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U.S. Citizenship
and Immigration
Services

B6



FILE:



Office: TEXAS SERVICE CENTER

Date: **AUG 04 2008**

SRC-05-257-50899

IN RE:

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, Texas Service Center (director) denied the employment-based preference visa petition based on the petitioner's failure to establish its ability to pay the beneficiary the proffered wage, and for its failure to demonstrate that the beneficiary had the required experience for the position offered. The petitioner appealed to the Administrative Appeals Office ("AAO"), and asserted that it had requested more time to respond to the director's Request for Evidence ("RFE"), which the director failed to grant. The AAO remanded the petition to the director to issue an RFE related to both bases for denial, and then for the director to render a determination on the merits of the petition. The director issued an RFE. The petitioner failed to respond to the RFE. The director denied the petition based on abandonment. The petitioner filed a Motion to Reopen, which the director denied and certified the decision to the AAO in accordance with the remand that the decision be certified to the AAO if the director's decision was adverse to the petitioner. The director's decision will be withdrawn and the matter will be remanded to the director for re-issuance of the RFE to counsel's current address.

The petitioner is a tailor shop. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. As required by statute, the petition was filed with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). On April 28, 2008, the director denied the petition for abandonment as the petitioner failed to respond to the director's RFE. As the petition was denied for abandonment, the petitioner was unable to appeal the director's decision, but instead filed a motion to reopen, which the director denied and certified to the AAO.

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. See DHS Delegation No. [REDACTED] (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those 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) (2005 ed.).

Certifications by regional service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

The petitioner seeks to classify the beneficiary as a skilled worker. 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that the Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. See 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential

element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2).

The history of the case, while incorporated into the record, is pertinent to this matter, and in order to fully understand its progression, is summarized in a chronology as follows:

- On March 12, 2001, the petitioner, filed Form ETA 750 on behalf on the beneficiary for the position of alteration tailor, at a pay rate of \$8.82 per hour, which is equivalent to \$18,345.60 per year based on a 40 hour work week;
- On July 27, 2005, the Form ETA 750 is approved;
- On September 22, 2005, the petitioner filed Form I-140 on behalf of the beneficiary. The petitioner listed the following information on the Form I-140 Petition: date established: October 1, 1975; gross annual income: \$5,000,000; net annual income: \$400,000 and current number of employees: 63;
- On October 14, 2005, the director issued a Request for Evidence for the petitioner to submit documentation related to the petitioner's ability to pay the beneficiary the proffered wage and the beneficiary's prior experience as the petition was initially filed with no evidence of either;
- On January 5, 2006, counsel requested an extension of time to respond to the RFE, as "the information requested was sent to my office by the Petitioner and Beneficiary via certified mail which was not received by my office assistant being out on maternity leave and was not here to sign for the certified mail. The package was the returned to the Post Office and its whereabouts are currently unknown."
- On January 20, 2006, the director denied the Form I-140 petition as the petitioner failed to provide evidence in response to the RFE that it could pay the beneficiary the proffered wage. Further, the petitioner failed to establish that the beneficiary had the experience required for the position offered;
- The petitioner appealed to the AAO. On appeal, counsel asserted that the petitioner had requested additional time to respond to the RFE as the response materials the petitioner sent to counsel by certified mail were returned to the post office and their whereabouts unknown. Counsel submitted the requested items on appeal,¹ including the petitioner's 2001 through 2004 federal tax returns,² as well as a letter to evidence the beneficiary's experience.
- On August 28, 2007, the AAO issued a decision, which considered the documentation submitted, noted its deficiencies and remanded the petition back to the director to adjudicate the petition on its merits. Specifically, the AAO director noted that the director was bound by 8 C.F.R. 103.2(b)(8), and could not allow the petitioner additional time to respond to the RFE. Further, the petitioner's ability to pay could not be adequately assessed as the petitioner failed to provide all relevant schedules and attachments. Additionally, the letter submitted to document that the beneficiary had the required experience to meet the terms of the certified labor certification failed to provide the title of the person who wrote the letter, or adequately describe the beneficiary's job duties as required by 8 C.F.R. § 204.5(l)(3).

¹ The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988).

