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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

[Redacted]

DATE: **MAY 29 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

*Ron Rosenberg*  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The acting service center director denied the nonimmigrant visa petition. The petitioner appealed the director's denial to the Administrative Appeals Office (AAO) and, on October 6, 2011, the AAO dismissed the appeal. The matter is again before the AAO on a motion to reconsider. The motion will be dismissed.

The petition in question had been filed to extend the validity of the petitioner's previous H-1B petition, pursuant to which the petitioner had been employing the beneficiary as an H-1B nonimmigrant worker in a specialty occupation. As with the previous, approved petition, this extension petition was filed for what the petitioner identified as a Civil Engineer position.

The text of the acting director's decision to deny the extension petition indicates that she accepted the proffered position as being a civil engineer position, but that she denied the petition because she determined that the position required a State of California license as a Civil Engineer, that the record of proceeding indicated that the beneficiary did not hold such a license, and that the evidence of record did not establish that there was an exemption or exception by which the beneficiary could lawfully perform the services of a Civil Engineer in California without licensure.<sup>1</sup>

The AAO dismissed the subsequent appeal on multiple grounds.

The first grounds for dismissing the appeal reside in the AAO's determinations that, one, the evidence indicated that the position actually belonged to the Civil Engineering Technicians occupational category, rather than to the Civil Engineers occupational category; and that, two, as such, the proffered position did not qualify as a specialty occupation.

The second independent basis for dismissing the appeal was the AAO's determinations that the acting director had been correct in her determination that the beneficiary's lack of a license to practice civil engineering in the State of California precluded the beneficiary from being identified as, and from performing the services of, a civil engineer in that state.

As indicated by the check mark at Box E of Part 2 of the Form I-290B, the AAO's decision to dismiss the appeal is now before the AAO as the subject of a motion to reconsider the decision.

A motion to reconsider must state the reasons for reconsideration and be supported by citations to pertinent statutes, regulations, and/or precedent decisions to establish that the decision was based on an incorrect application of law or United States Citizenship and Immigration Services (USCIS) policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. See 8 C.F.R. § 103.5(a)(3) (requirements for a motion to reconsider) and the instructions for motions to reconsider at Part 3 of the Form I-290B.<sup>2</sup> A motion to reconsider that does not meet these requirements will be dismissed. See 8 C.F.R. § 103.5(a)(4).

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<sup>1</sup> It is undisputed that California is the jurisdiction where the proffered position is located.

<sup>2</sup> The provision at 8 C.F.R. § 103.5(a)(3) states the following:

On motion, counsel asserts that the AAO's decision dismissing the appeal be reconsidered and, upon reconsideration, overturned. Counsel asserts three grounds for relief, namely, that the AAO had (1) misinterpreted and misapplied the registration requirements of the California Professional Engineers Act (which will hereinafter be referred to as simply the CPEA); (2) erroneously determined that the subject of the proffered position is actually a Civil Engineer Technician position rather than a Civil Engineer position; and (3) failed to give appropriate weight to the fact that the petitioner's previous H-1B petitions for the beneficiary to serve in the proffered position had been approved.

As will now be discussed, the AAO finds that the motion fails to demonstrate that the AAO's decision to dismiss the appeal was based on an incorrect application of law or USCIS policy to the evidence before the AAO at the time of its decision. Therefore, as the motion fails to satisfy the requirements for a motion to reconsider the decision, it will be dismissed.

For ease of reference, the AAO will first introduce several relevant provisions of the CPEA, which is published at sections 6700 – 6799 of the California Business and Professions Code.<sup>3</sup>

#### **6705. Subordinate defined**

A subordinate is any person who assists a registered professional engineer in the practice of professional engineering without assuming responsible charge of work.

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*Requirements for motion to reconsider.* 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. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

This regulation is supplemented by the instructions on the Form I-290B, by operation of the rule at 8 C.F.R. § 103.2(a)(1) that all submissions must comply with the instructions that appear on any form prescribed for those submissions. With regard to motions for reconsideration, Part 3 of the Form I-290B submitted by the petitioner states:

**Motion to Reconsider:** The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions.

The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part :

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission.

<sup>3</sup> The California Professional Engineers Act is available on the Internet at [http://www.bpelsg.ca.gov/laws/pe\\_act.pdf](http://www.bpelsg.ca.gov/laws/pe_act.pdf).

