



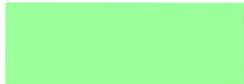
U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: JUN 27 2013

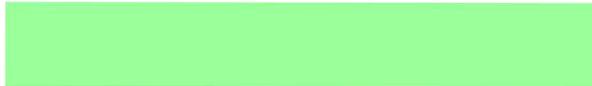
OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE:

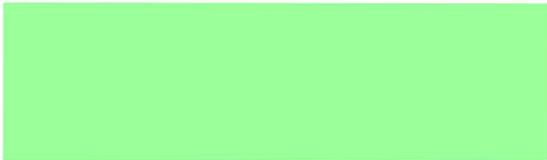
Petitioner:

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:



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, Texas 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 describes itself as a lodging business. It seeks to permanently employ the beneficiary in the United States as a front office supervisor. 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 petition is accompanied by a copy of an ETA Form 9089, Application for Permanent Employment Certification (labor certification), issued by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is August 22, 2007. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that "the evidence does not establish that the petitioner had the ability to pay the proffered wage at the time of the priority date was established and continuing to the present."

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.<sup>1</sup>

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*

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<sup>1</sup> 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).

*Department of Homeland Security within 180 calendar days* of the date the Department of Labor granted the certification.” (Emphasis added).

The petition was filed on February 15, 2012 with a labor certification approved by the U.S. Department of Labor (DOL) on September 27, 2007 and valid until March 25, 2008. As this Form I-140 was filed February 15, 2012, 1,422 days passed after the expiration of the labor certification’s validity date and prior to the filing of the petition with United States Citizenship and Immigration Services (USCIS). A search of USCIS records reflects no prior I-140 petition has been submitted or filed by the petitioner for this beneficiary. As the filing of the instant case was more than 180 days of the labor certification’s approval, the petition was, therefore, filed without a valid labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i).

The record reflects that, at the time the instant petition was filed, counsel stated the following:

The certified ETA has expired. To the best of our belief and knowledge, this case has previously been submitted to the USCIS, however no receipt notice has ever been received by this office or by the Petitioner. Therefore, the request for a duplicate copy of the expired ETA is being respectfully submitted herein.

Counsel failed to submit any evidence of filing a prior petition prior to the expiration of the labor certification. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)). Further, the AAO notes that the labor certification in the record is not a duplicate of the certified ETA Form 9089; the labor certification is not signed by DOL’s certifying officer, bears no date of signature by the certifying officer, and does bear original signatures by the petitioner and beneficiary, dated January 12, 2012, and counsel, dated January 31, 2012. Therefore, this does not appear to be a copy of an original labor certification approved by DOL and properly submitted to USCIS prior to its expiration.

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.).

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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.