USCIS) from approving the instant petition. According to counsel, the filing of the instant petition was intended "to provide the beneficiary with a prospective right to obtain permanent resident status in the event that he were to lose his permanent residen[t] status in the future." While conceding that approval of the instant petition would not grant the beneficiary the immediate right to an immigrant visa, counsel contends that it would confer upon him "the right to seek permanent resident status anew if he were to either abandon said status or have that status revoked." Counsel did not elucidate what circumstances might lead to the abandonment or revocation of the beneficiary's LPR status.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In adjudicating appeals the AAO considers all pertinent evidence in the record.

Section 101(a)(3) of the Act defines "alien" as "any person not a citizen or national of the United States," and section 101(a)(15) defines "immigrant" as "every alien except an alien who is within one of the following classes of nonimmigrant aliens." The definition of "alien" and "immigrant" encompasses lawful permanent residents. These definitions are relevant when analyzing sections of the Act and USCIS regulations pertaining to employment-based immigrant petitions.

Section 203(b) of the Act, which provides for the allocation of immigrant visas to employment-based immigrants, allots visas by preference categories to "[a]liens."

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to "[q]ualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years of training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States."

Section 204(b) of the Act, which governs USCIS authority to approve immigrant visa petitions, states that "[a]fter an investigation of the facts in each case [the Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the *alien* in behalf of whom the petition is [filed is eligible] for preference under subsection (a) or (b) of section 203, approve the petition." (All emphases added).

The regulation at 8 C.F.R. § 204.5(c) states that any "United States employer desiring and intending to employ an *alien* may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2) , or 203(b)(3) of the Act." (Emphasis added). The regulation at 8 C.F.R. § 204.5(l)(1) states that any "United States employer may file a petition on Form I-140 for classification of an *alien* under section 203(b)(3) as a skilled worker, professional, or other (unskilled) worker." (Emphasis added).

The regulations also foresee that more than one petition could be filed on behalf of a beneficiary. The regulation at 8 C.F.R. § 204.5(e) states that "[i]n the event that the alien is the beneficiary of multiple petitions under sections 203(b)(1), (2), or (3) of the Act, the alien shall be entitled to the earliest priority date."

For classification in the requested employment-based category, the regulations state that the minimum requirements of the offered position must meet the requirements of the requested classification;² the petitioner must establish that the beneficiary meets the minimum requirements of the offered position;³ the petitioner must establish its ability to pay the proffered wage from the priority date;⁴ and the petition must be accompanied by a labor certification application that has been certified by the DOL.⁵ Neither the Act nor the regulations explicitly prohibit the filing of a petition on behalf of a lawful permanent resident.

A 1989 legacy Immigration and Naturalization Service (INS) legal opinion concludes that the INS cannot preclude individuals granted lawful temporary resident status under the Immigration Reform and Control Act (IRCA) from obtaining lawful permanent resident status under another provision of the Act. See Raymond Penn, Assistant Commissioner Legalization, INS, *Permanent Residence Granted Under Multiple Sections of the Immigration and Nationality Act*, Genco Opinion 89-38 (April 6, 1989). The opinion states that "Congress did not expressly or impliedly provide that an alien legalized under IRCA could obtain lawful permanent resident status under IRCA alone and not under any other provision of the Immigration and Nationality Act." *Id.*⁶

² 8 C.F.R. § 204.5(l)(3)(ii).

³ *Id.*

⁴ 8 C.F.R. § 204.5(g)(2).

⁵ 8 C.F.R. § 204.5(l)(3)(i).

