



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

In Re: 24834421

Date: FEB. 07, 2023

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree)

The Petitioner, a manufacturer's representative company, seeks to employ the Beneficiary as a sales engineer. It requested classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the offered position requires an advanced degree, which is required for classifying a beneficiary as an advanced degree professional. We then dismissed the Petitioner's appeal on the same grounds and further found that the labor certification submitted by the Petitioner was not the original or signed by the Beneficiary. The matter is now before us on a combined motion to reopen and reconsider. 8 C.F.R. § 103.5(a)(2)-(3).

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Upon review, we will dismiss the motions.

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested benefit.

Employment-based immigration generally follows a three-step process. First, a prospective employer must obtain certification from the U.S. Department of Labor (DOL). Section 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position, and that the employment of a noncitizen will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

Second, an employer must submit the certified labor application with an immigrant visa petition for approval from U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. Third, a noncitizen may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

The term “advanced degree” is defined in the regulation at 8 C.F.R. § 204.5(k)(2) as follows:

*Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master’s degree.

In its motion to reconsider, the Petitioner claims that we incorrectly applied the law in our previous decision because the Beneficiary holds the equivalent of a master’s degree under 8 C.F.R. § 204.5(k)(2). However, neither the Director’s denial nor our dismissal addressed the Beneficiary’s qualifications as an advanced degree professional. Both decisions were made on the basis that the offered position does not qualify for the second preference immigrant classification because the position only requires a bachelor’s degree in electrical engineering with no work experience.

As noted in our prior decision, in order to qualify for the second preference immigrant classification as an advanced degree professional, the job offer portion of the labor certification must demonstrate that the offered position requires a professional holding an advanced degree or the equivalent. 8 C.F.R. § 204.5(k)(4)(i). In this case, the job offer portion of the labor certification states that the position of sales engineer only requires a bachelor’s degree in electrical engineering. For this reason, the petition cannot be approved regardless of the Beneficiary’s qualifications.

The Petitioner has not established that we misapplied any law or policy in our prior decision, and therefore does not meet the requirements of a motion to reconsider. 8 C.F.R. § 103.5(a)(3). The motion will be dismissed. 8 C.F.R. § 103.5(a)(4).

In its motion to reopen, the Petitioner states that new circumstances have arisen which qualify the Beneficiary for a national interest waiver of the job offer requirement attached to this employment-based classification. *See* section 203(b)(2) of the Act.

On Form I-140, Immigrant Petition for Alien Workers, Part 2, the Petitioner selected option 1.d., indicating that the petition was being filed for a member of the professions holding an advanced degree or a noncitizen of exceptional ability who is not seeking a national interest waiver. The Petitioner did not select option 1.h., which is for noncitizens applying for a national interest waiver.

A petitioner must establish eligibility at the time of filing. 8 C.F.R. § 103.2(b)(1). Therefore, they may not make material changes to a petition that has already been filed in order to make a deficient petition conform to USCIS requirements. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm’r 1971) (“A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts”). We cannot change the visa

category selected in Part 2 of the Form I-140 once a decision has already been made on the petition.<sup>1</sup> Instead, the Petitioner must file a new Form I-140 under the proper visa category, pay the required fee, and submit supporting documentation establishing eligibility for a national interest waiver.

Because the petition does not qualify for a waiver of the job offer requirement, it must be accompanied by an original, valid labor certification. 8 C.F.R. §§ 204.5(k)(4)(i), 204.5(g)(1). Additionally, labor certifications must be signed by the beneficiary in order to be valid. 20 C.F.R. § 656.17(a)(1). As noted in our prior decision, the labor certification submitted with the petition is not signed by the Beneficiary and is a copy rather than the original. Additionally, as noted above, the labor certification does not support the requested immigrant classification because it does not show that the offered position requires a professional holding an advanced degree. 8 C.F.R. § 204.5(k)(4)(i). The Petitioner's new evidence does not overcome these deficiencies.

The Petitioner has not submitted new facts which establish that, at the time the petition was filed, its labor certification was valid and supported the second preference immigration classification. Therefore, it has not met the requirements of a motion to reopen, and the motion will be dismissed. 8 C.F.R. § 103.5(a)(2), (4).

**ORDER:** The motion to reconsider is dismissed.

**FURTHER ORDER:** The motion to reopen is dismissed.

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<sup>1</sup> Petition Filing and Processing Procedures for Form I-140, Immigrant Petition for Alien Workers, <https://www.uscis.gov/forms/all-forms/petition-filing-and-processing-procedures-for-form-i-140-immigrant-petition-for-alien-workers#Requesting>.