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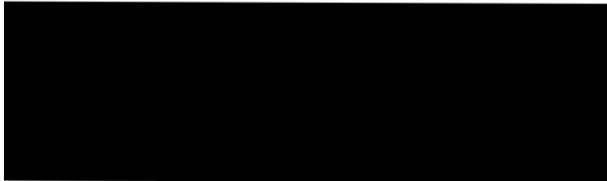
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: NOV 09 2006

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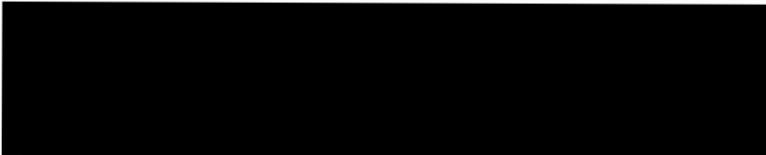
Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or 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:

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 Director, Vermont Service Center, denied the instant employment-based visa petition. Pursuant to a subsequent motion the director reaffirmed the decision of denial and denied the petition. The director certified that decision to the Administrative Appeals Office (AAO).¹ The decision of denial will be affirmed.

The petitioner is a law firm. It seeks to employ the beneficiary permanently in the United States as a patent agent. As required by statute, a Form ETA 9089 Application for Permanent Employment Certification approved by the Department of Labor accompanies the petition. The director denied the petition because he found that the petitioner had failed to demonstrate that the beneficiary is qualified for the proffered position as per the requirements stated on the approved Form ETA 9089 labor certification.

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 or seasonal nature, for which qualified workers are unavailable in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

Section 203(b)(3)(a)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

Eligibility hinges on the petitioner demonstrating that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. 8 C.F.R. § 204.5(l)(3)(ii) and *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The priority date of the petition is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted for processing on June 10, 2005. In section H, item 14, the petitioner set forth the following specific requirement for the proffered position: "All candidates must be registered before the U.S. Patent and Trademark Office as a patent agent."

With the petition counsel submitted an undated letter from the United States Patent and Trademark Office (PTO) Office of Enrollment and Discipline stating that the beneficiary has been accorded limited recognition pursuant to 37 C.F.R. § 10.9(b). That letter further states that the beneficiary's practice before the PTO is limited to prosecution of patent applications for the petitioner's clients in which an employee of the petitioner is the attorney of record. The letter states, further still, that the beneficiary's limited recognition shall expire (1) when the beneficiary ceases to lawfully reside in the United States, (2) when the beneficiary's

¹ Actually the director mistakenly certified the matter to the Board of Immigration Appeals. AAO, however, has jurisdiction and the matter shall be treated as though correctly certified to this office.

employment with the petitioner ceases, (3) when the beneficiary ceases to remain or reside in the United States on an H-1B visa, or (4) on June 23, 2006, whichever comes first.

The petitioner submitted no other evidence pertinent to the beneficiary's registration before or recognition by the PTO. Because the evidence submitted did not demonstrate that the beneficiary was registered before the PTO as a patent agent the Vermont Service Center, on January 24, 2006, requested pertinent evidence. The service center stipulated that the evidence must show that the beneficiary was a registered patent agent by the June 10, 2005 priority date.

In response, counsel submitted a letter, dated April 10, 2006 from the PTO and his own April 20, 2006 letter.

The April 10, 2006 letter from the PTO states that pursuant to his limited recognition status the beneficiary would be eligible, upon adjusting status to lawful permanent resident (LPR), to register as a patent agent by completion of a form and payment of a fee. The letter also states that "A decision to register [the beneficiary] would be subject to a determination by [the Office of Enrollment and Discipline of the PTO] concerning whether [the beneficiary is] of good character." The beneficiary first obtained limited recognition on December 6, 2002.

In his April 20, 2006 letter counsel characterizes the beneficiary's status as "continuous recognition as a patent agent." Counsel further states that the beneficiary's "permanent registration will follow upon his presentation of documentation of his acquisition of permanent residence, without the need for completion of any discretionary examination, interview or other condition subsequent." Counsel cites a Board of Alien Labor Certification Appeals (BALCA) decision for the proposition that the requirement of registration as a patent agent has therefore been satisfied.

On May 18, 2006, the director denied the petition, finding that the evidence submitted did not demonstrate that the beneficiary was, by the priority date, registered before the PTO as a patent agent. On June 7, 2006 the director issued an essentially identical decision, again denying the petition. This office believes that the second decision was issued in error and is superfluous.

Counsel submitted a Form I-290B in this matter on July 10, 2006. The Vermont Service Center deemed that appeal as late and treated it as a motion. In that motion counsel again argued that the evidence submitted, the undated letter from the PTO, demonstrates that the beneficiary's limited recognition enables him to perform the duties of a patent agent.

Counsel further notes that an alien who is not a legal permanent resident (LPR) is not permitted to register as a patent agent. Counsel states that the beneficiary's limited recognition will automatically be converted to registration as a patent agent upon presentation of proof of LPR status, completion of a form, and payment of a fee. Counsel further states that the conversion is therefore purely ministerial and that, pursuant to the BALCA case previously cited, the requirement of the labor certification should be deemed satisfied. Counsel argues that because a non-resident alien cannot satisfy the requirement on the labor certification CIS must deem that requirement to be satisfied by this alternative method.

