

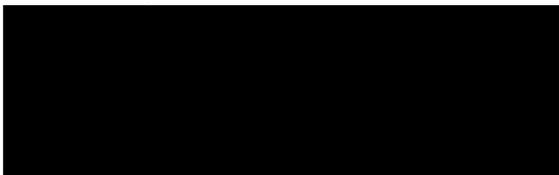


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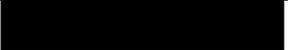
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FILE:



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Office: VERMONT SERVICE CENTER

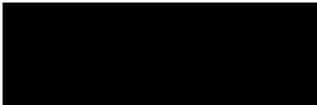
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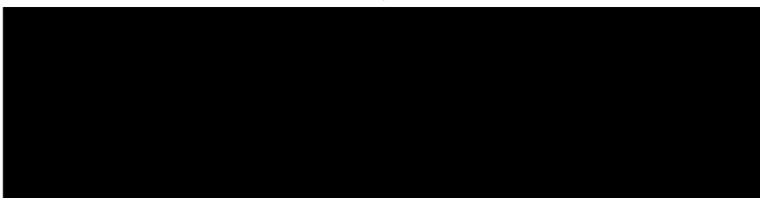
Petitioner:

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 preference visa petition was denied by the Acting Center Director (Director), Vermont Service Center. Upon completion of reviewing the record of proceeding after granting a motion to reopen, the director affirmed the previous decision. Now the matter is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as an Indian cuisine cook. The petitioner claimed that a Form ETA 750, Application for Alien Employment Certification (labor certification or the Form ETA 750), on behalf of the beneficiary was approved by the Department of Labor (DOL) on January 28, 2002. However, the petitioner did not submit the approved labor certification with the petition. The director determined that the record contains no evidence of labor certification by the Secretary of Labor or his designated representative. The director denied the petition accordingly.

On appeal, counsel submits a brief without additional evidence.¹

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 regulation at 8 C.F.R. § 204.5(l)(3) states in pertinent part:

Initial evidence – (i) Labor Certification or evidence that alien qualifies for Labor Market Information Pilot Program. Every petition under this classification must be accompanied by an individual labor certification from DOL, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the DOL's Labor Market Information Pilot Program.

The instant I-140 petition was submitted on March 14, 2003 without the original approved labor certification from DOL. On March 4, 2004 the director issued a request for additional evidence (RFE), requesting the petitioner to submit an original completed DOL Form ETA 750, Parts A and B. In response to the director's RFE, counsel submitted a copy of uncertified Form ETA 750 and a correspondence between counsel and DOL. On June 15, 2004 the director denied the petition finding the submitted ETA 750 forms do not contain the endorsement stamps necessary for approval. On August 26, 2004 the director affirmed her decision of denial after granting a motion to reopen and reviewing the record.

On appeal, counsel asserts that the petitioner petitioned the director to request a duplicate labor certification, however, the director failed to request and obtain a duplicate labor certification from DOL upon receipt of a request from the petitioner under the regulation at 20 C.F.R. §656.30.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). However, since the petitioner does not submit new evidence, the AAO will evaluate the decision of the director, based on the evidence submitted prior to the director's decision only.

The instant petition is not an application for Schedule A designation, nor does it establish that the beneficiary qualifies for one of the shortage occupations in DOL's Labor Market Information Pilot Program. Therefore, the petitioner must submit an original individual labor certification from DOL as initial evidence to support its petition under 8 C.F.R. § 204.5(1)(3). However, the petitioner claimed with its initial filing that it never received the certification although the certification was issued by DOL on January 28, 2002, and requested that the director request a duplicate approval of the application for alien labor certification directly from DOL. Counsel's submission letter dated March 13, 2003 stated in pertinent part that:

We were informed by the Certifying Officer that [the beneficiary]'s Application for Alien labor Certification was approved by the U.S. Department of Labor on **January 28, 2002**. [The beneficiary] was issued Case [REDACTED]. The approved application for alien labor certification was mailed to this office, but was never received in the mail. The employer also informed us that he has not received the approval of the application of alien labor certification.

Please note, the Certifying Officer of the U.S. Department of Labor advised on March 4, 2003, that they will not issue a duplicate approval of the alien labor certification to the attorney or the employer. The Certifying Officer of the USDOL further advised, that duplicate approvals of certified applications for alien labor certification will only be issued to [CIS], once your agency makes an internal request for a **duplicate** approval of the certified application with their agency.

At this time, we respectfully request that your office request a **duplicate** approval of the application for alien labor certification directly from the Certifying Officer of the USDOL at 201 Varick Street, Rm. 755, New York, New York 10014, and proceed with the processing of Form I-140.

(Emphasis in original).

As counsel quotes on appeal, the regulation at 20 C.F.R. § 656.30(e) states that:

Certifying Officer shall issue duplicate labor certifications only upon the written request of a Consular or Immigration Officer. Certifying Officer shall issue such duplicate certifications only to the Consular or Immigration Officers who submitted the written request. An alien, employer, or an employer or alien's agent, therefore, may petition an Immigration or Consular Officer to request a duplicate from a Certifying Officer.

Generally in visa petition proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. §1361. The regulation does not provide any remedies to the petitioner to provide a duplicate labor certification when it has not received the approval from DOL. Instead, the regulation limits certifying officers only to issue a duplicate approval to consular or Immigration officers who submitted a written request for such a duplicate. The record of proceeding shows that on October 28, 2004 the director requested DOL to issue a duplicate labor certification for the instant case. In response to the request on November 30, 2004, DOL informed the director that they were unable to issue a duplicate certification because this case could not be found in their archive department.

Therefore, the AAO finds that the director has done all that she can do in order to obtain a duplicate labor certification. There is no other evidence in the record of proceeding that the labor certification was approved by DOL. Pursuant to the regulation at 8 C.F.R. § 204.5(1)(3) it is the burden solely with of the petitioner to have its petition under this classification accompanied by an individual labor certification certified by DOL. In

the instant case, the petitioner failed to meet this burden by not establishing that an individual labor certification for the proffered position was approved. Without objective evidence to prove or confirmation from DOL that the labor certification for the instant petition was certified, CIS cannot further process the petition, and the petition must be denied.

In view of the foregoing, the appeal will be dismissed, the previous decision of the director will be affirmed and the petition remains denied.

ORDER: The appeal is dismissed.