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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

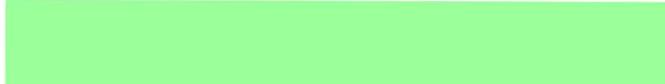


Date: **AUG 15 2013**

Office: TEXAS SERVICE CENTER

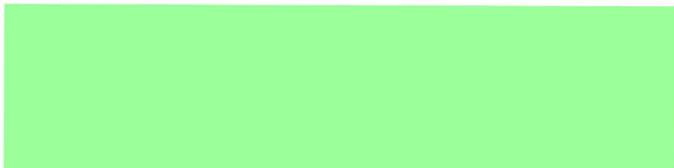


IN RE: Petitioner:
Beneficiary:



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

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 the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reconsider. The motion to reconsider the petition will be granted and the matter reconsidered. Upon review of the matter, the AAO's prior decision (May 22, 2013) is affirmed. The petition remains denied.

The petitioner is a full service lightning protection and grounding company. It seeks to employ the beneficiary permanently in the United States as a senior manager-export sales. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the petition requires a minimum of a baccalaureate degree, and therefore, that the beneficiary cannot be found qualified for classification as a professional. The director denied the petition accordingly.

Beyond the decision of the director, the AAO further denied the petition on appeal on the grounds that the petitioner failed to sufficiently establish that the beneficiary met the requirements of the proffered position as stated in the certified labor certification and that the petitioner failed to establish the ability to pay the proffered wage from the priority date.

The record shows that the motion to reconsider is properly filed. 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.

A motion to reconsider must: (1) 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 [USCIS] policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The petitioner has stated reasons for reconsideration and cited a precedent decision in support of its request for reconsideration. The motion to reconsider will be granted and the matter, therefore, will be reconsidered.

Related to the first issue that the labor certification does not support the professional category, counsel asserts on motion that the director erred as a matter of law and fact in concluding that the position does not qualify for a professional classification; and asserts that previous interpretations of 8 C.F.R. § 204.5(l)(3)(i) permitted a beneficiary with an equivalent of a U.S. bachelor's degree to qualify for a professional classification under INA § 203(b)(3)(A)(ii). Counsel states that the current interpretation of the regulation conflicts with previous interpretation by United States Citizenship and Immigration Services (USCIS), and is therefore "entitled to considerable less deference" than a long standing consistent interpretation per *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987). Counsel cites to *Long Island Card at Home, Ltd. v. Coke*, 551 U.S. 158, 170-171 (2007) in asserting that interpretive changes to regulations are permissible and subject to deference as long as the

agency does not create an “unfair surprise.” Counsel asserts that the revised interpretation of the regulation was issued with the intent to bind USCIS in I-140 adjudications and is therefore subject to the notice and comment procedure mandated by the Administrative Procedure Act (APA). Counsel cites to *Hector v. United States Department of Agriculture*, 82 F.3d 165, 169 (7th Cir. 1996) in support of this claim.

Counsel does not provide evidence of any “previous interpretations of 8 C.F.R. § 204.5(l)(3)(i)” as opposed to current interpretations of this regulation, therefore his claims related to *INS v. Cardoza-Fonseca*, *Long Island Card at Home, Ltd. v. Coke*, and the APA cannot be addressed.

Prior versions of Form I-140 allowed for consideration of a petition as both a professional and a skilled worker on the same form based on one selection. The revised form requires a petitioner to select one category or the other, either professional or skilled worker. Changes to forms are published in advance. *See generally* 74 Fed. Reg. 186 (Sept. 28, 2009) regarding proposed changes to Form I-140 and information collection. As set forth in the AAO’s May 22, 2013 decision, the labor certification allows for “other” in H.8 as the alternate level of education based on an alternate combination of education and experience combined, which is less than a bachelor’s degree as required by 8 C.F.R. § 204.5(l)(3)(i). Therefore, the labor certification requirements do not meet the professional category, as selected by the petitioner on Form I-140.

The AAO also found in its May 22, 2013 decision that the petitioner failed to demonstrate that the beneficiary had the minimum 24 months of experience in the related occupation of Head of Products Promotion and the specific skills mentioned in H.14. As noted in the AAO’s May 22, 2013 decision, the petitioner submitted an evaluation combining the beneficiary’s education and experience seeking to equate the combined education and experience to the equivalent of a bachelor’s degree. The evaluation relies on that same experience the petitioner also seeks to use to establish that the beneficiary has the required two years of experience. The AAO’s decision also noted conflicts in the dates of employment claimed and the experience attested to, references to “various capacities” and the letter’s failure to document that the beneficiary had the required H.14 skills. Counsel does not submit any evidence with the instant motion to establish that the beneficiary has the aforementioned experience and special skills as required by the certified labor certification.

The record contains what purports to be the petitioner’s Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, for the years 2009 and 2010 and the 2010 IRS Form W-2 issued to the beneficiary. The AAO observes that the federal employer identification number (EIN) for the employer on the tax returns is [REDACTED]. The EIN on the W-2 forms submitted ends in [REDACTED] (which appears to be a payroll agency). However, the EIN number listed for the petitioner on the underling labor certification and Form I-140 petition in this case is [REDACTED], which indicates that the employer on the labor certification and petition is a different entity than the one on the tax return and Form W-2. The record did not address or provide any explanation for this inconsistency. 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).

Counsel states that the inconsistency between the federal employment identification number on the tax returns and the labor certification and Form I-140 was due to a clerical error by a previous human resources manager in the DOL online account setup; this individual is no longer employed by the petitioner; and further information related to the error made in the DOL online account setup is therefore not available. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 20 C.F.R. § 656.3 states that an employer must possess a valid EIN. The EIN on the labor certification conflicts with the tax documentation submitted and the 2009, and 2010 W-2 Forms in the record.

Counsel also states that the petitioner reorganized and created a successor-in-interest named [REDACTED] LLC; and all of the petitioner's employees are now employees of [REDACTED]. He cites to a fourth and different EIN. The AAO notes that there is no supporting evidence in the record to establish a successor-in-interest relationship. A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). The record does not contain any documentation from the petitioner to establish the asserted successorship. Nothing on motion overcomes the lack of the petitioner's ability to pay the proffered wage based on the discrepancy as set forth in the AAO's May 22, 2013 decision.

The motion does not establish that the petition requires a minimum of a baccalaureate degree based on the certified labor certification, and therefore, the beneficiary cannot be found qualified for classification as a professional. The motion does not establish that the beneficiary met the requirements of the proffered position as stated in the certified labor certification, and fails to establish a valid successorship, or that the petitioner has the ability to pay the proffered wage from the priority date based on the outlined discrepancies.

The petition will remain denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. Here, that burden has not been met.

ORDER: The motion to reconsider is granted and the petition is reconsidered. The previous decision of the AAO dated May 22, 2013 is affirmed. The petition remains denied.