



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: APR 01 2014 OFFICE: TEXAS SERVICE CENTER

IN RE:

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 (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. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's March 23, 2011 decision will be withdrawn. The petition will be remanded.

The petitioner describes itself as a jeweler and retailer. It seeks to permanently employ the beneficiary in the United States as a jewelry craftsman. 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 Form ETA 750, Application for Alien Employment Certification (labor certification), certified 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 April 30, 2001. See 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the labor certification submitted with the petition was not valid as the petition had not been filed within 180 days from July 16, 2007. On appeal, the petitioner states that the labor certification was submitted with a previous petition filed on January 14, 2008, which is the Monday following the 180th day following July 16, 2007. The petitioner notes that the regulations permit a filing on the next workday if a deadline falls on a holiday or weekend.

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.

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 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 regulation at 8 C.F.R. § 103.2(a)(7) states:

An application or petition received in a USCIS office shall be stamped to show the time and date of actual receipt and, unless otherwise specified in part 204 or part 245 or part 245a of this chapter, shall be regarded as properly filed when so stamped, if it is signed and executed and the required filing fee is attached or a waiver of the filing fee is granted. An application or petition which is not properly signed or is submitted with the wrong filing fee shall be rejected as improperly filed. Rejected applications and petitions, and ones in which the check or other financial instrument used to pay the filing fee is subsequently returned as non-payable will not retain a filing date.

The instant petition was filed on June 3, 2010 with a labor certification approved by the Department of Labor (DOL) on April 17, 2007. The instant Form I-140 petitioner states that it filed a previous Form I-140 dated January 14, 2008 using the same ETA Form 750. In support of its contention that the labor certification was filed with a petition previously, the petitioner submitted a Form I-140 bearing the same beneficiary name with a stamp stating receipt on January 14, 2008.² Underneath the stamp, a handwritten number, [REDACTED] appears along with the filing fee amount of \$475. The petitioner also submitted a letter on United States Citizenship and Immigration Services (USCIS) letterhead dated January 14, 2008 stating that the petition was being rejected for not being filed within 180 days of the issuance of the labor certification.³ This letter does not have a name or

² The petitioner’s name on the previously filed Form I-140 is “[REDACTED]” This name differs from the instant petitioner [REDACTED] as well as from the employer listed on the labor certification ([REDACTED]).

³ The petitioner also submitted a printout from the USCIS website stating that a Form I-140 was received on January 14, 2008; this printout contains no identifying information regarding the petitioner or beneficiary of the Form I-140 referenced. The petitioner also submitted a receipt notice dated January 15, 2008 with the petitioner’s and beneficiary’s names obscured. As noted by the director in his decision, the barcode at the bottom of this document, when scanned, reveals a different petitioner and beneficiary name than the ones on the instant petition. The attorney, [REDACTED], is the same attorney whom the petitioner originally retained to file the original Form I-140. A letter dated January 20, 2008 from [REDACTED] to USCIS states that he filed six applications on “January 14, 2007” and that only the petition with the instant petitioner and beneficiary was rejected as untimely. (It can be assumed that [REDACTED] meant the date to be January 14, 2008.) This letter, containing the petitioner’s and beneficiary’s names, contains a handwritten notation on the side from a Service Center officer that it “must have been received at the Service Center by 1/12/08” (emphasis original). It would appear that the receipt notice submitted concerns one of the other five petitions submitted by [REDACTED] on that same day and that some confusion arose as to which petition matched this particular receipt because it lacked the petitioner’s

address, but does contain the same handwritten number, "2301046," in the upper left hand side of the page. The petitioner also submitted a Form G-28, Notice of Entry of Appearance as Attorney or Representative, stamped January 14, 2008 and also bearing the number "[REDACTED]"

The evidence in the record indicates that the petitioner attempted to file a Form I-140 petition using the ETA Form 750 dated April 30, 2001 on January 14, 2008 and that this petition was rejected by the director for being untimely filed. The 180th day from July 14, 2007, the date proscribed by regulation, was January 12, 2008, a Saturday. As a result, the petitioner had until the following regular workday, Monday January 14, 2008 in which to file its petition. The evidence in the record establishes that the petition was filed in a timely manner so that the director improperly rejected the previous filing. Because the previous filing should have been accepted, the labor certification remains valid for the purposes of the instant filing pursuant to 8 C.F.R. § 204.5(l)(3)(i).

