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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



B6

DATE: AUG 24 2012 OFFICE: NEBRASKA SERVICE CENTER



IN RE:



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:

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision denying the petition will be withdrawn. The petition will be remanded to the director for entry of a new decision.

The petitioner is a software engineering firm. It seeks to employ the beneficiary permanently in the United States as a software engineer. 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). The Form ETA 750, with a priority date of April 29, 2003, was certified by DOL for alien worker with the initials [REDACTED]. By correspondence dated May 18, 2007, the petitioner submitted a statement wherein it stated its intention to substitute the present beneficiary for alien worker [REDACTED]. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition (May 24, 2007) predated the final rule, and since it does not appear that another beneficiary has been issued lawful permanent residence based on the labor certification, the requested substitution was accepted.¹

As the AAO accepts the documentation submitted in support of the beneficiary's statement of education and experience, under the present circumstances, the director's decision is withdrawn.

The only basis for the director's denial was the failure to submit a signed Form ETA 750B on behalf of the substituted beneficiary. As the AAO accepts the forms submitted on behalf of the instant beneficiary, and the record shows that an initial education and work summary was submitted, this

¹ On December 10, 2008, the director issued a Request for Evidence (RFE) requesting, in part, that the petitioner provide a signed labor certification containing pertinent information about the present beneficiary who was being substituted for the original named beneficiary [REDACTED]. The petitioner responded to the RFE but did not provide the requested signed labor certification, Form ETA 750, Part B, with information pertaining to the present beneficiary. The director accordingly denied the petition for failure to provide requested information which precluded a material line of inquiry. The regulation at 8 C.F.R. § 103.2(b)(13) states the following: "*Effect of failure to respond to a request for evidence or appearance.* If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied."

In this instance, however, the petitioner stated that the requested information had been attached to the original Form ETA 750 submitted with the Form I-140. The original documentation submitted contained a summary of the beneficiary's education and experience although it was unsigned. The petitioner, on appeal, and with a letter dated March 16, 2009 (one day after the director's decision denying the petition), submitted a copy of pages five through nine of the ETA Form 9089 containing alien information and the beneficiary's signature dated May 15, 2007. The submitted documentation will be accepted as sufficient pertaining to the beneficiary's signature, and statement of education and experience to be compared against the evidence of the beneficiary's qualifications to determine whether the beneficiary meets the education and experience required on the labor certification.

matter is remanded to the director to issue a new decision on the merits of the case. The director shall determine whether the petitioner has established the continuing ability to pay the proffered wage from the April 29, 2003 priority date onward and whether the beneficiary meets the education and experience requirements of the Form ETA 750 as of the priority date.²

² It is noted that the petitioner did not submit any of the documentation required by 8 C.F.R. § 204.5(g)(2) (copies of annual reports, federal tax returns, or audited financial statements) in support of its ability to pay the proffered wage in 2003, 2004 or 2006. The petitioner submitted its 2005 tax return which states sufficient net current assets to pay the beneficiary's proffered wage. It is noted, however, that USCIS records indicate that the petitioner has filed approximately 224 additional Form I-140/I-129 petitions for other workers. The record does not establish that the petitioner has maintained the continuing ability to pay the proffered wages of the other sponsored Form I-140 workers. In order to make that determination the petitioner would need to provide the following information for those workers:

- Full name.
- Receipt number and priority date of each petition.
- Exact dates employed by your organization.
- Whether the petition(s) are pending or inactive (meaning that the petition has been withdrawn, the petition has been denied but is not on appeal, or the beneficiary has obtained lawful permanent residence). If a petition is inactive, provide the date that the petition was withdrawn, denied, or that the beneficiary obtained lawful permanent residence.
- The proffered wage listed on the labor certification submitted with each petition.
- The wage paid to each beneficiary from the priority date of the instant petition to the present.
- Forms W-2 or 1099 issued to each beneficiary from the priority date of the instant petition to the present.

The director may request such additional information as he deems necessary in adjudicating this petition, including, but not limited to, documentation required by 8 C.F.R. § 204.5(g)(2) (copies of annual reports, federal tax returns, or audited financial statements) for 2003, 2004, 2006, 2009, 2010 and 2011 to establish the petitioner's ability to pay the proffered wages of all sponsored workers from their respective priority dates, and copies of W-2 Forms or Forms 1099 for all sponsored workers to establish wages paid to those employees.

It is further noted that, as above stated, the petitioner has filed approximately 224 Form I-140/Form I-129 petitions, yet reports only 35 employees in a subsequent Form I-140 petition which was approved for the present beneficiary on December 20, 2010. The petitioner stated on the Form I-140 filed for the present beneficiary on May 24, 2007 that it had 150 employees. This brings into question whether the petitioner would actually be the employer of the sponsored workers or is simply acting as a subcontractor with respect to the employment of these workers. The director may also request such information as he deems necessary to establish that the petitioner is, in fact, the employer of these sponsored workers.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for issuance of a new decision in consideration of the foregoing.