



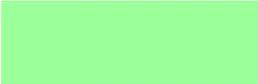
U.S. Citizenship
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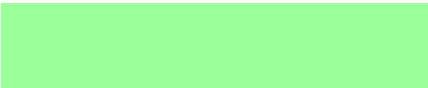


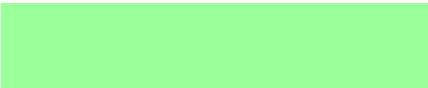
DATE: JUL 11 2013

OFFICE: TEXAS SERVICE CENTER

FILE: 

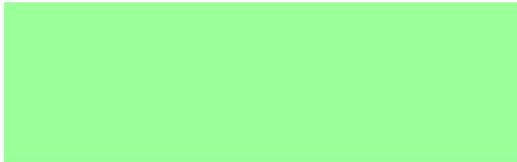
IN RE:

Petitioner: 

Beneficiary: 

Petition: Immigrant Petition for Alien Worker as Skilled Worker pursuant to § 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i)

ON BEHALF OF PETITIONER:

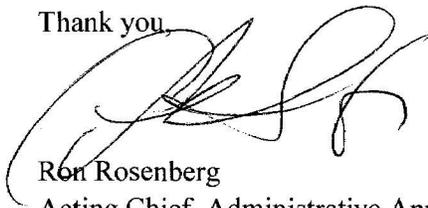


INSTRUCTIONS:

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,



Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: On December 5, 2012, the Administrative Appeals Office (AAO) dismissed 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 dental office and is seeking to permanently employ the beneficiary in the United States as a dentist 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 was accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to establish the continuing ability to pay the proffered wage to the beneficiary since the priority date. The director denied the petition accordingly.

The petitioner subsequently filed a timely appeal on October 20, 2011. The AAO determined that the petitioner had not established its continuing ability to pay the proffered wage to the beneficiary since the priority date, and furthermore found that the petitioner had not established that the beneficiary is qualified for the proffered position due to the lack of the requisite three years of experience. The AAO dismissed the appeal on December 5, 2012. The cover page of the AAO's decision instructed the petitioner that it may file either a motion to reopen or a motion to reconsider the decision pursuant to the requirements found at 8 C.F.R. § 103.5, and that any motion must be filed with the office that originally decided the case within 30 days of the decision that the motion seeks to reconsider or reopen as required by 8 C.F.R. § 103.5(a)(1)(i).

Counsel subsequently attempted to file another appeal on the petitioner's behalf on December 14, 2012. The AAO, however, does not exercise appellate jurisdiction over its own decisions. 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. Counsel checked box B ("I am filing an appeal. My brief and/or additional evidence will be submitted to the AAO within 30 days"), instead. The record does not include any evidence that the petitioner intended to file a motion to reopen and/or reconsider. A motion must meet the regulatory requirements of a motion to reopen or reconsider at the time it is filed; no provision exists for USCIS to grant an extension to the petitioner to file evidence or arguments in the future. The fact that the petitioner on the Form I-290B incorrectly checked box B ("I am filing an appeal. My brief and/or additional evidence will be submitted to the AAO within 30 days"), does not permit the petitioner to submit evidence beyond the 30 day period allowed for motions to reopen or reconsider. 8 C.F.R. § 103.5(a)(1)(i). 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).

The AAO notes that even if the filing qualified as a motion to reopen and/or reconsider, which it does not, the petitioner has failed to overcome the grounds of denial in the initial AAO decision.¹ Counsel asserts that United States Citizenship and Immigration Services (USCIS) must consider the ability of the intending immigrant employee to add to the firm's income when determining whether the petitioner has the ability to pay the proffered wage and cites to "*Matter of Segovia*, 12 I&N Dec. 612 (BIA 1967)."² The AAO finds this contention to lack merit. The AAO notes, in regard to the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) states, "I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal." The AAO noted in its December 5, 2012 decision that the petitioner failed to submit any evidence on appeal to overcome the director's basis for dismissal, that the petitioner failed to establish its ability to pay the proffered wage. Similarly, the petitioner sent no evidence with the instant filing.

In regard to the second basis of denial, counsel asserts that the AAO gave undue weight to a clerical oversight regarding the beneficiary's length of experience while unduly dismissing other evidence supporting that the beneficiary possesses the requisite three years of work experience. Counsel has not provided precedent case law to support his claim. The AAO specifically noted that based on failure to list the beneficiary's experience on ETA Form 9089, the petitioner would need to submit independent evidence "such as wage payment records and records maintained by an official governmental entity." The petitioner failed to do so. In addition, the petitioner has not provided independent corroborative evidence that the beneficiary is qualified for the proffered position based on having the required three years of experience.

ORDER: The appeal is rejected. The AAO's previous decision dated December 5, 2012 shall not be disturbed.

¹ The regulation at 8 C.F.R. § 103.5 provides in pertinent part that "a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." "New" facts are those that were not available and could not reasonably have been discovered or presented in the previous proceeding. A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [USCIS] policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

² The AAO notes that the citation appears to be referring to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).