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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: NOV 09 2010

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a wholesale export financial services business. It seeks to employ the beneficiary permanently in the United States as an accountant. The director determined that the petitioner had not complied with the instructions for electronic filing by submitting the original ETA Form 9089, Application for Permanent Employment Certification, as certified by the U. S. Department of Labor (DOL) within seven business days of electronically filing the Form I-140, Immigrant Petition for Alien Worker. The director denied the petition accordingly.

On appeal, counsel asserted that the petitioner did not have the original ETA Form 9089 to submit with the evidence initially provided because previous counsel would not release that form. Counsel indicated that previous counsel in this matter alleged that the petitioner owed him money and would not provide the ETA Form 9089 until the money was paid. Counsel indicated that in lieu of the original ETA Form 9089, the petitioner filed a copy of the ETA Form 9089 within seven business days of the electronic filing of the Form I-140.

However, the record indicates that the petitioner filed only a copy of the DOL ETA Form 9089 cover letter with the supporting documents initially filed in this case. Further, the record reflects that the director received this cover letter, together with all the initially filed supporting documents in this matter, on October 9, 2007. This date is 8 business days after the electronic filing of the petitioner's Form I-140, which took place on Wednesday, September 26, 2007.[1]

Counsel indicated that the director should have issued a request for evidence (RFE) or notice of intent to deny (NOID) prior to issuing a denial in this matter. As authority, counsel relied primarily on the William Yates, United States Citizenship and Immigration Services (USCIS), Associate Director, Operations, February 16, 2005 Interoffice Memorandum to Regional Directors, Service Center Directors, District Directors and Officers-in-Charge, Re: Requests for Evidence and Notices of Intent to Deny. Counsel indicated that USCIS, as a matter of discretion, in keeping with the Yates' February 16, 2005 memorandum, should have issued an RFE as the petitioner had submitted, for example, a valid ETA case number for the ETA Form 9089 and that this indicated that the petitioner could establish eligibility. Counsel is incorrect. First, USCIS memoranda merely articulate internal guidelines for USCIS personnel. They do not establish judicially enforceable rights. An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(*quoting Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)). Moreover, the instant petition was filed on September 26, 2007. The regulation regarding RFEs and NOIDs as in place from June 18, 2007 onward at 8 C.F.R. § 103.2(b)(8)(iii) governs in this matter. This regulation sets forth that USCIS may, in its discretion, deny a petition which is not filed with all the required initial evidence or is filed with evidence that does not demonstrate eligibility.

[1] Monday, October 8, 2007 was a Federal holiday.

The record reflects that the petitioner initially submitted supporting documentation on October 9, 2007 or more than seven business days after electronically filing the petition. Moreover, the petitioner did not submit the ETA Form 9089 as certified by the DOL until June 9, 2008, on appeal.

As stated by the director, the regulation at 8 C.F.R. § 103.2(a)(1) provides that the instructions for filing applications and petitions are "incorporated into the particular section of the regulations in this chapter requiring its submission." The instructions for the electronic filing of a Form I-140 as well as the general electronic filing instructions regarding the submission of supporting documentation are available at www.uscis.gov. The instructions for the electronic filing of the Form I-140 provide that if the petitioner does not submit the original ETA Form 9089 as certified along with the rest of the required initial evidence within seven business days the petitioner "will not establish a basis for eligibility and [USCIS] may deny [the] petition or application." The petitioner did not submit the original ETA Form 9089 as certified within seven business days[2] from the date of the electronic filing of the Form I-140. Thus, the petitioner did not establish a basis for eligibility and the director did not err in denying the petition.

The burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met its burden.

ORDER: The appeal is dismissed.

[2] The ETA Form 9089 was not submitted until June 9, 2008, more than eight months after the petition was electronically filed.