⁶ The opinion also states, however, that "[o]nce an alien obtains lawful permanent residence by one route, the other applications become superfluous and should be administratively closed as moot." *Id.*

Another INS legal opinion acknowledges that aliens who obtained lawful permanent residence pursuant to IRCA were subsequently beneficiaries of visa petitions under the preference system in order to obtain lawful permanent resident status for their spouses and children. See Paul Virtue, Acting General Counsel, INS, Legal Opinion, *Eligibility of Lawful Permanent Residents for Adjustment of Status*, Genco opinion 89-90 (December 21, 1989). Concluding that this is an acceptable practice, the opinion states that the Act "does not preclude a lawful permanent resident from abandoning his permanent resident status and returning to the United States with a new immigrant visa" if the alien is the beneficiary of an approved visa petition, and an immigrant visa number is available. *Id.*⁷

The Department of State (DOS) has addressed this issue more directly. In correspondence by ██████████ in ██████████ in October 1991, ██████████ stated that an alien is eligible to receive an immigrant visa even if he is already a lawful permanent resident. See 69 No. 11 *Interpreter Releases* 354 (March 23, 1999). In a related letter dated January 3, 1992, Mr. Odom also stated that a lawful permanent resident is not precluded from filing another immigrant visa petition. *Id.* In addition, the DOS Foreign Affairs Manual (FAM) states that "[t]here is no legal restriction preventing a lawful permanent resident (LPR) from obtaining another immigrant visa in a different preference status in order to confer derivative status on a spouse or child." 9 FAM 42.43, note 10.2-1.⁸

As the foregoing discussion illustrates, neither the Act nor USCIS regulations (nor any agency or judicial decisions) prohibit the approval of an employment-based immigrant visa petition requesting classification of an alien as a skilled worker when the alien holds LPR status. In this case, therefore, the beneficiary's LPR status does not make him ineligible in the instant petition for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act. In light of the above, the AAO concludes that the Director erred in denying the petition on that basis.

Accordingly, the Director's decision of October 16, 2007, will be withdrawn. The petition will be remanded to the Director for the issuance of a new decision.

⁷ USCIS internal memoranda and manuals do not establish judicially enforceable rights. See *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely"). The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. See *N.L.R.B. v. Ashkenazy 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).

⁸ It must be noted that State Department Advisory Opinions and the FAM are not binding upon USCIS. See generally *Avena v. INS*, 989 F. Supp. 1 (D.D.C. 1997); *Matter of Bosuego*, 17 I&N 125 (BIA 1979). The FAM provides guidance to employees of the DOS in carrying out their official duties, such as the adjudication of visa applications abroad.

The AAO notes, however, that there is other documentation in the record which casts doubt on the beneficiary's eligibility for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act. The beneficiary was granted LPR status on April 4, 1997, based on his marriage to a U.S. citizen in 1995. The beneficiary subsequently filed an Application for Naturalization, Form N-400, in July 2003. In a decision dated March 21, 2005, the USCIS District Director in Los Angeles (L.A. Director) denied the application for naturalization on several interrelated grounds. The L.A. Director found that the beneficiary was ineligible for naturalization for lack of "good moral character" because he failed to disclose that he had already been married to a Mexican citizen since 1986 at the time of his U.S. marriage in 1995, which made the second marriage bigamous and invalid. Indeed, the beneficiary gave false and misleading testimony about his Mexican marriage both in his application for LPR status and in his naturalization application. The L.A. Director concluded that the beneficiary was improperly admitted to the United States as an LPR, since he was not validly married to a U.S. citizen, and ineligible for naturalization for lack of good moral character.

Section 204(c) of the Act provides as follows:

Notwithstanding the provisions of subsection (b)⁹ no petition shall be approved if:

- (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the [Director] to have been entered into for the purpose of evading the immigration laws; or
- (2) the [Director] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

In his reconsideration of the instant petition on remand, the Director shall take the above legal provisions and the documentation discussed in the L.A. Director's decision into account. The Director may request any additional evidence he deems pertinent, and the petitioner may provide additional evidence within a reasonable period of time to be set by the Director. Upon receipt of all such evidence, the Director shall enter a new decision.

The burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The Director's decision of October 16, 2007, is withdrawn. The petition is remanded to the director for reconsideration in accord with the foregoing discussion and the issuance of a new decision.

⁹ Subsection (b) of section 204 of the Act refers to preference visa petitions that are verified as true and forwarded to the DOS for issuance of a visa.