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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date:

MAR 17 2011

IN RE:

Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 \$630. 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 Director, Texas Service Center (director), denied the above-referenced petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO rejected the appeal. The petitioner filed a motion to reconsider the AAO's rejection of the appeal. The motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(i), 103.5(a)(3), and 103.5(a)(4).

The petitioner is a private household. It seeks to permanently employ the beneficiary in the United States as a child monitor. The petitioner requests classification of the beneficiary as an unskilled worker pursuant to section 203(b)(3)(A) of the *Immigration and Nationality Act (the Act)*, 8 U.S.C. § 1153(b)(3)(A).¹

Counsel attempted to file the above-referenced petition with the Texas Service Center on January 10, 2008. The petition was rejected because it did not contain the required filing fees. Counsel resubmitted the petition on January 29, 2008 with the required filing fees. However, by the time the petition was accepted for filing, the underlying labor certification was no longer valid. Accordingly, on March 12, 2008, the director denied the petition. The denial states that there is no appeal from the decision. On April 10, 2008, counsel appealed the director's decision to the AAO. On September 1, 2010, the AAO rejected the appeal. The rejection states that the AAO does not have jurisdiction to consider appeals of denials of petitions based on the failure to submit a valid labor certification. On October 1, 2010, counsel attempted to file a motion to reconsider the AAO's rejection. The motion was returned to counsel because he incorrectly attempted to file it directly with the AAO. Counsel correctly resubmitted the motion and it was accepted as filed on October 18, 2010.

United States Citizenship and Immigration Services (USCIS) regulations require that motions to reconsider be filed within 30 days of the underlying decision. 8 C.F.R. § 103.5(a)(1)(i). In this matter, the motion was filed 47 days after the AAO's decision. The record indicates that the AAO's decision was mailed to both the petitioner at its business address and to its counsel of record. The motion is untimely and must be dismissed for that reason.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

¹ Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), grants preference classification to other qualified immigrants who are capable of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Even if the motion were timely filed, the motion would still have been dismissed. As is explained in detail in the AAO's September 1, 2010 rejection of the appeal (and again below), the AAO does not have jurisdiction over denials of a petition based on the lack of a valid labor certification.

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 January 29, 2008 with a labor certification approved by the U.S. Department of Labor (DOL) on July 26, 2005. One hundred and ninety-seven days passed after July 16, 2007 and prior to the filing of the petition with USCIS. As the filing of the petition was after 180 days of 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 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.

Finally, it is noted that the director had an opportunity to review its denial of the petition when counsel appealed the decision to the AAO. See 8 C.F.R. § 103.3(a)(2)(ii). If favorable action was warranted,

the director could have treated the appeal as a motion to reopen or reconsider and issued an approval of the petition. *See* 8 C.F.R. § 103.3(a)(2)(iii). In forwarding the appeal to the AAO, the director determined that favorable action was not warranted in this case.

ORDER: The motion is dismissed.