The director reconsidered the matter and, on August 10, 2006, denied the petition again. The director noted that the approved labor certification in this case requires that the beneficiary be registered as a patent agent before the PTO and that the petitioner had not demonstrated that the beneficiary was so registered. The director certified the matter to this office for review.

The regulation at 37 C.F.R. § 11.9(b) authorizes the PTO to grant limited recognition to various individuals, including nonimmigrant aliens. The beneficiary appears to have been granted limited recognition pursuant to that regulation and his nonimmigrant status. Counsel argues that this status is the equivalent of registration as a patent agent. The terms of the undated letter from the PTO contradict that assertion. Further, the regulation at 37 C.F.R. § 11.6(b) sets forth the requirements and authority of patent agents, which are different from those of individuals with limited recognition under 37 C.F.R. § 11.9(b). The regulatory provisions governing limited recognition specifically differentiate that status from a registered patent agent. The PTO's OED has clearly stated that the beneficiary is only permitted to prosecute patent applications for the petitioner and only under the supervision of one of the petitioner's attorneys.

Counsel further urges that conversion from limited recognition to registration as a patent agent is ministerial, requiring only proof of LPR status, completion and submission of a form, and payment of a fee. As such, counsel argues, the petition should be approved pursuant to BALCA precedent.

First, although 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA 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).

In any event, the case cited to by counsel, *Matter of Perla-Tate*, 90-INA-175 (BALCA Dec. 4, 1992) (en banc), *aff'd on recon.* (Feb. 10, 1992), is distinguishable from the facts of the instant petition. In *Perla-Tate*, physicians and physician assistants were deemed ineligible for labor certification if they did not have a state license or if obtaining that state license was not feasible "within a proximate time of the alien's entry into the United States through the completion of a ministerial process." That case involved the second preference category while the case at hand involves the third preference category, which involves different regulations in determining beneficiary qualifications and eligibility for immigration benefits. Additionally, *Perla-Tate* involved state requirements not delineated on the labor certification application². In the case at hand, *the petitioner*, not a state, set forth the requirements of being registered before the PTO.

² Likewise, in Schedule A nurse cases, CIS policy dictated approving foreign nurses who did not have a nursing license if they submitted a letter from a state licensing board stating their eligibility to receive a license (because they needed lawful permanent resident status to obtain a social security number in order to obtain a license). See Memo. From Thomas E. Cook, Acting Asst. Commr., U.S. Dept. Homeland Sec., to Reg. Dirs., Dist. Dirs., Officers-in-Charge & Serv. Ctr. Dirs., *Adjudication of Form I-140 Petitions for Schedule-A Nurses Temporarily Unable to Obtain Social Security Cards*, (Dec. 20, 2002). CIS has not extended that policy to other occupations with state licensing requirements, and it is noted that nurses have been designated a shortage occupation eligible for exemption from the labor certification process. Practicing before the PTO is also not a state regulated occupation but rather an administrative agency regulated practice. A nurse could not practice nursing without a license. However, the PTO has set forth a rule that a patent agent could represent clients in a status less than registered as an agent subject to conditions not present if

Further, the last sentence of the April 10, 2006 letter from the PTO makes clear that the conversion from limited recognition to registered patent agent is not purely ministerial, but involves a determination by the PTO pertinent to moral character. According to the PTO regulation at 37 C.F.R. §§ 11.7(g) and (h), good moral character and reputation involves submitting evidence proving the negative of a felony conviction, drug or alcohol abuse, lack of candor, suspension or disbarment, or resignation from a state bar. Even if this office accepted the BALCA case as binding precedent, it would not support counsel's position in this matter.

The approved labor certification in this matter states that, in order to be qualified for the proffered position, the beneficiary must be registered as a patent agent before the PTO. The petitioner has not demonstrated that the beneficiary was so registered by the priority date. That a non-resident alien cannot satisfy the condition stated on the labor certification does not mandate that this office construe some other way in which the condition may be satisfied.

The petitioner was free to stipulate on the labor certification application that the position was open to people granted limited recognition by the PTO. Such a stipulation would have opened the position to U.S. workers with limited recognition. By not including such a provision the petitioner may have excluded U.S. workers with limited recognition from applying for the proffered position. Counsel now argues, however, that the position should be offered to an alien on the basis of his limited recognition. That argument does not convince this office.

The evidence submitted does not demonstrate credibly that the beneficiary is a registered patent agent. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position and the petition may not be approved.

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 decision of denial is affirmed.

fully registered. The petitioner did not set forth that lesser status as its minimum requirement to be qualified for the proffered position and cannot alter that expressed intent after DOL's review and certification of the position's requirements and the petitioner's recruitment process involving the disqualification of U.S. candidates applying thinking they needed to be registered and not simply in a limited recognized status before the PTO. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).