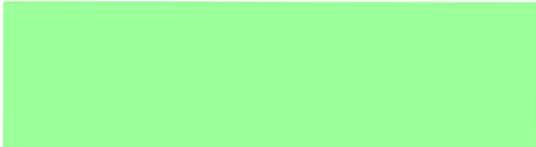


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUN 20 2013

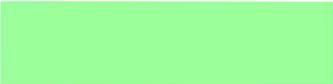
OFFICE: TEXAS SERVICE CENTER

FILE:



IN RE:

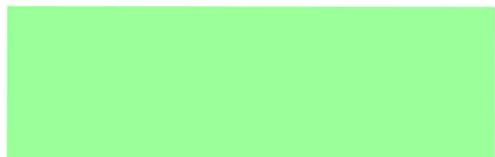
Petitioner:



Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or a 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.

Thank you,

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

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (Director), approved the employment-based immigrant visa petition. The Director subsequently revoked the approval of the petition. The petitioner appealed the revocation to the Administrative Appeals Office (AAO). The AAO withdrew the Director's decision and remanded the case for the issuance of a new decision. The Director revoked the approval of the petition a second time. The revocation will again be withdrawn, and the petition will be remanded to the Director for the issuance of a new decision.

The petitioner describes itself as a software consulting company. It seeks to employ the beneficiary permanently in the United States as a software engineer and to classify him as professional or a skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3)(A).¹

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on October 28, 2005. The petition was accompanied by a Form ETA 750, Application for Alien Employment Certification, which was filed with the U.S. Department of Labor (DOL) on May 9, 2003, and approved on September 20, 2005.

On February 16, 2006, the Director approved the petition. On February 6, 2009, the Director issued a Notice of Intent to Revoke (NOIR) the approval of the petition. The NOIR advised the petitioner of apparent inconsistencies in the record regarding the company's business locations, and expressed doubts about its ability to pay the proffered wages of numerous other beneficiaries of employment-based immigrant (Form I-140) and nonimmigrant (Form I-129) petitions, in addition to the proffered wage of the beneficiary in the instant proceeding. The petitioner was given 30 days to respond to the NOIR.

On March 24, 2009, the Director issued a Notice of Revocation (NOR) on the ground that the petitioner did not respond to the NOIR and therefore failed to resolve the evidentiary inconsistencies in the record. The Director stated that the NOIR had been returned to the TSC on March 16, 2009, with no response.

The petitioner filed a timely Form I-290B, Notice of Appeal or Motion, on April 7, 2009, asserting that it filed a timely response to the NOIR. The evidence in the record of proceeding supported the petitioner's claim. Specifically, the record contained a NOIR response that had been stamped as received by the Texas Service Center on March 6, 2009.

After reviewing all the evidence of record, the AAO remanded the petition to the Director. In its remand decision, dated September 11, 2012, the AAO noted that the petitioner had submitted

¹ Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

documentary evidence of its ability to pay the proffered wage to the beneficiary for each of the years from 2003 to 2008 in the form of Wage and Tax Statements (Forms W-2) issued to the beneficiary. The W-2 Forms showed that the wages paid to the beneficiary exceeded the \$50,000 proffered wage in each of those years. The AAO concluded that the petitioner had established its continuing ability to pay the proffered wage as of the May 9, 2003 priority date.

Based on the record before the AAO at that time, however, the AAO could not approve the petition. To be eligible for an employment-based immigrant visa the beneficiary must have all the education, training, and experience specified on the labor certification as of the application's priority date. See *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). As discussed in the AAO's decision, the Director had made no determination as to whether the beneficiary satisfied the education requirements set forth on the labor certification. Accordingly, the AAO remanded the petition for consideration of this issue, and any other issue the Director deemed necessary.

On January 2, 2013, the Director issued another NOIR, advising the petitioner that it had 33 days to respond with additional documentation.

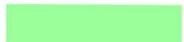
On February 22, 2013, the Director issued another NOR. According to the Director, no response had been received to the NOIR dated January 2, 2003. The Director concluded, therefore, that the petitioner failed to establish its eligibility for the requested visa classification.

On March 13, 2013, the petitioner filed a timely appeal. In the appeal brief counsel asserts that the petitioner filed a timely response to the NOIR, which was mailed on January 31, 2013 and was received by the Texas Service Center on February 1, 2013.

The record includes a brief responding to the NOIR accompanied by extensive documentation, and topped by a copy of the NOIR that bears a receipt stamp of February 1, 2013. A Federal Express Receipt confirms that a package was delivered by counsel to the Texas Service Center by priority overnight delivery. As indicated on the receipt, the shipping date was January 31, 2013, and the delivery date was February 1, 2013. The record also includes an email message from "trackingupdates@fedex.com" sent on Friday February 1, 2013 at 9:16 a.m. confirming that the package had been delivered to the mailroom of the Texas Service Center at [REDACTED] in Dallas, Texas, and signed for by [REDACTED]. The email message further identified the package as a FedEx Priority Overnight – "ATTN: I-140" – with a tracking number of [REDACTED]. The confirmation stated that the package weighed seven pounds, which is consistent with the NOIR response in the record. Therefore, based on this evidence, the AAO again finds that the petitioner filed a timely response to the NOIR, and the Director failed to consider the response when issuing the NOR.

Accordingly, the petition will be remanded to the Director for a new decision that takes into consideration counsel's brief and the supporting documentation that were delivered to the Texas Service Center on February 1, 2013, as well as the materials submitted in response to the Director's initial NOIR in March 2009.

(b)(6)



Page 4

ORDER: The Director's decision of February 22, 2013, revoking the approval of the petition, is withdrawn. The petition is remanded to the Director for a new decision on the merits in accordance with the foregoing discussion.