**6740. Exemption of subordinates**

*A subordinate to a civil, electrical or mechanical engineer licensed under this chapter, or a subordinate to a civil, electrical or mechanical engineer exempted from licensure under this chapter, insofar as he acts solely in that capacity, is exempt from licensure under the provisions of this chapter. This exemption, however, does not permit any such subordinate to practice civil, electrical or mechanical engineering in his own right or to use the titles listed in Section 6732, 6736, and 6736.1. (Emphasis added.)*

Section 6732, of the California Professional Engineers Act, states the following:

**6732. Use of seal, stamp or title by unregistered person**

*It is unlawful for anyone other than a professional engineer licensed under this chapter to stamp or seal any plans, specifications, plats, reports, or other documents with the seal or stamp of a professional engineer, or in any manner, use the title “professional engineer,” “registered engineer,” or “consulting engineer,” or any of the following branch titles: “agricultural engineer,” “chemical engineer,” “civil engineer,” “control system engineer,” “electrical engineer,” “fire protection engineer,” “industrial engineer,” “mechanical engineer,” “metallurgical engineer,” “nuclear engineer,” “petroleum engineer,” or “traffic engineer,” or any combination of these words and phrases or abbreviations thereof unless licensed under this chapter. (Emphasis added.)*

The AAO is not persuaded by counsel’s contention that, by operation of the licensure exemption at CPEA section 6705 (also quoted above), the beneficiary may perform the work of a civil engineer, even though not licensed as one, because he works as a *subordinate* to a licensed civil engineer, as defined at CPEA section 6740 (quoted above).

The AAO finds that, read in conjunction with each other, the above-quoted sections indicate that the CPEA does not allow a non-licensed subordinate to a civil engineer to actually fully perform the services of, or to identify himself or herself as, a civil engineer. With regard to this constraint against a non-licensed subordinate performing as a civil engineer, the AAO notes in particular the language at CPEA section 6740 indicating that a the non-licensed person is exempt from the licensure requirement only to the extent that he is acting in a capacity that is subordinate to a civil engineer. Section 6740 of the CPEA states that the “subordinate” is exempt from licensure “insofar as he acts solely in that capacity.” Likewise, section 6740 also states that its exemption “does not permit any such subordinate to practice civil, electrical or mechanical engineering in his own right.” Further, the definition itself at CPEA 6705 clearly indicates that a CPEA section 6705 subordinate acts in an assistant capacity only – and not as, or on the professional of level of, a civil engineer.

The AAO finds, in particular, that the AAO’s interpretation and application of the CPEA to the facts before it on appeal were correct. Contrary to the petitioner’s view, the CPEA provisions upon

which the AAO relied do indeed indicate that, in California, absent licensure or registration as a civil engineer, a person may not fully perform the duties of a civil engineer even if working under the supervision of a registered Civil Engineer. As correctly noted in the AAO's decision, an unlicensed person assisting a registered Civil Engineer is "a subordinate" to that registered engineer, and, as such, is relegated to purely an assistant's role and an assistant's level of work, is not permitted to assume responsible charge over civil engineering work, is not permitted to exceed an assistant's role, and is not permitted to identify himself or herself as a civil engineer. Also, the AAO finds, there is no allowance in the CPEA for a person to use the title "civil engineer" if he or she is not licensed as such. Moreover, contrary to counsel's claims, there is no distinction in the CPEA between a licensed civil engineer and a civil engineer, and the two terms are used interchangeably in that Act. Consequently,

The AAO's decision on appeal was also correct in its assessment that if the evidence of record had established the proffered position as a Civil Engineer specialty-occupation position - which is not the case - the beneficiary could not be classified as an H-1B specialty-occupation worker for that position. This is because, under the CPEA, licensure would be required in order to fully perform the occupation.

In this regard, the AAO first draws the petitioner's attention to the following USCIS regulatory provisions, which appear at 8 C.F.R. § 214.2(h)(4)(v) (*Licensure for H classification*). The provision at 8 C.F.R. § 214.2(h)(4)(v)(A) states:

*General.* If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

The AAO finds that this provision would preclude the beneficiary from serving in a civilian engineer position in California, because, as already reflected in the AAO's comments and findings in this decision, the language of the CPEA indicates that California requires a state license for, in the words of this USCIS provision, "an individual to fully perform the duties of the occupation." Next, there is this provision at 8 C.F.R. § 214.2(h)(4)(v)(C):

*Duties without licensure.* In certain occupations which generally require licensure, a state may allow an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation. In such cases, the director shall examine the nature of the duties and the level at which they are performed. If the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted.

