

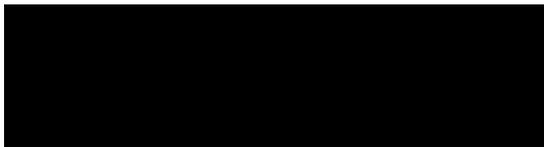
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



Ag

Date: **JAN 05 2012**

Office: VERMONT SERVICE CENTER

FILE: 

IN RE:

Petitioner:

Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The petitioner filed a subsequent appeal. The Administrative Appeals Office (AAO) dismissed the appeal. The matter is now before the AAO on a motion to reconsider. The motion will be dismissed.

The petitioner states that it is a prepaid phone card retailer with seven employees. It seeks to employ the beneficiary as a market research analyst. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on December 6, 2007 on the grounds that (1) the proffered position is not a specialty occupation; (2) the beneficiary has not been maintaining H-1B status; and (3) the Labor Condition Application (LCA) submitted in support of the petition was invalid. On December 27, 2007, counsel for the petitioner filed an appeal seeking review of the director's decision. After reviewing the record, the AAO dismissed the appeal and affirmed the director's denial on all three grounds. The petitioner has now filed a motion seeking to reconsider the AAO's January 7, 2010 decision.

A motion to reconsider must 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. 8 C.F.R. § 103.5(a)(3). In addition, a motion to reconsider must establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.*

On motion, counsel submits a three-page brief in support of the instant motion to reconsider. However, the motion to reconsider does not state that the AAO's decision was based on an incorrect application of law or USCIS policy, nor does it contain any evidence or pertinent precedent decisions to support it. More importantly, therefore, the motion to reconsider fails to establish that the AAO's decision was incorrect based on the evidence of record at the time of that decision.

Specifically, counsel's primary arguments on motion are that the beneficiary has had an H-1B nonimmigrant status under this same position since October 1, 2002; that the Department of Labor (DOL)'s *Occupation Outlook Handbook (Handbook)*, 2006-2007 edition, reports a bachelor's degree is the minimum educational requirement for many market and survey research jobs; and that the AAO's decision on LIN 92 257 51102 supports the assertion.

First, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, they would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that United States citizenship and Immigration Services (USCIS) or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485

U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Second, the *Handbook* only states that "[a] bachelor's degree is the minimum educational requirement for many market and survey research jobs." The *Handbook* does not state that such a degree is a normal minimum entry requirement for all accountant and auditor positions. The first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of market research analyst positions require at least a bachelor's degree in a specific specialty or a related field, it could be said that "most" market research analyst positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. Therefore, counsel's assertion that the *Handbook* states many market and survey research jobs require a bachelor's degree does not establish that the proffered position is a specialty occupation. It therefore does not demonstrate that the AAO determined that the proffered position is not a specialty occupation based on an incorrect application of law or USCIS policy.

Third, counsel also asserts that the AAO has previously noted that market analyst work is similar to that of a social scientist as the nature is one of qualitative computation and gathering of data and refers to the AAO's decision on [REDACTED]. Counsel, however, has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Additionally, the motion will also be dismissed for failing to meet another applicable requirement. Specifically, the regulation at 8 C.F.R. § 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Title 8 C.F.R. section 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C).

The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion did not meet the applicable

filing requirement listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must be dismissed for this additional reason.

The instant motion does not meet applicable requirements to be considered as a motion to reconsider. Again, pursuant to 8 C.F.R. § 103.5(a)(4), a motion that does not meet applicable requirements shall be dismissed.

ORDER: The motion is dismissed. The AAO's January 7, 2010 decision is affirmed and the petition remains denied.