



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 25 2013 OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 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 Director, Texas Service Center (director), denied the immigrant visa petition. The petitioner filed a motion to reconsider the denial, which was denied by the director. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner describes itself as a dry cleaners. It seeks to permanently employ the beneficiary in the United States as an alteration tailor. The petitioner requests classification of the beneficiary as a professional or 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). The petition was filed with a labor certification approved by the U.S. Department of Labor (DOL) on behalf of another beneficiary. The director denied the petition as the petitioner failed to file it with a valid labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i). The AAO affirmed the director's decision.

The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the director and the AAO made an erroneous decision through misapplication of law or policy. Specifically, counsel asserted that the AAO erred by not following USCIS policy regarding the substitution of beneficiaries.

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The regulation at 20 C.F.R. § 656.11 states the following:

Substitution or change to the identity of an alien beneficiary on any application for permanent labor certification, whether filed under this part or 20 CFR part 656 in effect prior to March 28, 2005, and on any resulting certification, is prohibited for any request to substitute submitted after July 16, 2007.

Additionally, the regulation at 20 C.F.R. § 656.30(c)(2) provides:

A permanent labor certification involving a specific job offer is valid only for the particular job opportunity, the alien named on the original application (unless a substitution was approved prior to July 16, 2007), and the area of intended employment stated on the *Application for Alien Employment Certification* (Form ETA 750) or the *Application for Permanent Employment Certification* (Form ETA 9089).

The Act does not provide for the substitution of aliens in the permanent labor certification process. DOL's regulation became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications, as well as prohibiting the sale, barter, or purchase of permanent labor certifications and applications. The rule continues the Department's efforts to construct a deliberate, coordinated fraud reduction and prevention framework within the permanent labor certification program. *See* 72 Fed. Reg. 27904 (May 17, 2007).

Counsel states on motion that the "petitioner's substitution request was in progress" before July 16, 2007. Counsel is correct that the petitioner had filed an earlier petition based on this labor certification and had successfully substituted this beneficiary for the original beneficiary. That petition was denied on July 25, 2007, because the petitioner had failed to establish the ability to pay the proffered wage. Counsel did not, however, explain why that decision was not appealed or why, instead, the petitioner filed a new petition after the new rule regarding substitution had been enacted.

As the filing of the instant case was after July 16, 2007, the petitioner is not able to substitute the beneficiary. The petition was, therefore, filed without a valid certified labor certification pursuant to 8 C.F.R. § 204.5(1)(3)(i).

The Secretary of the Department of Homeland Security (DHS) delegates the authority to adjudicate appeals to the AAO pursuant to the authority vested in him 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). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv).

Among the appellate authorities are appeals from denials of petitions for immigrant visa classification based on employment, "except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act." 8 C.F.R. § 103.1(f)(3)(iii)(B) (2003 ed.).

As alien labor certification substitution is no longer permitted and the petition is not accompanied by a valid labor certification, this office lacks jurisdiction to consider an appeal from the director's decision.

ORDER: The motion to reconsider is granted. The previous AAO decision is affirmed. The petition remains denied.