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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUN 2 7 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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

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.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be rejected.

The petitioner is a dental office. It seeks to permanently employ the beneficiary in the United States as a dental waxer. The petitioner requests classification of the beneficiary as a skilled worker 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 record contains a duplicate copy of an ETA Form 9089, Application for Permanent Employment Certification, certified by the U.S. Department of Labor (DOL) on March 19, 2009. The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is September 7, 2007. *See* 8 C.F.R. § 204.5(d).

The director's decision concludes that the instant petition was not filed with a valid labor certification because it expired before the petition was filed.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

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. § 656.30(b)(1) provides: "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." (Emphasis added).

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The instant petition was filed on April 10, 2012 and was accompanied by a request for United States Citizenship and Immigration Services (USCIS) to obtain a labor certification approved by the U.S. Department of Labor (DOL). DOL submitted a certified duplicate copy of the labor certification to the USCIS which stated that the labor certification was certified on March 19, 2009 and valid until September 15, 2009. More than two years and six months passed after the expiration of the labor certification's validity date and prior to the filing of the petition with USCIS.[2] As the filing of the instant case was after 180 days of the labor certification's expiration, the petition was, therefore, filed without a valid labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i).

The AAO notes that the record contains emails between counsel for the petitioner and DOL regarding the labor certification. These emails indicate that on February 22, 2011, counsel for the petitioner requested a status update regarding the labor certification. On February 23, 2011, DOL responded to this email and stated that the labor certification was certified and "mailed to the employer's representing attorney or agent (if applicable) on: March 19, 2009." The record contains counsel's response to DOL's email on February 23, 2011, in which counsel states that their office and the employer did not receive the original labor certification. While this correspondence indicates the petitioner's contact with DOL, it does not change the requirement that the Form I-140 must be filed with a valid labor certification. *See* 8 C.F.R. § 204.5(l)(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 her 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 the labor certification is expired, the petition is not accompanied by a valid labor certification, and this office lacks jurisdiction to consider an appeal from the director's decision.

ORDER: The appeal is rejected.

[2] The director noted that the petitioner first sent a Form I-140 to USCIS on August 22, 2011, 23 months after the expiration of the labor certification's validity date, which was rejected for not having a valid labor certification. Therefore, even if that filing had been accepted, it would have been denied because the labor certification was expired at the time of filing. 8 C.F.R. § 204.5(l)(3)(i).