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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



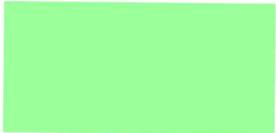
U.S. Citizenship
and Immigration
Services



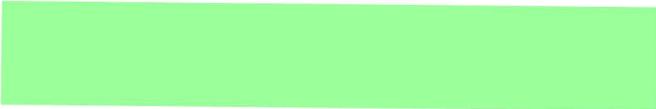
DATE: **FEB 28 2014**

OFFICE: TEXAS SERVICE CENTER

FILE:



IN RE: Petitioner:
 Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 203(b)(3)
 of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

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 appeal will be summarily dismissed as abandoned pursuant to 8 C.F.R. § 103.2(b)(13)(i).

The petitioner is a restaurant. It seeks to permanently employ the beneficiary in the United States as a cook. The petitioner requests classification of the beneficiary as a an Other, Unskilled Worker Pursuant to § 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii). The petition is accompanied by a labor certification approved by the U.S. Department of Labor.

The director's decision denying the petition concluded that the petitioner had not established that it had the ability to pay the beneficiary's proffered wage from the priority date onward. The director noted in his denial that the petitioner had not provided any evidence regarding its ability to pay the proffered wage.

The record shows that the appeal is properly filed 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.

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

On March 25, 2011, the AAO sent the petitioner a notice of derogatory information (NDI) with a copy to counsel of record because the petitioner indicated on the ETA Form 9089, Part C.9, that a familial relationship does not exist between the petitioner's owner and the beneficiary, yet U.S. Citizenship and Immigration Services (USCIS) records indicated that there may be a familial relationship. The NDI requested that the petitioner identify the potential family relationship. Additionally, the NDI requested evidence of the petitioner's ability to pay the beneficiary's proffered wage from the priority date onward. The AAO also requested that the petitioner resolve a discrepancy with the beneficiary's experience letter, which was unsigned, in order to establish that the beneficiary is qualified for the position. The NDI allowed the petitioner 30 days in which to submit a response. The AAO informed the petitioner that failure to respond to the NDI would result in a dismissal of the appeal.

As of the date of this decision, the petitioner has not responded to the AAO's NDI. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Because the petitioner failed to respond to the NDI, the appeal will be summarily dismissed as abandoned pursuant to 8 C.F.R. § 103.2(b)(13)(i).

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 8 C.F.R. § 103.2(a)(1).

Even if the petition had not been dismissed as abandoned, the AAO notes that the petitioner has not established that a *bona fide* job offer exists. A USCIS officer contacted the petitioner's owner on April 20, 2012, who indicated that the beneficiary is her ex-sister-in-law and that the petitioner no longer intends to employ the beneficiary who stopped working there approximately one year earlier. Therefore, in any further proceedings, the petitioner must demonstrate the existence of a *bona fide* job offer. The petitioner must also demonstrate in any further proceedings that it has the ability to pay the beneficiary's proffered wage, and that the beneficiary meets the experience requirements of the labor certification.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Additionally, this matter was referred to the DOL on July 30, 2012 because of the family relationship between the petitioner's owner and the beneficiary, which was not disclosed to the DOL on Part C.9 of the labor certification. The DOL has not yet determined whether this warrants revocation of the instant labor certification. Therefore, the labor certification remains open at this time. However, if the DOL later decides to revoke it, the labor certification will no longer be valid for use with any immigration petition. Further, the AAO may reopen the instant matter for a finding of fraud and/or willful misrepresentation.²

² *See* section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

See also 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

(d) finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

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NON-PRECEDENT DECISION

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In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.