



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: OFFICE: TEXAS SERVICE CENTER

FILE:

JUL 24 2014

IN RE: Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Professional Pursuant to Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(ii)

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 (director) denied the employment-based immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before our office as a Motion to Reconsider (MTR). The MTR will be dismissed as abandoned under 8 C.F.R. §§ 103.2(b)(13)(i), (15). The visa petition will remain denied.

The petitioner is a pest control/misting systems company. It seeks to employ the beneficiary permanently in the United States as an operations vice president. The petitioner requests classification of the beneficiary as a professional pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii).

Procedural History

The director denied the immigrant visa petition on November 29, 2011. On December 23, 2011, you appealed the director's decision to this office. We dismissed the appeal on April 5, 2013, finding that the record did not establish that the visa petition was based on a *bona fide* job opportunity available to all qualified U.S. workers. Specifically, we noted that the petitioner had failed to disclose the beneficiary's minority ownership in its business during the labor certification process.

On this same date, we forwarded a copy of the underlying ETA Form 9089, Application for Permanent Employment Certification (labor certification), to the U.S. Department of Labor (DOL) seeking clarification of the relationship between the petitioner and beneficiary. The petitioner filed the aforementioned MTR with us on May 10, 2013. On February 5, 2014, DOL issued a Notice of Intent to Revoke (NOIR) the labor certification to the petitioner, followed by a Revocation Notice on May 5, 2014. On May 20, 2014, we issued a Notice of Intent to Dismiss (NOID) to the petitioner based on DOL's revocation of the labor certification and gave the petitioner 30 days to submit a rebuttal or other response. The NOID informed the petitioner that failure to respond might result in the petition being summarily denied as abandoned pursuant to 8 C.F.R. § 103.2(b)(13)(i).

As of this date, the petitioner has not responded and the visa petition is, therefore, subject to dismissal as abandoned.¹ In addition, we will discuss DOL's revocation of the labor certification and its effect on our adjudication of the instant Motion to Reconsider.

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.²

¹ 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).

² 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). 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).

Lack of Jurisdiction

The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). We exercise appellate jurisdiction over the 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). Within our jurisdiction are appeals from the denials of petitions for immigrant visa classification based on employment, “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.” 8 C.F.R. § 103.1(f)(3)(iii)(B) (2003 ed.). As DOL has revoked the labor certification in this matter, we have no authority to consider the MTR. Accordingly, had the petitioner responded without evidence of a valid labor certification, the MTR would be rejected for lack of jurisdiction. We also would not consider the MTR, as it is not properly filed.

Proper Filing of Form I-140 Petition

A 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 [now Secretary of Homeland Security] 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 8 C.F.R. § 204.5(a)(2) states the following:

(a) *General.* A petition to classify an alien under section 203(b)(1), 203(b)(2), or 203(b)(3) of the Act must be filed on Form I-140 A petition is considered properly filed if it is:

. . . .

(2) Accompanied by any required individual labor certification

The regulation at 8 C.F.R. § 204.5(1)(3)(i) provides:

(3) *Initial evidence* –

Labor certification or evidence that alien qualifies for Labor Market Information Pilot Program. Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program.

Here, DOL has revoked the underlying labor certification pursuant to its authority at 20 C.F.R. § 656.32. Accordingly, the visa petition is no longer supported by an approved labor certification. Therefore, it is not properly filed, pursuant to 8 C.F.R. § 204.5(a)(2) and, further, lacks the initial evidence required by 8 C.F.R. § 204.5(1)(3)(i). As the visa petition is not properly filed, the Motion to Reconsider filed by the petitioner is moot. Therefore, we would also not consider the motion as the petition lacks initial evidence and is not properly filed.

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. The MTR will be dismissed as abandoned. The visa petition will remain denied.

ORDER: The motion is dismissed as abandoned. The visa petition remains denied.