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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

B6



FILE:



Office: TEXAS SERVICE CENTER

Date:

APR 22 2009

SRC 07 223 52625

IN RE:

Petitioner:

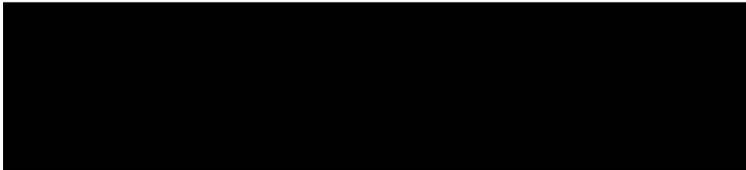
Beneficiary:



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.


John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, cited a failure by the petitioner to respond to his February 27, 2008 Request for Evidence (RFE) within 42 days and denied the immigrant visa petition on April 24, 2008. The petitioner filed an appeal of that decision to the Administrative Appeals Office (AAO). The matter will be remanded.

The petitioner is a farm and ranching business. It seeks to employ the beneficiary permanently in the United States as a farm-equipment mechanic. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the United States Department of Labor (DOL). As set forth in the director's April 24, 2008 decision, the director determined that the petitioner had not established that it had the ability to pay the beneficiary the proffered salary. The director denied the petition accordingly.

Counsel stated in his appeal that he submitted a complete response to the RFE in a timely manner with additional evidence contradicting the findings in the denial. Counsel provided evidence that the Texas Service Center received the response on April 10, 2008. In his February 27, 2008 RFE, the director had asked the petitioner to submit its response within 42 days. The Texas Service Center did not receive the petitioner's response until 43 days later. Due to the fact that the RFE was sent to the petitioner by mail, the director should have provided the petitioner with three additional days in which to submit its response in order to allow for potential postal delays.¹ On April 2, 2008, counsel sent a letter requesting a 30 day extension to submit the additional ability to pay evidence, but the petitioner was able to submit the additional ability to pay evidence by April 10, 2008. Within his April 24, 2008 decision, the director did not consider or specifically reference the additional ability to pay evidence that the petitioner submitted, and the director stated that USCIS would not grant the petitioner additional time and that USCIS would not consider the additional ability to pay evidence to be part of the record.

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 AAO reviewed the record of proceeding under its *de novo* review authority. The authority to adjudicate appeals is delegated to the AAO by the Secretary of Homeland Security pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)

¹ *See* 8 CFR § 103.5a(b), which applies to all U.S. Citizenship and Immigration Services (USCIS) notices.

Effect of service by mail. Whenever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, 3 days shall be added to the prescribed period. Service by mail is complete upon mailing.

Upon review of the record, the AAO has determined that the petitioner submitted the additional ability to pay evidence to the Texas Service Center in a timely manner. The director did not evaluate this information before issuing his decision on April 24, 2008. Therefore, the AAO will remand the case to the director to consider the additional evidence that counsel timely submitted and to issue a new decision.

In view of the foregoing, the previous decision of the director will be withdrawn. 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 director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and for entry of a new decision.