



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **APR 23 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
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:

SELF-REPRESENTED

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.

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The director denied the petition and the petitioner filed a motion to reopen. The director granted the motion and after issuing a Request for Evidence, affirmed the denial of the petition. The petitioner's subsequent appeal was rejected by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reconsider. The motion will be granted. The AAO withdraws its previous decision in part, and remands the application for further action and consideration.

The petitioner describes itself as a truck equipment manufacturer. It seeks to permanently employ the beneficiary in the United States as a welder. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). The director determined that the petition was not filed with an original labor certification from the Department of Labor (DOL) and denied the petition accordingly.

Former counsel filed a motion to reopen the director's decision. In the motion, counsel noted the error in the request to the DOL for a duplicate labor certification, as the petition involved a substitution of beneficiaries and the request to the DOL mentioned only the instant beneficiary. The director granted the motion and subsequently affirmed its denial, as an original labor certification still could not be located internally.

The AAO's decision rejecting the appeal concludes that 1) the appeal was not properly filed by the petitioner as its counsel was disbarred, 2) the AAO did not have jurisdiction over the appeal as it was filed without an original labor certification, 3) the petitioner failed to establish its ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence, and 4) the petitioner failed to establish the beneficiary was qualified for the proffered position.

The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner asserts that the AAO made an erroneous decision through misapplication of law or policy.

On motion, the petitioner asserts that the appeal was properly filed because its attorney was fully licensed at the time the Form I-290B, Notice of Appeal or Motion, was filed. The record reflects that the Form I-290B was filed on April 28, 2008. The record reflects that the petitioner's former counsel was disbarred on February 27, 2011.¹ Given this, the appeal was properly filed and the AAO withdraws this portion of its decision.

On motion, the petitioner also requests the withdrawal of the petition for the original beneficiary and asserts that it will provide further evidence of its continuing ability to pay the proffered wage. It is noted that no additional evidence of the petitioner's continuing ability to pay the proffered wage has been submitted.

The petitioner also asserts that the petition did not lack certification by the DOL, therefore, the AAO did have jurisdiction. The record reflects that the petitioner is requesting substitution of the original beneficiary and submitted a new, uncertified Form ETA 750. However, the record still fails to

¹ See [REDACTED] (accessed March 15, 2013).

(b)(6)

Page 3

contain the original labor certification. As noted above, the director requested a duplicate labor certification from the DOL using the name of the instant beneficiary, not the original beneficiary. The DOL advised the director that there was no record of a labor certification for the instant beneficiary. Accordingly, the director denied the petition.

The record fails to demonstrate that the director requested a duplicate labor certification from the DOL for the original beneficiary after it became apparent in the petitioner's motion to reopen that the director's first request to the DOL mentioned the wrong beneficiary. Without the labor certification, the AAO has no jurisdiction over the matter. Therefore, the AAO remands the matter so the director can request a duplicate labor certification from the DOL for the original beneficiary and address the petitioner's assertions on motion.

In view of the foregoing, the previous decision of the AAO will be withdrawn in part. The petition is remanded to the director for consideration of the issue stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The AAO's previous rejection of the appeal is withdrawn. The petition is currently unapprovable for the reasons discussed above, and 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 issuance of a new, detailed decision.