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U.S. Citizenship
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FILE:



Office: TEXAS SERVICE CENTER

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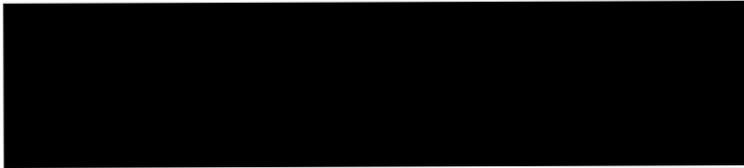
Petitioner:



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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center,¹ and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner is a medical clinic. It seeks to employ the beneficiary permanently in the United States as a licensed practical nurse. The petition is accompanied by a copy of Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not submitted the original of the Form ETA 750 and denied the petition accordingly. The director provided no further information as to any appeal rights or ability to submit a motion to reopen or reconsider in his decision.

With regard to initial evidence for petitions for professionals or skilled workers 8 C.F.R. § 204.5(l)(3), in pertinent part, states:

- (i) Labor certification or evidence that alien qualifies for Labor Market Information 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.

With regard to initial evidence, 8 C.F.R. § 204.5(g)(1) states: "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."

The labor certification documentation is pivotal to the further adjudication of the I-140 petition. The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In this case, the Form ETA 750 was certified by the Department of Labor on January 14, 1998.

With regard to the submission of evidence in response to the director's request for further evidence, 8 C.F.R. § 103.2 (11) states in pertinent part: "All evidence submitted in response to a [CIS] request must be submitted at one time. The submission of only some of the requested evidence will be considered a request for a decision based on the record."

Furthermore, 8 C.F.R. § 103.2 (b) (5) states, in pertinent part:

Where a copy of a document is submitted with an application or petition, the [CIS] may at any time require that the original document be submitted for review. If the requested original, other than one issued by the [CIS] is not submitted within 12 weeks, the petition or application shall

¹ On September 21, 2005, the director had requested further evidence from the petitioner as to the petitioner's ability to pay the proffered wage and also requested the original Form ETA 750. The petitioner responded to the director's request with evidence as to the petitioner's ability to pay the proffered wage. The director then denied the petition based on the record as constituted at the time of the petitioner's response.

be denied or revoked. There shall be no appeal from a denial or revocation based on the failure to submit an original document upon the request of the [CIS] to substantiate a previously submitted copy. Further, an applicant or petitioner may not move to reopen or reconsider the proceeding based on the subsequent availability of the document.

The record reflects that the director in his request for further evidence specifically asked that the petitioner submit the original Form ETA 750. The record also reflects that the director made his decision prior to the twelve weeks allowed to submit further evidence. Nonetheless, the regulation at 8 C.F.R. § 204.5(1)(3) clearly establishes that the director can make a determination on a petition when partial evidence has been received. Since the two regulations in question conflict somewhat within the context of the instant petition, and the director did not provide the petitioner with the allowed response of twelve weeks, the AAO will comment more fully on the rejection of this appeal. Nevertheless, the appeal will be rejected based on 8 C.F.R. § 103.2 (b)(5).

The record contains a copy of the Form ETA 750 that was submitted with the initial petition. On appeal, counsel submits a copy of the Form ETA 750 previously submitted to the record. The record also establishes that on November 14, 2005, in response to the director's request for further evidence, the petitioner, perhaps through its accountant, submitted copies of its Form 1120 tax returns from 1999 to 2004, as well as copies of the beneficiary's W-2 forms for tax years 1998 to 2004.

On appeal, counsel asserts that the director in his request for further evidence gave the petitioner twelve weeks to respond to the request and states that December 21, 2005 is the appropriate date, twelve weeks after the request, to submit the requested evidence. Counsel then states that the petitioner's accountant mailed the copies of the petitioner's tax returns directly to the Texas Service Center on November 14, 2005. Counsel then asserts that Citizenship and Immigration Services (CIS) denied the petitioner on November 21, 2005, prior to the twelve weeks period of time stipulated to submit evidence. Counsel states that CIS wrongfully denied the petitioner and the beneficiary the proper amount of time to provide all the requested evidence. Counsel states that she submits a copy of all the evidence requested on appeal.

As previously stated, the regulation at 8 C.F.R. § 103.2 states in pertinent part that the submission of only some of the requested evidence will be considered a request for a decision based on the record. Therefore the director was well within his authority to make a determination of the petition upon the receipt of the petitioner's income tax returns on November 14, 2005.² The AAO notes that the petitioner apparently established its ability to pay the proffered wage as of the 1998 priority date based on the beneficiary's wages because the director made no reference to the petitioner's ability to pay the proffered wage in his decision.

The record also reflects that a copy of the original Form ETA 750 certified by the Department of Labor in 1998 was submitted with the initial petition on September 15, 2005. The director in his request for further evidence specifically requested the original Form ETA 750, and not a copy of the Form ETA 750. It is further noted that counsel on appeal submits a copy of the original Form ETA 750, rather than the original Form ETA requested by the director. The record also does not contain any explanation for why the original Form ETA

² The AAO notes that although the director does not explicitly state this in his decision, the petitioner, based on the beneficiary's W-2 forms for tax years 1998 to 2004, established that the petitioner had paid the beneficiary a salary greater than the proffered wage of \$22,276.80 during all the relevant tax years. The beneficiary's W-2 Forms establish that she earned \$27,130.71 in 1998, \$31,267.14 in 1999, \$35,920 in 2000, \$33,835 in 2001, \$35,517.50 in 2002, \$36,225 in 2003 and \$34,615 in 2004.

was not submitted either with the initial petition, in response to the director's request for further evidence, or on appeal.

The AAO notes that on appeal counsel still submits a copy of the Form ETA 750, rather than the original document. Thus, while the petitioner may not have had the allowed twelve weeks to submit all the evidence requested, the record suggests that the petitioner may well have not submitted the original Form ETA 750 even if provided the twelve weeks within to submit the requested evidence. The AAO finds that the director was within his authority to deny the petition pursuant to 8 C.F.R. § 103.2(b)(5) with no recourse to an appeal. As this AAO has no appellate jurisdiction in the instant matter, the AAO will reject the appeal.³

ORDER: The appeal is rejected.

³ Beyond the decision of the director, the AAO notes that the petitioner has not established that the beneficiary is qualified to perform the duties of the position. 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).

As stated on the Form ETA, Part A, line 15, other special requirements, "Bilingual: Spanish/English. Certified as a Nurse assistant or Nurse Aid, or has ability to obtain Texas certification as Nurse Assistant or Nurse Aid." The record contains no documentation as to the beneficiary's licensure as a nurse assistant, or for the occupational title identified by the Department of Labor for the proffered position, Licensed Practical Nurse. Furthermore the record contains no letter of work verification as to the beneficiary's two years of previous work experience as a Licensed Practical Nurse. *See* 8 C.F.R. § 204.5(1)(3).

The appeal, if reviewed by the AAO, would have been denied for both the lack of the original Form ETA 750 document, and for the lack of requisite licensure, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. In the instant petition, the petitioner has not met that burden.