

(b)(6)

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



U.S. Citizenship
and Immigration
Services

DATE: **AUG 07 2013** OFFICE: TEXAS SERVICE CENTER

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: On June 14, 2002, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the VSC director on July 10, 2003. The director of the Texas Service Center (“the director”), however, revoked the approval of the immigrant petition on June 13, 2012 and certified the decision to the Administrative Appeals Office (AAO) for review. On November 5, 2012, the AAO issued a notice of intent to dismiss and derogatory information (NOID/NODI), informing the petitioner of the AAO’s discovery that the petitioner’s business was dissolved on June 18, 2012. The AAO provided the petitioner 30 days to submit evidence demonstrating its continued existence, operation, and good standing. The petitioner failed to respond to the NOID/NODI. On April 3, 2013, the AAO affirmed the director’s decision to revoke the approval of the petition; entered a finding of material misrepresentation; and invalidated the labor certification. On June 21, 2013,¹ the AAO received the petitioner’s Form I-290B, Notice of Appeal or Motion, dated July 12, 2012, appealing the director’s certification decision to the AAO proposing to revoke the approval of the petition.² Upon review, the appeal will be rejected.

The petitioner describes itself as a restaurant. It seeks to permanently employ the beneficiary in the United States as a cook pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).³ 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.

In the director’s decision on certification, the director found that the petitioner has failed to demonstrate that it conducted good faith recruitment in advertising for the proffered position; that the beneficiary possessed the requisite work experience in the job offered as of the priority date; and that it had the continuing ability to pay the proffered wage. The director further

¹ It is unclear why the AAO received the petitioner’s appeal nearly one year after it was filed. The AAO acknowledges this delayed receipt as Service error. Nevertheless, as the director’s decision to certify the case for review is not appealable, the appeal will be rejected. The issues raised in the appeal have been fully vetted in the AAO decision, dated April 3, 2013.

² The AAO notes that although the petitioner’s counsel checked the box “D” indicating that he is filing a motion to reopen a decision, in the narrative section of the form, counsel states that he is appealing the decision. The AAO will treat the Form I-290B as an appeal.

³ Section 203(b)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

concluded that the petitioner made material misrepresentations on the ETA Form 750 and invalidated the labor certification.

On appeal, the petitioner states that the director's decision to revoke the approval of the petition was erroneous because it has made a good faith effort to recruit potential employees; that the beneficiary possessed two years of experience in the job offered prior to his employment with the petitioner; and that it has the ability to pay the beneficiary. The forum to have addressed these issues was in the certification of the decision from the director to the AAO.

On April 3, 2013, the AAO concluded that the record did not support a finding that the petitioner failed to conduct good faith recruitment and withdrew the director's finding that the petitioner failed to follow the Department of Labor recruitment requirements. The AAO, however, affirmed the director's decision to revoke the approval of the petition, finding that the beneficiary did not possess the requisite experience before the priority date and that the petitioner failed to demonstrate that it had the continuing ability to pay the proffered wage. The AAO also affirmed the director's decision to invalidate the labor certification, concluding that representations made by the petitioner were material and willful misrepresentations. Beyond the director's decision, the AAO also concluded that the petition was moot as the petitioner was dissolved on June 8, 2012 and was no longer an active business.

The issues raised by the petitioner on appeal were fully addressed by the AAO on certification. The AAO notes that although the appeal is filed timely and makes a specific allegation of error in law or fact, certification of the director's decision to the AAO is not appealable.⁴ Nevertheless, the AAO has considered all pertinent evidence in the record, including new evidence submitted upon appeal.⁵ Upon review, the AAO concludes that the petitioner has failed

⁴ Under 8 C.F.R. § 103.4(a)(1), district directors may certify their decisions to the AAO for review "when a case involves an unusually complex or novel issue of law or fact." In the instructions accompanying the decision, the director stated that the petitioner could submit a brief to the AAO for consideration within 30 days of his decision. The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in her 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). The AAO cannot exercise appellate jurisdiction over additional matters on its own volition, or at the request of an applicant or petitioner.

⁵ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

to submit any evidence⁶ demonstrating its continued existence, operation, and good standing.⁷ In addition, the petitioner does not raise any new issues or cite any new facts regarding its continuing ability to pay the proffered wage and the beneficiary's qualifications that would cause the AAO to reopen on its own motion. Therefore, the AAO affirms its April 3, 2013 decision in its entirety.

The appeal is rejected.

ORDER: The appeal is rejected.

⁶ As noted above, the AAO sent a NOID/NODI to the petitioner on November 5, 2012, which was subsequent to the petitioner's appeal. Therefore, the petitioner was given sufficient notice of the derogatory information contained in the file, and was provided the opportunity to respond and submit evidence. The petitioner, however, has not submitted any additional evidence since the NOID/NODI.

⁷ The approval of the petition would be subject to automatic revocation due to the termination of the petitioner's business. *See* 8 C.F.R. § 205.1(a)(iii)(D).