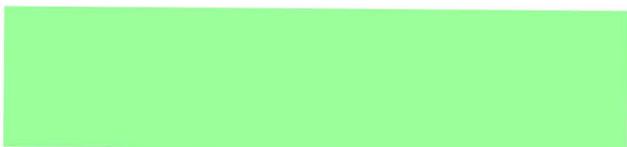




U.S. Citizenship
and Immigration
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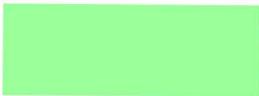


DATE: JUL 08 2014

OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center denied the employment-based immigrant visa petition and dismissed a subsequent motion to reopen. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a software development firm. It seeks to permanently employ the beneficiary in the United States as a project engineer. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by a labor certification approved by the U.S. Department of Labor (DOL).

The director's decision denying the petition concluded that the petitioner and beneficiary fraudulently misrepresented that a familial relationship did not exist between the beneficiary and the petitioner's owner.

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 the decision. Further elaboration of the procedural history will be made only as necessary. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.

As advised in the Notice of Intent to Dismiss (NOID) that we issued to the petitioner on May 23, 2014, the DOL issued a Notice of Intent to Revoke the certification of the ETA Form 9089 (case number [REDACTED]) on April 1, 2014. The DOL revoked the approval of the labor certification on May 6, 2014, based on the petitioner's failure to respond to the DOL's Notice of Intent to Revoke. The DOL indicated that it was revoking the certification of the ETA Form 9089 under 20 C.F.R. § 656.32, as the certification was not justified. Specifically, the petitioner failed to inform DOL that a familial relationship existed between the foreign worker and the employer's president, despite evidence that the foreign worker is the brother of the employer's president. Pursuant to 20 C.F.R. § 656.10(c)(8), at the time of certification, the job opportunity must have been clearly open to any U.S. worker.

An alien seeking to be classified as an employment-based second preference immigrant under section 203(b)(2) of the Act is inadmissible unless the Secretary of Labor has determined and certified that there are not sufficient workers who are able, willing, qualified and available for the employer's job opportunity, and that the alien's admission to the United States will not adversely affect the wages and working conditions of U.S. workers similarly situated. *See* sections 212(a)(5)(A)(i)(I) and (II) of the Act. Accordingly, every petition filed to classify an alien beneficiary as an employment-based advanced degree professional under section 203(b)(3) of the Act must be accompanied by an individual labor certification issued by DOL. *See* 8 C.F.R. § 204.5(a)(2). Without an appropriate certification from DOL, we are without statutory authority to adjudicate or grant a petitioner's employment-based second preference immigrant petition.

The instant petition is not supported by a valid labor certification. Therefore, the appeal is moot.

As noted above, on May 23, 2014, we issued a NOID informing the petitioner that the U.S. Department of Labor had revoked certification of the labor certification (ETA Form 9089). The petitioner was permitted thirty (30) days to respond to our Notice. We have received no response. The instant appeal is therefore moot.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed as moot.