



U.S. Citizenship
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FILE:



Office: NEBRASKA SERVICE CENTER

Date: JUL 10 2006

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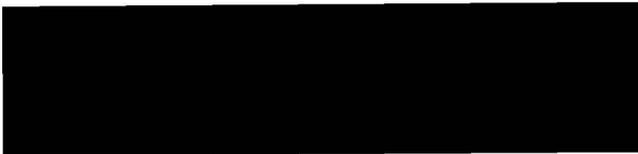
IN RE:

Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant To § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a mortgage company. It seeks to employ the beneficiary permanently in the United States as a loan manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanies the petition. The employer named on that Form ETA 750 labor certification,¹ however, is not the petitioner.

Because the record contained no evidence to demonstrate that the petitioner is the successor-in-interest to the employer identified on the Form ETA 750, the Nebraska Service Center, on March 30, 2004, requested additional evidence. Specifically, the Service Center requested evidence of the type of change of ownership, buyout, merger, etc., and evidence that the petitioner assumed all rights, duties, obligations, and assets of the original employer.

Counsel submitted a response to the Request for Evidence. That response contained evidence pertinent to other issues raised in the request, but no response pertinent to whether the petitioner is the successor-in-interest of the original employer. The director determined that the evidence submitted did not establish that the petitioner is the original employer's successor-in-interest and, on August 3, 2004, denied the petition.

The director determined that the petitioner had not established that it is the successor-in-interest to the employer named on the labor petition and denied the petition accordingly. The director also denied the petitioner's subsequent motion to reopen and reconsider.

On appeal, counsel has not submitted a brief or additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The Department of Labor does not issue a Form ETA 750 labor certification to a potential employee/beneficiary, but to a potential employer/petitioner. Under certain circumstances, the petitioner may substitute a beneficiary. The beneficiary is not permitted, however, to substitute a petitioner. An exception to this rule is triggered if the petitioner is purchased, merges with another company, or is otherwise under new ownership. The successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. See *Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981).

On appeal, counsel asserts that it is permissible to file a petition with a labor certification even though issued to another employer so long as the employment relationship, job duties and job location are the same as with the employer named in the ETA 750. Counsel asserts that the petitioner need not apply for a new labor certification when the job offer and area of employment remain the same, citing *In the Matter of International*

¹ The Department of Labor issued the ETA 750 certification to [REDACTED], of Denver, Colorado, as the prospective employer of the beneficiary.

Contractors Inc. and Technical Programming Services, 89 INA 278 (BALCA 1990); and *In The Matters Of American Chick Sexing Association And Accu-Co, Employer*, 89 INA 320 (BALCA 1992).

In denying counsel's motions, the director properly distinguished *American Chick Sexing*, stating the latter "only applies to the application process for certification and does not extend past the point of certification." The director held in the instant case that once the labor certification issues, "a new employer may not utilize that labor certification to support its own [petition]."

Although 8 C.F.R. 103.3(c) provides that Service precedent decisions are binding on all Service 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 cites two Department of Labor Board of Alien Labor Certification Appeals (BALCA) decisions in support of the appeal. In labor certification proceedings, the Department of Labor's determination is limited to the analysis of the relevant job market conditions and the effect which the grant of a visa would have on the employment situation. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd* 703 F.2d 571 (7th Cir. 1983). USCIS, through the statutorily imposed requirement found in section 204(b) of the Act, shall investigate the facts of each case and determine if the material facts of the petition and labor certification are true. As such, the cases do not alter the fact that the petition is not accompanied by an original labor certification issued in the name of the petitioner as the prospective employer.

Beyond the decision of the director, this office notes that the as an additional reason for denial of the petition, we note the record does not contain an original of the Form ETA 750 labor certification issued to the petition as required by 8 C.F.R. § 204.5(l)(3)(ii)(B). 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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). Had the director denied the petition upon this further ground, no appeal would have been possible. This office would not have jurisdiction over a petition denied based upon lack of a labor certification. The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv). Among the appellate authorities are appeals from denials of petitions for immigrant visa classification based on employment, "except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act." 8 C.F.R. § 103.1(f)(3)(iii)(B)(2003 ed.).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.