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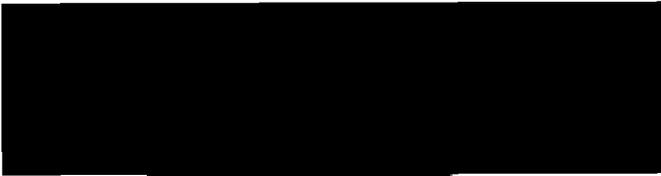
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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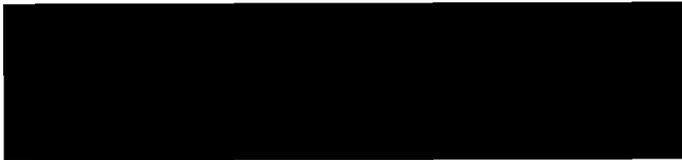
Office: NEBRASKA SERVICE CENTER

Date: **MAY 11 2010**

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:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On May 11, 2009, the Director, Nebraska Service Center, denied the immigrant visa petition.¹ The petitioner submitted a motion to reopen to the director in which counsel explained that the petitioner had not received the decision to deny the instant petition and described financial fraud perpetrated by a notary that had submitted the initial petition. On July 17, 2009, the director rejected the petitioner's motion as untimely. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner is a restaurant, and seeks to employ the beneficiary permanently in the United States as a cook of Italian food specialities, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). The petition was filed with a labor certification approved by the Department of Labor (DOL) on August 8, 2008. The director denied the petition because the petitioner's ETA Form 9089 at the time of filing the instant petition was more than 180 days old, and thus, had expired. The director stated that the petition was filed without a valid labor certification and denied the petition..

Section 203(b)(3)(A)(i) of 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 maintains plenary power to review each appeal on a de novo basis, which has long been recognized by the federal courts. *See Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

¹ An earlier I-140 petition for the beneficiary (LIN 07 013 51856) was rejected on December 20, 2006 for the submission of insufficient funds to pay the required filing fee. The petitioner then filed the instant petition on April 16, 2008. The petitioner's ETA Form 9089 has a receipt date of April 30, 2001. The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. In this case, the PERM regulations apply because the petitioner appears to have filed a labor certification application on ETA Form 9089 seeking to convert a previously submitted ETA Form 750 to an ETA 9089 under the special conversion guidelines set forth in PERM. 20 C.F.R. § 656.17(d) sets forth the requirements necessary for the converted labor certification application to retain the priority date set forth on the former ETA 750. The petitioner's ETA Form 9089 was certified by the Department of Labor on August 4, 2006, and filed with both the earlier petition and the instant petition.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The regulation at 20 C.F.R. § 656.30(b)(2) provides: "An approved permanent labor certification *granted before July 16, 2007 expires* if not filed in support of a Form I-140 petition with the Department of Homeland Security *within 180 calendar days of July 16, 2007.*" (Emphasis added).

The petition was filed on April 16, 2008³ with a labor certification approved by the Department of Labor (DOL) on August 8, 2006. 275 days passed after July 16, 2007 and prior to the filing of the petition with U.S. Citizenship and Immigration Services (USCIS). As the filing of the instant case was after 180 days after July 16, 2007, the petition was, therefore, filed without a valid labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i).

The Secretary of the Department of Homeland Security (DHS) delegates the authority to adjudicate appeals to the AAO pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the 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).

Among the appellate authorities are appeals from denials of petitions for immigrant visa classification based on employment, "except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act." 8 C.F.R. § 103.1(f)(3)(iii)(B) (2003 ed.).

As the labor certification is expired, the petition is not accompanied by a valid labor certification, and this office lacks jurisdiction to consider an appeal from the director's decision.

³ The I-140 petition indicates an earlier date of submission of March 6, 2008 that was crossed out, with the actual day of receipt of the petition noted as April 16, 2008. The AAO notes that even under the earlier filing date, the petitioner's labor certification had expired prior to the filing of the I-140 petition. 180 days after the July 16, 2007 cutoff date is January 12, 2008.

ORDER: The appeal is rejected.