



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

DATE: JUN 24 2013 OFFICE: TEXAS SERVICE CENTER

[Redacted]

IN RE: Petitioner:  
Beneficiary:

[Redacted]

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

ON BEHALF OF PETITIONER:

[Redacted]

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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 appeal will be remanded to the director for consideration of the following and issuance of a new decision.

The petitioner filed a Form I-140 [REDACTED] in a previous proceeding. In support of that petition the petitioner submitted an ETA Form 9089 (ETA Case [REDACTED] with a priority date of October 6, 2005. On January 10, 2011, the petitioner filed a second and separate Form I-140 [REDACTED]. The petitioner did not submit a certified labor certification in support of that petition but submitted a copy of a labor certification filed on October 27, 2009 and requested that the United States Citizenship and Immigration Service (USCIS) “obtain a duplicate alien labor certification from the department of labor” [REDACTED] as previous counsel had stated that the original labor certification had been lost. Present counsel submitted a copy of that labor certification which is neither signed nor certified but states a filing date of October 27, 2009.<sup>1</sup> The record does not show that USCIS requested a copy of that labor certification from the United States Department of Labor (DOL). On February 13, 2012, the director issued a decision denying the petition [REDACTED] stating that the petitioner failed to establish the continuing ability to pay the proffered wage (\$11.69 per hour as stated on the ETA Form 9089, ETA Case Number [REDACTED] from the October 6, 2005 priority date stated on the ETA Form 9089 with an ETA Case Number of [REDACTED]. As the director denied the present Form I-140 based upon the wrong labor certification [REDACTED] rather than requesting a duplicate copy of the labor certification [REDACTED] the director’s decision shall be withdrawn and the case remanded to the director to issue a new decision after first obtaining a copy of the correct labor certification from the DOL, if such was certified.

Counsel stated on appeal that the petitioner’s 2009 “finances” show the ability to pay the proffered wage. It is noted that USCIS records indicate that the petitioner has filed at least seven additional

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<sup>1</sup> The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New United States Department of Labor (DOL) regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. The PERM regulation contains provisions to convert a previously submitted ETA Form 750 to an ETA 9089 under the special conversion guidelines set forth in PERM. 20 C.F.R. § 656.17(d) sets forth the requirements necessary for the converted labor certification application to retain the priority date set forth on the former ETA 750. Page 1, Part A of the ETA Form 9089 states that the petitioner seeks to use a prior filing date of January 13, 2001. As the ETA Form 9089 was filed in 2009, retention of the 2001 date appears to be in error. Alternatively, if the 2001 date was retained on the certified labor certification, the petitioner would need to establish its ability to pay the proffered wage from 2001 onward. This issue should be addressed upon receipt of the certified labor certification, if any.

Form I-140 petitions on behalf of other workers. It will be necessary for the petitioner to establish its ability to pay the proffered wages of these workers from their respective priority dates until their adjustment to lawful permanent status in addition to the proffered wage of the present petitioner. In making this determination, the director may wish to issue a Request for Evidence (RFE) requesting the following information relative to these workers:

- Each workers full name.
- Receipt number and priority date of each petition.
- Exact dates employed by the petitioner.
- Whether the petition(s) are pending or inactive (meaning that the petition has been withdrawn, the petition has been denied but is not on appeal, or the beneficiary has obtained lawful permanent residence). If a petition is inactive, provide the date that the petition was withdrawn, denied, or that the beneficiary obtained lawful permanent residence.
- The proffered wage listed on the labor certification submitted with each petition.
- The actual wage paid to each beneficiary from the priority date of the instant petition to the present.
- Forms W-2 or 1099 issued to each beneficiary from the priority date of the instant petition to the present.

The director may also request such additional information as he deems necessary for the petitioner to establish its ability to pay the proffered wage of all sponsored workers such as copies of the petitioner's federal tax returns for 2010, 2011 and 2012.

In accordance with the foregoing, on remand the director should request a duplicate of the certified labor certification, and if the labor certification was properly certified and filed within 180 days of certification, the director shall consider whether the petitioner has established its ability to pay the proffered wage and whether the beneficiary meets the terms of the certified labor certification.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's February 13, 2012 decision is withdrawn. The matter is remanded to the director to issue a new decision commensurate with the directives of this opinion.