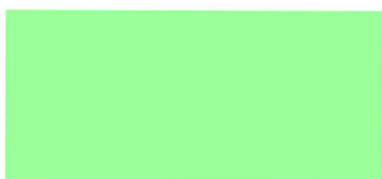


(b)(6)

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



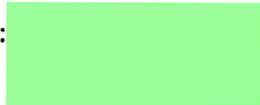
U.S. Citizenship
and Immigration
Services



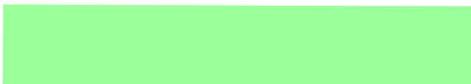
DATE: FEB 05 2013

OFFICE: TEXAS SERVICE CENTER

FILE:



IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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,

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

Ron Rosenberg
Acting 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 The director's decision denying the petition will be withdrawn.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 pipe lining business. It seeks to employ the beneficiary permanently in the United States in a position entitled "Pipe Liner Maintenance." The petition is accompanied by a copy of a Form ETA 750, Application for Alien Employment Certification, the original of which was approved by the United States Department of Labor (DOL). The Form ETA 750, as stated above, is a copy and not an original document as required by statute. The AAO notes, however, that the original Form ETA 750 (priority date – April 30, 2001) is in the record, having been previously timely submitted with a Form I-140 (filed on behalf of the same beneficiary as the present case) which was denied by the director. The decision denying the previous petition has become final as there was no appeal filed to that decision.¹ On April 19, 2010, the petitioner filed the present Form I-140 on behalf of the beneficiary as an unskilled/other worker. The director denied the petition stating that the Form ETA 750 had expired, having been filed more than 180 days after the date the Form ETA 750 was certified by the DOL (certification date – September 12, 2007).

All I-140s based on approved labor certifications must be filed within 180 days of the labor certification approval.² All permanent labor certifications approved on or after the effective date of July 16, 2007, will expire 180 calendar days after certification, whether the original application was filed under the PERM or pre-PERM regulations, unless the employer uses the approved labor certification prior to expiration in support of an I-140 petition with USCIS. Likewise, all labor certifications approved prior to July 16, 2007 expired in 180 calendar days, unless filed in support of an I-140 petition with USCIS prior to the expiration date. In this instance, the Form ETA 750 was certified on September 12, 2007 and was required to be used within 180 days of that date or the labor certification would expire. It was used in support of a Form I-140 petition which was filed on

¹ The petitioner initially filed the first Form I-140 petition under the wrong preference category, as a professional. The petition was denied as the labor certification did not support the category sought. The petitioner filed a motion to reopen seeking to correct the error in classification, which the director dismissed. The petitioner then filed the present Form I-140 petition.

² 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.

December 17, 2007, less than 180 days from the September 12, 2007 certification date.³ The labor certification, therefore, did not expire and was available for use in support of the present petition. The director's decision in that regard is withdrawn.

The director did not issue a determination as to whether the petitioner had established the continuous ability to pay the proffered wage from the April 30, 2001 priority date onward, or whether the beneficiary met the experience requirements of the Form ETA 750 (one year of experience in the proffered position, or one year of experience as a "Pipeliner Maintenance Assistant"). It is noted that the petitioner has not submitted copies of its corporate tax returns to establish its ability to pay the proffered wage.⁴ The only documentation submitted relative to its ability to pay the proffered wage are copies of W-2 Forms showing wages paid to the beneficiary from 2000 through 2006, and

³ In a September 14, 2009 USCIS memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, Revisions to Adjudicator's Field Manual (AFM). Chapter 22.2(b) General Form I-140 Issues (AFM Update AD07-26), which amends the Adjudicator's Field Manual (AFM). The following is stated related to the issue of labor certification expiration:

...

Exception: USCIS will continue to accept amended or duplicate Form I-140 petitions that are filed with a copy of a labor certification that is expired at the time the amended or duplicate Form I-140 petition is filed, **if the original labor certification was submitted in support of a previously filed petition during the labor certification's validity period.** These filings may occur when:

-
- The petitioning employer wishes to file a new petition subsequent to the denial, revocation or abandonment of the previously filed petition, and the labor certification was not invalidated due to material misrepresentation or fraud relating to the labor certification application;
 - An amended petition is filed to request a different visa classification than the visa classification requested in the previously filed petition, or;
-

(Emphasis in original).

⁴ If the petitioner has filed additional petitions for other beneficiaries, it would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay any H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

a copy of a pay stub showing wages paid to the beneficiary through July 5, 2008. None of the wage documentation would establish the petitioner's ability to pay the proffered wage during any relevant year.

This 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 30, 2001 priority date onward and whether the beneficiary meets the education and experience requirements of the Form ETA 750 as of the priority date.

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. Should the director's decision be adverse to the petitioner, the matter shall then be certified to the AAO for further consideration.