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FILE:

SRC 06 800 09185

Office: TEXAS SERVICE CENTER

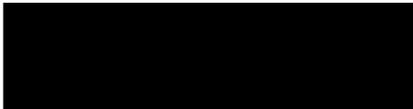
Date:

AUG 14 2007

IN RE:

Petitioner:

Beneficiary:



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

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, Texas Service Center, denied the preference visa petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded for further consideration.

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a retail store manager. The director determined that the petitioner had not submitted with the petition an original labor certification (Form ETA 750, Application for Alien Employment Certification,) approved by the Department of Labor as required by statute. The director denied the petition accordingly.

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial, the single issue in this case is whether or not the petitioner submitted with the petition an original labor certification (Form ETA 750, Application for Alien Employment Certification,) approved by the Department of Labor as required by statute.

Section 203(b)(3)(A)(i) of 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 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 the Department of Labor, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. . .

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Initial evidence. (1) *General.* Specific requirements for initial supporting documents for the various employment-based immigrant classifications are set forth in this section. In general, ordinary legible photocopies of such documents (**except for labor certifications from the Department of Labor**) will be acceptable for initial filing and approval. However, at the discretion of the director, original documents may be required in individual cases. Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

(Bold emphasis added.)

The regulation at 8 C.F.R. § 103.2(b)(4) states:

Submitting copies of documents. Application and petition forms must be submitted in the original. Forms and documents issued to support an application or petition, such as labor certifications, Form IAP-66, medical examinations, affidavits, formal consultations, and other statements, must be submitted in the original unless previously filed with the [Citizenship and Immigration Services (CIS)].

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 Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1(2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(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.). However, in this case, there is a labor certification in the record of proceeding, but it is a copy and an original is required.

The regulation at 20 C.F.R. § 656.30(e) states:

Duplicate labor certifications.

- 1) The Certifying Officer shall issue a duplicate labor certification at the written request of a Consular or Immigration Officer. The Certifying Officer shall issue such duplicate labor certifications only to the Consular or Immigration Officer who initiated the request.
- 2) The Certifying Officer shall issue a duplicate labor certification to a Consular or Immigration Officer at the written request of an alien, employer, or an alien's or employer's attorney/agent. Such request for a duplicate labor certification must be addressed to the Certifying Officer who issued the labor certification; must include documentary evidence from a Consular or Immigration Officer that a visa application or visa petition, as appropriate, has been filed; and must include a Consular Officer or DHS tracking number.

In the instant case, the record contains information from counsel explaining that the original labor certification was submitted with a prior petition (SRC 03 104 53194) for the same beneficiary. Counsel specifically stated that the original labor certification was in the control of CIS and not his client.

Since the evidence in the record suggests that the petitioner did have an approved ETA 750 for the beneficiary, purported to have been submitted in support of a prior petition, and since there is no evidence in the record that the director attempted to obtain a duplicate labor certification from the Department of Labor as permitted by the regulation at 20 C.F.R. § 656.30(e), we must remand the matter for the purpose of obtaining the original labor certification from the prior petition (if possible) or *contacting the Department of Labor for a duplicate* pursuant to the regulation at 20 C.F.R. § 656.30(e).

After the original or duplicate has been obtained, the director shall render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility, including but not limited to the beneficiary's qualifications for the certified position and the petitioner's ability to pay the proffered wage. As



always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's initial decision on the petition is withdrawn. The petition is remanded to the director to be adjudicated on its merits and for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.