



**U.S. Citizenship
and Immigration
Services**

(b)(6)

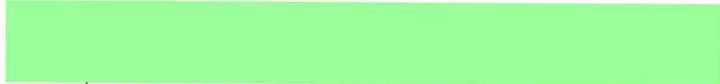


DATE:
MAR 28 2013

OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner:
 Beneficiary:



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.

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 The director's decision will be withdrawn, and the matter will be remanded to the director for further consideration and a new decision.

The petitioner is a religious center. It seeks to employ the beneficiary permanently in the United States as an Indian specialty cook. As required by statute, the petition is accompanied by a previously submitted Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had a current and approved Form ETA 750. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 17, 2010 denial, the single issue in this case is whether the petitioner had an expired Form ETA 750. The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182 (a)(5)(A)(i), 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)(2) provides: "An approved permanent labor certification *granted before 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 July 16, 2007.*" (Emphasis added).

The petition was filed on January 22, 2009 with a labor certification approved by the Department of Labor (DOL) on December 5, 2006. 557 days passed after July 16, 2007 and prior to the filing of the petition with United States Citizenship and Immigration Services (USCIS). As the filing of the instant case was after 180 days of July 16, 2007, the petition appeared, therefore, to have been filed without a valid labor certification pursuant to 8 C.F.R. § 204.5(1)(3)(i).

On appeal, counsel argues that the Form ETA 750 is still valid and has not expired, because the Form ETA 750 had been filed before expiration with an earlier Form I-140 [REDACTED]. As this previous Form I-140 had been filed with the Form ETA 750 in question, it was not expired when it was filed with the instant petition. Therefore the director's decision will be withdrawn.

However, the instant petition cannot be approved because the petitioner has failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.¹ If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967).

In the instant case, the petitioner has failed to establish its continuing ability to pay the proffered wage. The matter is remanded to the director to further consider this issue.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new decision.

¹ *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Filed Nov. 10, 2011).