² The petitioner failed to submit all relevant schedules and attachments.

- On January 3, 2008, the director issued an RFE for the petitioner to provide evidence of the petitioner's ability to pay the proffered wage, including the petitioner's federal tax returns for 2001 through 2006, including all relevant schedules, or the petitioner's audited financial statements, or annual reports for the specified years, as well as Forms W-2 if the petitioner employed the beneficiary in any of the relevant years. The RFE additionally requested that the petitioner provide an experience letter that contained the title of the individual who wrote the letter, and provided a detailed description of the beneficiary's job duties in conformance with the regulation.³
- The petitioner failed to respond to the director's RFE. On April 28, 2008, the director denied the petition due to abandonment. 8 C.F.R. § 103.2(b)(15) provides that a denial due to abandonment cannot be appealed, but an applicant or a petitioner may file a motion to reopen under 8 C.F.R. § 103.5.
- The petitioner filed a Motion to Reopen the petition. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. *See* 8 C.F.R. § 103.5(a)(2).
- In the petitioner's Motion to Reopen, counsel asserted that he had advised CIS of his change of address before the RFE was sent, and that the RFE was not sent to his new address. Further, he asserts that as of the date he filed his Motion to Reopen, that he had not yet received the RFE.
- The director denied the petitioner's Motion to Reopen and certified the petition to the AAO.

In the director's certification, the director provides that while counsel asserts that it provided the AAO with its change of address, that the petitioner did not provide evidence that it used Form AR-11 to register the change of address. The director continues that notification of the Texas Service Center would also be sufficient for purposes of registering an address change. However, while CIS confirmed the change of address on March 11, 2008, based on counsel's March 2, 2008 correspondence, the director provides that "the attorney of record had not completed the AR-11 or contacted the Texas Service Center until 2 months after the issuance of the Request for Evidence." Based on the change of address, the director provides that CIS could have abandoned the case, or could have reissued the RFE, and allowed the attorney of record another 12 weeks to respond. The director provides that he chose to deny the petition for abandonment, otherwise, the petitioner would have had over five months to respond to the RFE. Further, the director stated that after counsel gave notice of his change of address, counsel, despite assertions that CIS said it would resend the RFE, did not follow up until the denial for abandonment was received. The director certified the decision to the AAO, as the denial of the Motion to Reopen was adverse to the petitioner.

The specific issue before the AAO is whether CIS properly denied the petitioner's Motion to Reopen the abandoned petition.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. *See* 8 C.F.R. § 103.5(a)(2). More specifically, a Motion to Reopen an application denied due to abandonment must be filed with evidence that the decision was in error because:

- (i) The requested evidence was not material to the issue of eligibility;

³ We additionally note that the original letter was deficient in that it also failed to confirm whether the beneficiary was employed on a full-time or a part-time basis in order to calculate the total time that the beneficiary was employed.

- (ii) The requested initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or
- (iii) The request for additional information or appearance was sent to an address other than that on the application, petition, or notice of representation, or that the applicant or petitioner advised the Service,⁴ in writing, of a change of address or change of representation subsequent to filing and before the Service's request was sent, and the request did not go to the new address.

8 C.F.R. § 103.5(a)(2).

The requested evidence was material to the issue of eligibility, and the requested evidence was not initially submitted with the petition. Therefore, to properly be reopened, counsel would need to demonstrate that under 8 C.F.R. § 103.5(a)(2)(iii) he had provided his change of address to "the Service" (CIS) before CIS sent the RFE.

We note that counsel listed his address on Form I-140 in Part I related to information about the person or organization filing this form, and his address would likely have been entered for the petitioner's address, and, therefore, would be required to give notice of change of his address to meet 8 C.F.R. § 103.5(a)(2). Further, CIS records would reflect counsel's address for purposes of mailing petition related information and would therefore require change as well.

On motion, counsel provides that on December 5, 2007, before the director issued the most recent RFE, he contacted the AAO, part of CIS, to provide his new address. The record contains a letter date stamped December 5, 2007, which provided, "I have not received a decision and am concerned that possibly it was sent to my old address. Please reflect that I have moved to a new office [address provided]." The AAO issued notice to counsel on December 7, 2007 that the petition was remanded to the originating office on August 28, 2007, and that the AAO did not have the record.