The AAO finds that this provision would not operate to the beneficiary's advantage in the case before us. This is because of the substantial limitations that the CPEA places upon the scope of the work of a person who, like the beneficiary, is not licensed as a civil engineer. Simply put, the

CPEA only allows a licensed civil engineer to fully perform the duties of the Civil Engineering occupational classification. Thus, as the beneficiary could not fully perform the duties of a civil engineer in California, even if working under the supervision of a licensed civil engineer, he would not

As previously discussed, the Civil Engineer profession is not one for which the CPEA allows a person to, in the words of 8 C.F.R. § 214.2(h)(4)(v)(C), “*fully practice* the occupation under the supervision of licensed senior or supervisory personnel in that occupation.” (Emphasis added.) As discussed earlier in this decision, under the CPEA an unlicensed person working as a subordinate of a civil engineer is not allowed to, in the words of 8 C.F.R. § 214.2(h)(4)(v)(C), “fully perform the duties of the occupation.” This is evidenced by the fact that the CPEA prohibits such a person from practicing civil engineering in his own right, from assuming responsible charge of any civil engineering work, and from stamping or sealing any plans, specifications, plats, reports, or other documents with the seal or stamp of a professional engineer.

The AAO also finds that the AAO was correct in its determination on appeal that, to the extent that the proposed duties were described in the record of proceeding, they comported with the Civil Engineering Technicians occupational category, and not with the Civil Engineers occupational category for which the petition had been filed. In this regard, the AAO also finds a close correlation between the duties of the proffered position and the information that the AAO’s decision on the appeal quoted from the Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) with regard to the Civil Engineering Technicians occupational classification; but the AAO finds no such correlation between the proposed duties and the information quoted from the *Handbook* with regard to the Civil Engineers occupational classification.

The AAO also finds that neither the blueprints submitted into the record nor any other evidence that was before the AAO on appeal indicated that the petitioner, or the beneficiary in the course of the petitioner’s employment, would engage in the scale of work that characterizes the Civil Engineering occupation. In this regard, the AAO now draws the petitioner’s attention to characteristics of the Civil Engineering occupation, as discussed in the related *Handbook* chapter quoted in the AAO’s appeal decision, that are not reflective of or attributable to the proposed duties or the proffered position as they are presented in the record of proceeding. The *Handbook* states that

Civil engineers design major transportation projects. Civil engineers design and supervise large construction projects, including roads, buildings, airports, tunnels, dams, bridges, and systems for water supply and sewage treatment.

The *Handbook* also states, in pertinent part:

Civil engineers work on complex projects, so they usually specialize in one of several areas.

**Geotechnical engineers** work to make sure that foundations are solid. They focus on how structures built by civil engineers, such as buildings and tunnels, interact with

the earth (including soil and rock). Additionally, they design and plan for slopes, retaining walls, and tunnels.

*Structural engineers* design and assess major projects, such as bridges or dams, to ensure their strength and durability.

*Transportation engineers* plan and design everyday systems, such as streets and highways, but they also plan larger projects, such as airports, ports, and harbors.

Also, the AAO finds no error of law or fact in the AAO's analysis leading to its conclusion that the proffered position, as correctly classified as a civil engineering technician position, is not a specialty occupation.

Finally, the AAO finds no merit in counsel's assigning error to a claimed failure of the AAO to accord appropriate weight to the prior petition approvals. Counsel noted that USCIS had approved other petitions that had been previously filed on behalf of the beneficiary, and the director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. However, if the previous nonimmigrant petitions were approved based on substantially the same evidentiary foundation as contained in the current record, the approvals would constitute material 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 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).

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 the nonimmigrant petitions on behalf of the 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).

In summation, the AAO finds that, in reaching each of the grounds that it specified for dismissing the appeal, the AAO had correctly analyzed the relevant facts and had correctly applied the applicable statutes and regulations to those facts. The motion does not establish that the AAO's decision was based upon an incorrect application of law or USCIS policy to the evidence of record that was before the AAO on appeal. More particularly, the motion does not establish that the AAO had misinterpreted or misapplied the CPEA in any respect. Nor does the motion establish that the AAO erred in determining that the proffered position was actually a Civil Engineering Technician position; or in finding that, as such, the proffered position was not a specialty occupation; or in assessing the weight of the previous petition approvals. Consequently, this motion will be dismissed for not meeting the requirements for a motion to reconsider, pursuant to 8 C.F.R. § 103.5(a)(4).

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Finally, the motion shall be dismissed for failing to meet another applicable filing requirement. The regulation at 8 C.F.R. § 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 submissions constituting the motion do not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Again, 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 does not meet the applicable filing requirement listed at 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

It should be noted for the record that, unless USCIS directs otherwise, the filing of a motion to reconsider does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

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. Accordingly, the motion will be dismissed and the proceedings will not be reconsidered. The previous decision of the AAO will not be disturbed.

**ORDER:** The motion is dismissed.