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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUL 15 2014 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a 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,

Elizabeth M'Cormack

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and we dismissed the appeal on March 6, 2014. The petitioner filed a motion to reopen and a motion to reconsider our decision in accordance with 8 C.F.R. § 103.5. The motion to reopen and the motion to reconsider will be granted. Our previous decision will be affirmed, and the petition will be denied.

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 a 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.[1] The director denied the petition accordingly.

On March 6, 2014, we affirmed the director's decision. We determined that the petitioner had not established 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.[2] Beyond the decision of the director,[3] we noted that the record contains inconsistent

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[1] In the instant case, the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Bachelor's degree in Computer Science.
H.5. Training: None required.
H.6. Experience in the job offered: 60 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: Yes.
H.8-A. Alternate level of education required: Other.
H.8-B. Alternate level of education required: Any suitable combination of education, training and/or work experience.
H.8-C. Number of years experience acceptable in question 8: 7.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: 60 months in any job involving IT management experience with web-based & relational data.
H.14. Specific skills or other requirements: Listed on attachment to ETA Form 9089.

[2] We stated that 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. 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).

information regarding the beneficiary's employment with the petitioner.[4] We also noted that the record contains inconsistent information regarding the beneficiary's employment dates for

On motion, the petitioner makes the same assertions it made on appeal, with five additions. We will discuss these additional assertions below.

Motion to Reopen

On motion, in response to our request for evidence of a payroll services agreement between the petitioner and the petitioner provides a client services agreement between the petitioner and A motion to reopen must provide new facts and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). The motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner has provided new facts with supporting documentation not previously submitted. Specifically, the petitioner provided its client services agreement with ADP Totalsource, Inc. to demonstrate that the petitioner, through a payroll service, employed and paid the beneficiary.

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[3] 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).

[4] We stated that 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 as the beneficiary's employer. We stated that it appears that the beneficiary worked for 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). We stated that if is a payroll processing company or other staffing service, evidence of an agreement between the petitioner and must be provided.

[5] We noted that the ETA Form 9089 states that the beneficiary worked for 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, President of , states that the beneficiary worked for 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. at 591-92.

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 as the beneficiary's employer. We stated in our decision that it appears that the beneficiary worked for in 2012 and not for the petitioner. However, the petitioner's client services agreement with submitted on motion demonstrates that the petitioner used as a payroll service. Regarding the issue of whether the petitioner was the beneficiary's employer in 2012, the petitioner has overcome the inconsistencies in the record with independent, objective evidence. Thus, the petitioner has established that was its payroll company in 2012 and that the petitioner was the beneficiary's employer that year.

However, the petition will remain denied for the reasons stated below.

Motion to Reconsider

The regulation at 8 C.F.R. § 103.5(a)(3) provides:

> *Requirements for a 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 Service 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.

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, and that the decision was incorrect based on the evidence of record at the time of the initial decision. Specifically, on motion, the petitioner cites the following excerpt from our decision:

> 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.

The petitioner states that it requested the change from the professional category to the skilled worker category prior to a decision being rendered in this case and that the obligations of the reviewing officer were erroneously applied.

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. A petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971); 8 C.F.R. § 103.2(b)(l), (12). 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).

The petitioner requested that the petition be amended and considered under the skilled worker classification in response to the director's Notice of Intent to Deny (NOID) dated August 12, 2013. While the director has the discretion to approve a change of classification request made prior to adjudication to correct a clerical error, the petitioner does not assert that a clerical error was made in this case.[6] In his decision, the director noted the petitioner's change of classification request and denied the request based on the totality of the record. The director was not obligated to approve the petitioner's change of classification request, and we find no error in his decision to deny the request.

The petition will remain denied because the petitioner has not established 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.

