



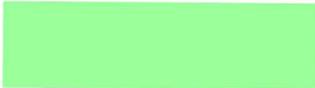
U.S. Citizenship
and Immigration
Services

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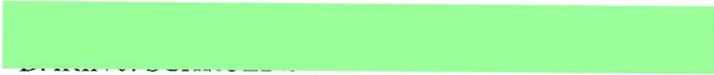


DATE: **MAR 06 2014**

OFFICE: TEXAS SERVICE CENTER



IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Professional Pursuant to Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(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 preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a commission financial services business. It seeks to employ the beneficiary permanently in the United States as an IT director. As required by statute, the petition is accompanied by labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the petition requires at least a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree and, therefore, that the beneficiary cannot be found qualified for classification as a professional. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. 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.

As set forth in the director's September 30, 2013 denial, the single issue in this case is whether or not the petitioner has established that the petition requires at least a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree such that the beneficiary may be found qualified for classification as a professional.

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

Here, the Form I-140 was filed on May 24, 2013. On Part 2 i.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional. The AAO notes that in his decision, the director described the proffered position as that of a registered nurse. The AAO withdraws the director's statements indicating that the proffered position is for a registered nurse.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal, counsel submits a brief. On appeal, counsel asserts that the beneficiary should be considered under the skilled worker category and that such a request is not a material change. Counsel also states that the AAO has previously considered beneficiaries under both the professional and skilled worker categories.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

¹ The submission of additional evidence on appeal is allowed by the instructions to the 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).

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

In this case, although the labor certification lists a bachelor's degree as the minimum educational level required in Part H.4., it also indicates in Part H.8. that it will accept the alternate level of education of "other" defined as "any suitable combination of education, training and/or work experience," and seven years of experience. As the petitioner will accept seven years of experience in lieu of the bachelor's degree, the labor certification does not qualify for classification as a professional. However, the petitioner requested the professional classification on the Form I-140. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

In the past, previous versions of the Form I-140 had petitioners check the same box for the professional and skilled worker categories. The current version of the Form I-140 separates the two categories, thereby clarifying the petitioner's intent at the time of filing. The record contains a letter signed by the petitioner and submitted at the time of filing stating that the proffered position is for "professional and specialized services." There is no indication that the petitioner sought consideration under the skilled worker category at the time of filing.

On appeal, counsel cites to several unpublished AAO decisions. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Counsel also cites to *Grace Korean United Methodist Church v. Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), *Hoosier Care, Inc. v. Chertoff*, 482 F.3d 987 (7th Cir., 2007), and *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983) in support of the assertion that USCIS is obligated to consider whether a position fits into both the professional and skilled worker categories. These cases were all decided prior to the amendment to the Form I-140 that separated the professional and skilled worker categories in Part 2 into box 1.e. and 1.f. Here, the petitioner checked box 1.e. requesting classification as a professional.

A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). As the beneficiary does not possess a bachelor's degree or its foreign equivalent, the beneficiary does not qualify for classification as a professional.

The evidence submitted does not establish that the labor certification requires at least a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree such that the beneficiary may be found qualified as a professional. Therefore, the director's decision is affirmed.

Beyond the decision of the director,² the AAO notes that the record contains inconsistent information regarding the beneficiary's employment. The labor certification indicates that the beneficiary has been working for the petitioner since October 1, 2007. The record contains paystubs dated January 2013 listing the petitioner as the beneficiary's employer, as well as the beneficiary's 2012 Internal Revenue Service (IRS) Form W-2 listing [REDACTED] as the beneficiary's employer. It appears that the beneficiary worked for [REDACTED] in 2012 and not for the petitioner. 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). [REDACTED] is a payroll processing company or other staffing service, evidence of an agreement between the petitioner and [REDACTED] must be provided.

Also beyond the decision of the director, the AAO notes that the record contains inconsistent information regarding the beneficiary's employment dates for [REDACTED]. The ETA Form 9089 states that the beneficiary worked for [REDACTED] from March 1, 1997 to September 1, 2007. The Form I-140 states that the beneficiary entered the United States on September 20, 2007. However, in his letter dated March 19, 2013, [REDACTED], President, states that the beneficiary worked for [REDACTED] from March 1, 1997 through September 30, 2007. 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).

The petition will be 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 appeal is dismissed.

² An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).