



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **AUG 22 2013** OFFICE: TEXAS SERVICE CENTER

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:

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,

Rachel Ni Turo
for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reconsider and a motion to reopen. The motion to reopen will be dismissed. The motion to reconsider will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a business process solutions company. It seeks to employ the beneficiary permanently in the United States as a financial controller. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to establish that the beneficiary satisfied the minimum level of education stated on the labor certification.

In a decision dated January 29, 2013, the AAO determined that the beneficiary does not have a U.S. bachelor's degree or a foreign equivalent degree and, accordingly, does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act.

On motion, counsel states that the beneficiary holds a single degree equivalent to a U.S. bachelor's degree in accounting. Counsel states that the Form ETA 9089 indicates that the minimum educational requirement for the proffered position is a bachelor's degree in accounting or its equivalent, and alternate fields of study are acceptable. Counsel states that the labor certification also indicates that "any suitable combination of education and experience" is acceptable. Counsel asserts that in an unrelated decision the AAO concluded that an [REDACTED] fellowship is equivalent to a U.S. bachelor's degree. Counsel states that in the instant case the AAO determined that [REDACTED] fellowship is not a "foreign equivalent degree" as required for advanced degree purposes. Counsel contends that the petitioner seeks EB-3 preference classification, for which the beneficiary qualifies. Counsel states that in the response to a Request for Evidence (RFE), the petitioner requested that U.S. Citizenship and Immigration Service's (USCIS) amend the Immigrant Petition for Alien Worker (Form I-140) to reflect the preference classification of skilled worker, instead of professional, and submitted a new Form I-140 reflecting this change. Counsel asserts that the decision not to accept this request is contrary to Form I-140 Standard Operating Procedures. Counsel cites *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 428-429 (D.C. Cir. 1977), to state that USCIS has discretion to change a preference classification. Counsel states that the court in *Grace Korean United Methodist Church v. Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), and *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. November 30, 2006), held that deference must be given to an employer's intent. Counsel contends that the terms of the labor certification reflect the employer's intent that the equivalent of a bachelor's degree is acceptable for the job opportunity.

The submitted evidence on motion includes copies of an educational evaluation prepared by Dr. [REDACTED], dated February 18, 2013; the USCIS document entitled "Petition Filing and Processing Procedures for Form I-140, Immigrant Petition for Alien Worker;" and two documents identified by the petitioner as "Section 5 Part 1" and "Part 7 - E31 Skilled Worker."

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.

A motion to reconsider must establish that the decision was based on an incorrect application of law or Service policy. *See* 8 C.F.R. § 103.5(a)(3). A motion to reopen must state new facts. *See* 8 C.F.R. § 103.5(a)(2).

The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the director and the AAO made an erroneous decision through misapplication of law or policy.

As to reconsideration, counsel states that in response to the RFE the petitioner requested EB-3 preference classification, and the decision not to accept the amended Form I-140 requesting this preference classification change is contrary to Form I-140 Standard Operating Procedures. Neither the law nor the regulations require the director to consider lesser classifications if the petitioner does not establish the beneficiary's eligibility for the classification requested. We cannot conclude that the director committed reversible error by adjudicating the petition under the classification requested by the petitioner. There are no provisions permitting the petitioner to amend the petition on appeal in order to establish eligibility under a lesser classification.

Also, the documents "Section 5 Part 1," "Part 7 – E31 Skilled Worker," and "Petition Filing and Processing Procedures for Form I-140, Immigrant Petition for Alien Worker" do not establish that the director's course of action not to adjudicate the Form I-140 under a lesser classification is a misapplication of law or policy. The document "Section 5 Part 1" specifically states that if the determination is made that the petitioner is requesting a classification for which the beneficiary is clearly not qualified, but appears to be qualified for another classification, "the petitioner may be offered the opportunity to change to a new classification." It is therefore within the discretion of USCIS regarding whether or not the petitioner is given an opportunity to change to a new classification. The document "Part 7 – E31 Skilled Worker" does not specifically address a request to amend the Form I-140, as it concerns labor certifications. The "Petition Filing and Processing Procedures for Form I-140, Immigrant Petition for Alien Worker" explicitly states that if a requested change of classification is made prior to adjudication to correct a clerical error in Part 2 of the Form I-140 "the determination regarding whether to change the visa preference classification will be made by USCIS, based on the totality of the record." Accordingly, USCIS is not compelled to change the visa preference classification and, moreover, there is no evidence in the record that the petitioner alleged clerical error in Part 2 of the Form I-140.

Counsel cites *Grace Korean United Methodist Church* and *Snapnames.com, Inc.* for the proposition that deference must be given to an employer's intent, but has not explained how these decisions are controlling. These cases do not specifically address the intent of the petitioner in the context of a request to amend the Form I-140 preference classification.

In summary, counsel has not established that the AAO's decision dated January 29, 2013 was erroneous and based on an incorrect application of law or policy.

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.¹

In this matter, the AAO finds that the petitioner presented no facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. See *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. Therefore, the motion will be dismissed in accordance with 8 C.F.R. § 103.5(a)(4).

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). The petitioner has not met that burden.

ORDER: The motion to reopen is dismissed. The motion to reconsider is granted, the decision of the AAO dated January 29, 2013 is affirmed, and the petition remains denied.

¹The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence>" *Webster's II New Riverside University Dictionary* 792 (1984)(emphasis in original).