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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: **FEB 17 2012**

Office: TEXAS SERVICE CENTER

FILE: 

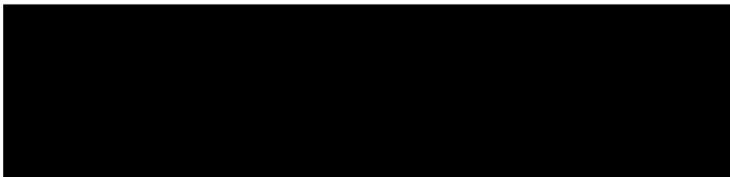
In re:

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)

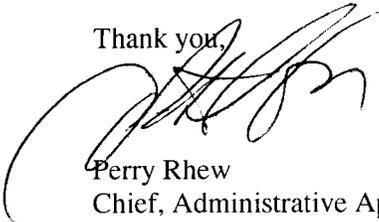
ON BEHALF OF PETITIONER:



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.

Thank you,

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed and the matter is now before the Administrative Appeals Office (AAO). The matter will be remanded to the Director in accordance with the below.

The petitioner is a Turkish restaurant and seeks to employ the beneficiary permanently in the United States as a Specialty Cook, Turkish Food, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). The petition was accepted for filing on March 27, 2008 with a labor certification approved by the Department of Labor (DOL) on August 25, 2007 and valid for 180 days (until February 21, 2008).<sup>1</sup> The director denied the petition because he determined that the petition was not filed within 180 days after the labor certification's approval by February 21, 2008 and, as the labor certification expired by the March 27, 2008 date of filing, the Form I-140 was, therefore, filed without a valid labor certification pursuant to 8 C.F.R. § 204.5(1)(3)(i).

On appeal, counsel states that the Form I-140 was initially filed on February 15, 2008, prior to the labor certification's expiration, but was improperly rejected by the United States Citizenship and Immigration Services (USCIS) Texas Service Center. Counsel claims that the Form I-140 filed on February 15, 2008 was returned by the Texas Service Center with a notice stating "Petitions must have original signatures – not a facsimile (e.g. stamp)." Counsel states that none of the forms filed on February 15, 2008 had a facsimile or stamped signature and that USCIS rejected the filing on February 15, 2008 in error.<sup>2</sup> Counsel claims that, if not for the improper rejection, the petition would have been timely filed, before the expiration of the labor certification on February 21, 2008.

The petition was accepted for filing on March 27, 2008 with a labor certification approved by the DOL on August 25, 2007 and valid until February 21, 2008. The record reflects that the petition was previously received by USCIS on February 15, 2008, and again on February 27, 2008, before being accepted for filing on March 27, 2008. The record also reflects that the petitioner's signatures on the

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<sup>1</sup> The regulation at 20 C.F.R. § 656.30(b) states:

(b) Expiration of labor certifications. For certifications resulting from applications filed under this part and 20 CFR part 656 in effect prior to March 28, 2005, the following applies:

(1) An approved permanent labor certification granted on or after 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 the date the Department of Labor granted the certification.

(2) 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.

<sup>2</sup> In his brief, counsel claims that the petitioner's signature on the Form G-28 and Form I-140 were original signatures. Counsel does not claim that his own signature was an original signature, however. Rather, counsel references in his brief that USCIS has, in the past, accepted stamped signatures on behalf of attorneys.

Form I-140 and Form ETA 750A are original signatures, while the attorney's signatures on Form I-140, and Form G-28 are rubber-stamped.

The regulation at 8 C.F.R. § 204.5(a)(1) provides that a petition is properly filed if it is accepted for processing under the provisions of 8 C.F.R. § 103. The regulation at 8 C.F.R. § 103.2(a)(2) provides:

*Signature.* An applicant or petitioner must sign his or her application or petition. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the application or petition, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the application or petition, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. Unless otherwise specified in this chapter, an acceptable signature on an application or petition that is being filed with [USCIS] is one that is either handwritten or, for applications or petitions filed electronically as permitted by the instructions to the form, in electronic format.

The provisions of 8 C.F.R. § 103 also discuss the procedure for receipt of an application where the representative's signature is improper. The regulation at 8 C.F.R. § 103.2(a)(3) provides:

*Representation.* An applicant or petitioner may be represented by an attorney in the United States . . . Where a notice of representation is submitted that is not properly signed, the application or petition will be processed as if the notice had not been submitted.

As the petition was properly signed by the petitioner, and the labor certification was properly signed by the petitioner and the beneficiary, the Director should accept the petition as properly filed with a valid labor certification as of the initial date of submission. The AAO withdraws the director's decision and remands it on this basis for the director to consider the merits of the petition.

Although the AAO finds that the instant petition was properly filed and should be considered as such by the Director, we note that the petition lacks sufficient evidence to establish eligibility for the benefit sought.<sup>3</sup> In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petition will be remanded to the Director to address the merits of the petition.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability

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<sup>3</sup> The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The proffered wage for the position of cook is \$24,440 per year (based on a 40 hour work week), yet the record of proceeding lacks sufficient evidence reflecting that the petitioner has the ability to pay the proffered wage from the time the priority date was established (April 27, 2001) conforming to the regulatory requirements of 8 C.F.R. § 204.5(g)(2). No evidence of the petitioner's ability to pay the proffered wage for any year was submitted with the instant Form I-140.

The petitioner must also establish that the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

The record lacks sufficient regulatory-prescribed evidence to demonstrate that the beneficiary is qualified to perform the duties of the proffered position. The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The regulation at 8 C.F.R. § 103.2(b)(3) provides:

*Translations*. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has

certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

The petition is for a skilled worker and the job requires two years of experience in the proffered position, yet the instant petition was filed without evidence reflecting that the beneficiary has two years of qualifying employment experience conforming to the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A); and 8 C.F.R. § 103.2(b)(3).

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to address the merits of the petition. 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; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.