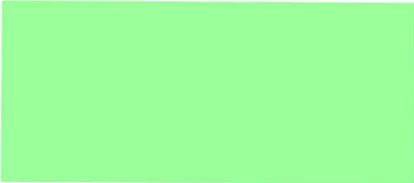




U.S. Citizenship
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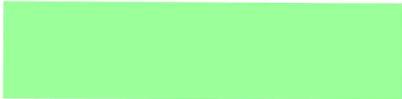


Date: **SEP 06 2013**

Office: TEXAS SERVICE CENTER



IN RE:



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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed to the Administrative Appeals Office (AAO). The director's decision was withdrawn and the matter was remanded to the director for issuance of a new decision. The director subsequently denied the petition due to abandonment, and certified the matter to the AAO.¹ The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly. On November 8, 2011, the AAO withdrew the director's decision and remanded the case to the director. Although the AAO determined that the petitioner had demonstrated its ability to pay the proffered wage in 2007, the AAO found that the petition was not approvable as the labor certification lacked the beneficiary's, the preparer's and the petitioner's original signatures, and the petitioner did not establish that the beneficiary met the required

¹ Certifications by field office or service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. See DHS Delegation No. 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those 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) (2005 ed.).

The regulation at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) states in pertinent part:

(iii) Appellate Authorities. In addition, the Associate Commissioner for Examinations exercises appellate jurisdiction over decisions on;

(B) Petitions for immigrant visa classification based on employment or as a special immigrant or entrepreneur under Secs. 204.5 and 204.6 of this chapter 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;

Pursuant to the delegation cited above, the AAO exercises the appellate jurisdiction formerly exercised by the Associate Commissioner for Examinations.

qualifications stated on the labor certification. The AAO noted that there were discrepancies in the documentation the petitioner provided to establish the beneficiary's experience. In its remand decision, the AAO instructed the director to request any additional evidence considered pertinent; to provide the petitioner a reasonable period of time to be determined by the director to submit a response; and, upon receipt of all the evidence, review the entire record and enter a new decision, which, if adverse to the petitioner, was to be certified to the Administrative Appeals Office for review.

On May 25, 2012, the director issued a request for evidence (RFE) to clarify discrepancies in the documentation the petitioner had provided to establish the beneficiary's qualifications. The director also requested that the petitioner submit the ETA Form 9089 with the beneficiary's, the preparer's and the petitioner's original signatures, as these were missing from the original ETA Form 9089. In addition the director requested evidence to establish that the petitioner had the ability to pay the proffered wage from 2007 and continuing through 2011, and requested the petitioner's complete tax returns for these years. The director requested that the information be provided within 84 days (87 days if the RFE was received by mail), and notified the petitioner that failure to do so may result in denial of the petition.

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.

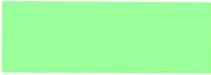
The director noted that as of June 21, 2013, the record did not reflect receipt of a response to the director's RFE. Therefore, the director denied the petition for abandonment and certified the adverse decision to the AAO.

The petitioner was provided 84 days (twelve weeks) to provide a response to the director's RFE. Three additional days were provided because the request for evidence was sent to the petitioner by mail. The request for evidence was issued on May 25, 2012. The response was due on August 21, 2012, including the additional three days. The record does not reflect receipt of a response from the petitioner.

The regulation at 8 C.F.R. § 103.2(b)(8) states the following:

Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or [USCIS] finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, [USCIS] shall request the missing initial evidence, and may request additional evidence. . . . In such cases, the applicant or petitioner shall be given 12 weeks to respond to a request for evidence. Additional time may not be granted.

Additionally, the regulation at 8 C.F.R. § 103.2(b)(13) states the following: "*Effect of failure to respond to a request for evidence or appearance.* If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied."



NON-PRECEDENT DECISION

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The regulations are clear that failure to respond to a request for evidence *shall* result in the application or petition being considered abandoned and denied. Denials for abandonment cannot be appealed. 8 C.F.R. § 103.2(b)(15).

ORDER: The appeal is dismissed. The director's decision to deny the petition for abandonment is affirmed.