Although the main basis for the director's decision is overturned, the petition is not currently approvable. The record lacks an original Form ETA 750. The regulations at 8 C.F.R. §§ 204.5(a)(2) and 204.5(l)(3)(i) require that any Form I-140 petition filed under the preference category of section 203(b)(3) of the Act be accompanied by a labor certification.

The regulation at 8 C.F.R. § 103.2(b) provides:

Submitting copies of documents. Application and petition forms must be submitted in the original. Forms and documents issued to support an application or petition, *such as labor certifications*, Form IAP-66, medical examinations, affidavits, formal consultations, and other statements, must be submitted in the original unless previously filed with [USCIS].

(emphasis added).

The regulation at 8 C.F.R. § 204.5(g) provides: "In general, ordinary legible photocopies of such documents (*except for labor certifications from the Department of Labor*) will be acceptable for initial filing and approval." (emphasis added). Counsel has not provided any authority permitting USCIS to accept a photocopy of the ETA 750. The regulation at 20 C.F.R. § 656.30(e) provides for the issuance of duplicate labor certifications by the DOL only upon the written request of a consular or immigration officer.⁵ The petitioner indicated on the Form I-140 that the petition was being

and beneficiary's names. It is noted that such a receipt would not have been generated for a rejected petition.

⁴ Photocopied with the Form G-28 is a check written from the Law Offices of [REDACTED], dated January 2, 2008 and written for \$475.

⁵ The regulation at 20 C.F.R. § 656.30(e) provides:

(e) Certifying Officers shall issue duplicate labor certifications only upon the written request of a Consular or Immigration Officer. Certifying Officers shall issue such duplicate certifications only to the Consular or Immigration Officer who submitted

submitted without an original labor certification. Counsel's cover letter asserts that the original labor certification was lost and requests that a duplicate be obtained from the DOL. A copy of the labor certification was submitted with the instant petition. However, the copy fails to include the cover page, or the second page of the Form ETA 750A which includes the employer's signature.⁶ Therefore, even if the petitioner's evidence had established its eligibility for the classification sought, the evidence would not support an approval of the Form I-140 petition unless a duplicate original of the Form ETA 750 labor certification had first been obtained.

Further, the director did not have an opportunity to address the merits of the instant petition, including whether the petitioner has the ability to pay the proffered wage,⁷ whether the beneficiary has the experience required for the offered position,⁸ and whether the instant petitioner is a valid successor-in-interest to the original employer listed on the labor certification.⁹ Therefore, we will remand the petition back to the director to allow the petitioner to address these issues.

the written request. An alien, employer, or an employer or alien's agent, therefore, may petition an Immigration or Consular Officer to request a duplicate from a Certifying Officer.

⁶ The Form I-140, in Part 5, lists a DOL/ETA case number of [REDACTED]. It is unclear from where this information was obtained, as this number is not listed on any of the supporting documentation submitted with the petition. Further, the Form ETA 750B includes the beneficiary's signature with a date of September 22, 2004. It is unclear why the beneficiary would have signed the form more than three years after it was purportedly filed, but nearly three years before it was certified. While notations on the form indicate that changes to the information on the form were made and approved in 2006 and 2007, nothing indicates why the beneficiary signed the form on an unrelated date in 2004. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

⁷ Although the petitioner submitted tax returns covering the period 2001 through 2008, the record does not include financial evidence pursuant to 8 C.F.R. § 204.5(g)(2) from 2008 onwards to determine the petitioner's ability to pay the proffered wage.

⁸ The letter submitted to verify the beneficiary's experience does not indicate whether the work done was in a full-time or part-time capacity, nor does it indicate the beneficiary's job duties in this previous position.

⁹ As noted above, the instant petitioner bears a different name from the employer listed on the labor certification. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for review and consideration of any additional issues that impact the petitioner's eligibility for the visa that were not initially identified by the director. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director may review the entire record and enter a new decision.

ORDER: The director's decision denying the petition is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.

opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.