The petitioner makes three additional assertions on motion. First, we noted in our decision that 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.[7] The petitioner asserts that the

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[6] The USCIS website states that "[a]lthough you may request a change of classification prior to adjudication to correct a clerical error in Part 2 of the form, the determination regarding whether to change the visa preference classification will be made by USCIS, based on the totality of the circumstances." *See* http://www.uscis.gov/forms/petition-filing-and-processing-procedures-form-i-140-immigrant-petition-alien-worker (accessed June 30, 2014). The selection of the professional classification on the Form I-140 does not appear to have been a clerical error. The petitioner's counsel asserted in his letter supporting the petition dated May 15, 2013 that the

> minimum educational requirement for this position is a bachelor's degree in Computer Science, or its equivalent, and five years of IT management experience using web-based and relational database solutions. In addition, 5 years of this experience must be in the real estate industry. This experience must also include experience with 4th Dimension relational database environment, and experience with general accounting principles and receivables financing.

He states that beneficiary was qualified for the position based on his "academic equivalency evaluation" combined with his work experience. His letter did not reference the alternate requirement of seven years of experience (in lieu of a bachelor's degree), and did not assert that the beneficiary was qualified under the skilled worker category based on seven years of experience.

[7] The full paragraph containing that excerpt from our decision is as follows:

supporting letter filed with the petition was "in no way intended to state which box Petitioner intended to check on the I-140." The petitioner states that the job is considered a professional one by the DOL and by the petitioner; however, it did not intend to classify the job as a professional one on the Form I-140. However, the petitioner did not submit any evidence that it intended to classify the position as something other than a professional position on the Form I-140. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Second, on appeal, the petitioner noted several of our prior decisions indicating that when a beneficiary is found not to meet the standard of a professional worker, he or she should be considered under the skilled worker classification. Our decision in this case stated that all of the prior cases were "decided prior to the amendment to the Form I-140 that separated the professional and skilled worker categories."[8] On motion, the petitioner states that the amendment to Form I-140 is "irrelevant to this discussion" because skilled workers and professionals still fall under the EB-3 classification. However, the petitioner has not provided any relevant authority establishing that we may ignore its selection of the professional classification on the Form I-140 and, instead, consider the petition under the skilled worker classification. *Id.*

Third, on motion, with respect to the beneficiary's employment with the

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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.

[8] The full paragraph containing that excerpt from our decision is as follows:

> 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.

petitioner states that the beneficiary:

> believes that the information Petitioner submitted on its 9089 is an accurate reflection of his prior employment, however, had conflicting records as to when it terminated his employment in their internal systems.

The petitioner further asserts that the beneficiary "proved he had 14 years, three months, and 29 days of experience" and thus, met the minimum qualifications for the proffered position.[9] However, the petitioner provided no independent, objective evidence of the beneficiary's prior employment with on motion. The letter from Mr. is not sufficient evidence of the beneficiary's employment with Thus, the petitioner has not established that the beneficiary was employed with during the timeframe listed on the ETA Form 9089.[10]

In sum, in its motion to reopen and motion to reconsider, the petitioner has not established 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, and it has not resolved the inconsistent information regarding the beneficiary's employment dates for

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden. The

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[9] Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

[10] The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). The record contains a letter dated August 25, 2013, from Jennifer Issley, Director of Human Resources at DDB Canada, Inc., indicating that the beneficiary was employed as the Manager of Information Systems from September 1, 1993 through March 1, 1997. This letter evidences three years and 6 months of experience. The beneficiary's employment with DDB Canada, Inc., without evidence of additional employment, does not qualify the beneficiary under the alternate qualification of seven years of experience at Part H.8. of the labor certification.

[11] The regulation at 8 C.F.R. §§ 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Section 103.5(a)(1)(iii)(C) states that motions must 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 and, if so, the court, nature, date and status or result of the proceeding.

In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C).

motion to reopen and the motion to reconsider will be granted, the proceedings have been reopened and reconsidered, and the previous decisions of the Texas Service Center and the AAO will not be disturbed.

ORDER: The motion to reopen is granted. The motion to reconsider is granted. The decision of the AAO dated March 6, 2014 is affirmed. The petition is denied.