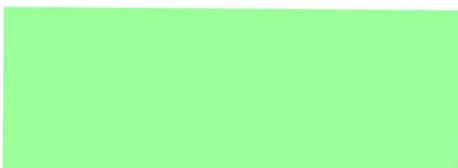


(b)(6)

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

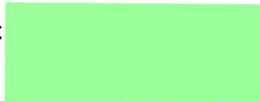


U.S. Citizenship
and Immigration
Services



DATE: **FEB 04 2014**

OFFICE: TEXAS SERVICE CENTER FILE:



IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Professional or Skilled Worker 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 Director, Texas Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner sought to employ the beneficiary permanently in the United States as an administrative assistant 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) as a skilled worker. As required by statute, a labor certification (ETA Form 9089) certified by the U.S. Department of Labor (DOL) accompanied the petition. It required two years of work experience in the job offered and offered a wage of \$37,500 per year. The director denied the petition, determining that the petitioner had not established its continuing financial ability to pay the proffered wage.

On appeal, the petitioner, through counsel, maintained that the petitioner had established its ability to pay the proffered wage.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The procedural history in this case is documented by the record and incorporated. Further elaboration of the procedural history will be made only as necessary.¹

Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), provides that “[a]ny employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(1)(B) . . . of this title may file a petition with the Attorney General [now Secretary of Homeland Security] for such classification.” (Emphasis added.)

Section 212(a)(5)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(5)(i) provides that 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.

¹The 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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The petitioner must establish that its job offer to the beneficiary is a realistic one and that the opportunity is a *bona fide* job offer. Because the filing of an ETA Form 9079 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 indicates that it was accepted for processing on February 28, 2007, which establishes the priority date.

The record indicates that the Form I-140 petition was filed on or about August 2, 2007. The director denied the petition on June 10, 2008, concluding that the petitioner had failed to demonstrate its continuing ability to pay the proffered wage as required by 8 C.F.R. § 204.5(g)(2).

On appeal and upon further review, the AAO notified the petitioner that the record suggested that the beneficiary had a familial relationship with the petitioner's owner. Specifically, the petitioner's owner, [REDACTED] indicated that the beneficiary is his sister-in-law. This raised a question of the *bona fides* of the job offer.

The AAO sought further consultation with the DOL and advised the petitioner as to the nature of the consultation and that the case would be held in abeyance pending DOL's response.

The DOL notified this office that as the employer had failed to indicate that a familial relationship existed, it raised serious concerns of undue influence and that the job opportunity was not clearly open to U.S. workers. The DOL indicated that it intended to revoke the certified ETA Form 9089 (ETA Case Number [REDACTED]) in accordance with 20 C.F.R. § 656.32. On January 7, 2014, DOL advised this office that the petitioner failed to respond to its notice of intent to revoke the ETA Form 9089's certification and that it considered the labor certification automatically revoked.

In this matter, section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3), provides immigrant classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. However, the petition must be accompanied by an individual labor certification approved by the Department of Labor. See 8 C.F.R. § 204.5(a)(2). Because this labor certification has been revoked, the petition is not supported by a valid labor certification, and further pursuit of the matter at hand is moot.

(b)(6)

NON-PRECEDENT DECISION

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ORDER: The appeal is dismissed, based on DOL's revocation of certification of the ETA Form 9089, as the petition is no longer supported by a valid labor certification.