



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: OFFICE: TEXAS SERVICE CENTER FILE:

JUL 09 2012

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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a millwork company. It seeks to permanently employ the beneficiary in the United States as a sanding supervisor. The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL).

The director's decision denying the petition concluded that the petitioner failed to establish its ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2).

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

On December 24, 2009, while the instant appeal was pending with the AAO, the petitioner filed a second Form I-140 on behalf of the beneficiary (SRC 10 058 51140). A letter from counsel accompanied the second Form I-140 stating:

Please find enclosed a re-filing of the petitioner's I-140 and \$475 fee. The first one was denied on 1/27/2009. Although the petitioner appealed the denial, we wish to re-file the I-140. . . Since the Service owns the original labor certification approval [Form ETA 750] as File # [REDACTED], the original cannot be submitted. **Please request a duplicate original ETA Form 750 from the US Department of Labor if you do not already have it in your file.**

(Emphasis original.)

The second Form I-140 states that accompanying labor certification is DOL/ETA Case Number [REDACTED] which is the same labor certification filed with the instant petition. The director requested a duplicate labor certification from the DOL, and approved the second petition on January 13, 2010, granting classification as a skilled worker under section 203(b)(3)(A)(i) of the Act.

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(c)(2) provides:

A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the Application for Alien Employment Certification form.

USCIS may not approve a visa petition when the approved labor certification has already been used by the petitioner in support of an approved petition. *See Matter of Harry Bailen Builders, Inc.*, 19 I&N Dec. 412, 414 (Comm. 1986).¹ The instant petition cannot be approved because the underlying labor certification has already been used in support of an approved petition.

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 met that burden.

ORDER: The appeal is dismissed.

¹ While *Harry Bailen*, 19 I&N Dec. at 414, relies in part on language in 8 C.F.R. § 204.4(f) that no longer exists in the regulations, the decision also relies on DOL's regulations, which continue to hold that a labor certification is valid only for a specific job opportunity. 20 C.F.R. § 656.30(c)(2). Moreover, the reasoning in *Harry Bailen*, 19 I&N Dec. at 414 has been adopted in recent cases. *See Matter of Francisco Javier Villarreal-Zuniga*, 23 I&N Dec. 886, 889-90 (BIA 2006).