

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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:

Office: NEBRASKA SERVICE CENTER

FILE:



JUL 16 2012

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.

Thank you,

Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: On June 29, 2011, the Administrative Appeals Office (AAO) rejected an appeal to the denial of an employment-based preference visa petition by the Director, Nebraska Service Center (NSC). The matter is now before the AAO again on appeal. The appeal will be rejected.

The petitioner is a skilled nursing facility and is seeking to permanently employ the beneficiary in the United States as a nursing assistant 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 without a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL) as required by section 212(a)(5)(A) of the Act. The director determined that the petitioner failed to file the petition with a valid labor certification pursuant to 8 C.F.R. § 204.5(e)(3) and denied the petition accordingly on July 30, 2010.

Counsel subsequently filed a timely appeal on the petitioner's behalf on September 1, 2010. Counsel claimed that the Form ETA 750 had been included with supporting documents that had been filed with the Form I-140, Immigrant Petition for Alien Worker, and the Form ETA 750 was subsequently lost by United States Citizenship and Immigration Services (USCIS). Counsel asserted that the director erroneously denied the petition rather than having issued a Request for Evidence (RFE) to the petitioner for the missing Form ETA 750 as required by the USCIS Adjudicators Field Manual (AFM).

Nevertheless, the Secretary of the Department of Homeland Security (DHS) delegates the authority to adjudicate appeals to the AAO pursuant to the authority vested in the Secretary 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). In the process of reorganizing the immigration regulations, the DHS deleted the list of the AAO's appellate jurisdiction that was previously found at former 8 C.F.R. § 103.1(f)(3)(iii) (2002). 68 Fed. Reg. 10922 (March 6, 2003). DHS replaced the appellate jurisdiction provision with a general delegation of authority, granting USCIS the authority to adjudicate the appeals that had been previously listed in the regulations as of February 28, 2003. *See* DHS Delegation No. 0150.1 para. (2)(U) (Mar. 1, 2003); 8 C.F.R. § 103.3(a)(iv). As a result, there is no generally accessible list of the AAO's jurisdiction that may be cited in immigration proceedings or in federal court.

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.). In this matter, the petition was denied because of the lack of a labor certification entitling the petitioner to the benefit sought. Accordingly, as there is no appeal from such a denial, the AAO had no jurisdiction to issue a decision in this case, and the appeal was rejected for this reason on June 29, 2011.

Counsel subsequently attempted to file another appeal on the petitioner's behalf on August 1, 2011, reiterating his claim that the Form ETA 750 had been lost by USCIS and that the AFM required that an RFE be issued under such search circumstances. Counsel notes that the director erroneously

denied the petition and that the AAO only compounded this error when it rejected the initial appeal relying upon a regulation that no longer existed. The AAO, however, does not exercise appellate jurisdiction over its own decisions. As noted above, the AAO only exercises appellate jurisdiction over matters that were specifically listed at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). For instance, in the event that a petitioner disagrees with an AAO decision, the petitioner can file a motion to reopen or a motion to reconsider in accordance with 8 C.F.R. § 103.5. In this matter, the petitioner did not check box D (“I am filing a motion to reopen a decision”), box E (“I am filing a motion to reconsider a decision”), or box F (“I am filing a motion to reopen and a motion to reconsider a decision”) on the Form I-290B, Notice of Appeal or Motion. In this case, counsel checked box A (“I am filing an appeal”), instead. Therefore, the appeal is improperly filed and must be rejected on this basis pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(I).

Therefore, as the appeal was not properly filed, it will be rejected.

ORDER: The appeal is rejected. The AAO's previous decision dated June 29, 2011 shall not be disturbed.