On March 2, 2008, counsel submitted a letter to the Texas Service Center, which provided that he had sent a change of address to the AAO, and that he would "like to make sure that your office [TSC] had my correct address." Counsel continues, "the Case Status Online system indicates that on January 3, 2008 a request for additional evidence was mailed but neither I nor my client have received anything. Please check to see that you have my correct address [new address provided]." Counsel additionally attached a March 24, 2008 Case Status Notice, which provided that the post office returned the RFE notice as undeliverable on January 26, 2008. The petitioner additionally provided a printout from an "INFOPASS" appointment that the beneficiary scheduled with the local Memphis, Tennessee office on March 31, 2008.

Counsel contends that he used all the means necessary to notify CIS of his change of address. Further, he provides that completion of Form AR-11 is not for petitioners, but instead for aliens to provide notice of their address change.

⁴ Service is defined at 8 C.F.R. § 1.1(c) as, after March 1, 2003, "unless otherwise specified, references to the Service after that date mean the Bureau of Citizenship and Immigration Services, the Bureau of Customs and Border Protection, and the Bureau of Immigration and Customs Enforcement."

Form AR-11 is the "Alien's Change of Address Card." The form specifically provides that "this card is to be used by all aliens to report a change of address within ten days of such change." The Form allows the individual to provide their name, status (visitor, student, permanent resident, or other), country of citizenship, present address, prior address, the alien's employer or school, date and port of entry into the U.S., stay expiration date if not a permanent resident, and the alien's signature. We agree with counsel that he, as the petitioner's representative, would not have to report an attorney's change of address on Form AR-11. Nothing on the form contemplates that counsel would be required to give notice of a change of address via Form AR-11.

CIS's website provides that "customers who have an application and/or petition which has been filed with [CIS] but has not yet been decided (also known as a 'pending' case) should notify [CIS] of any change of address as soon as possible after moving." The website provides that many addresses can be changed online, or alternatively provides that a change of address may be reported to CIS Customer Service via its toll-free number provided on the website and also on the Form I-140 receipt. See <https://egov.uscis.gov/crisgwi/go?action=coa> accessed July 7, 2008. The case status notice that counsel printed also provides a phone number for the petitioner to call in order to update its mailing address for the notice to be resent, as does the receipt mailed for filing a petition.

While CIS instructions relate to changing a petitioner's address, as counsel listed his address on Form I-140, it would be critical to provide CIS the new address. Further, CIS records would reflect counsel's address for purposes of mailing petition related information and would therefore require change as well. Without correction, CIS would not have either the petitioner's proper address, or counsel's proper address on record.

The beneficiary would not be required to report counsel's change of address to the local office through use of an Infopass appointment. Further, the local office would not have her record, or the Form I-140 petition on file in order to provide a copy of the RFE.

Following notification from the AAO that the petition had been remanded to the director, counsel should have phoned CIS Customer Service, or written the Texas Service Center where the petition was then pending, as he later did, to provide proper notice of counsel's change of address. The AAO, however, could have forwarded the new address to the record of proceeding, which was at that time with the director. As the AAO's response to counsel advises that all "documents have been returned to the Texas Service Center," counsel could have concluded that the AAO had forwarded the change of address to the director. Moreover, the regulation at 8 C.F.R. § 103.5(a)(2)(iii) only requires evidence that the petitioner had advised "the Service," now CIS, of its new address. The AAO is part of CIS. Thus, the petitioner filed a proper motion to reopen.

The director's decision to deny the petitioner's motion to reopen is withdrawn. The matter is remanded to the director for the purpose of reissuing the RFE to counsel's current address. We note that 8 C.F.R. § 103.2(b)(8) does not mandate that the petitioner be given the full twelve weeks to respond; rather, twelve weeks is the maximum response time that can be granted. Thus, given the director's concerns expressed in the denial for abandonment, the director may determine that a shorter response time is sufficient, especially given that the deficiencies in this matter have been set forth in several notices.

As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed in the AAO's previous remand order. Therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for re-issuance of the most recent RFE and ultimately issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.