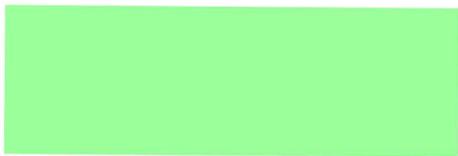




U.S. Citizenship
and Immigration
Services

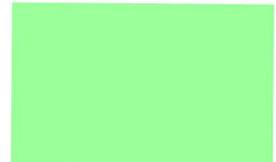
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DATE: NOV 14 2014

OFFICE: NEBRASKA SERVICE CENTER

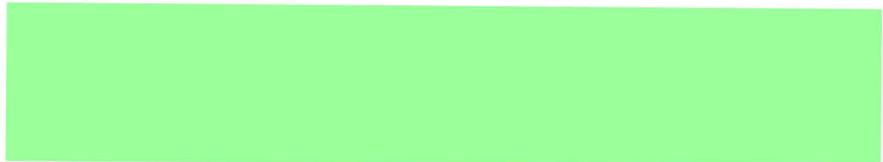
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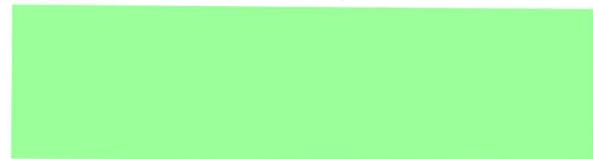
Petitioner:

Beneficiary:



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.

Thank you,


Ron Rosenberg

Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was initially approved by the Director, Nebraska Service Center (Director). The Director subsequently denied the petition without revoking the earlier approval. The petitioner filed an appeal, which is now before the Chief, Administrative Appeals Office (AAO). The case will be remanded to the Director for reconsideration of its prior approval and denial decisions, and the issuance of any new decision(s) that may be deemed appropriate.

Procedural History

The petitioner describes itself as a [REDACTED] grocery store. On August 27, 2010, it filed a Form I-140, Immigrant Petition for Alien Worker, seeking to employ the beneficiary permanently in the United States as a “retail store manager” and to classify him 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). This statutory provision provides for the granting of preference classification to qualified immigrants who are capable 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. As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was filed with the U.S. Department of Labor (DOL) on June 16, 2009, and certified by the DOL on March 3, 2010.

On October 1, 2010, the Director issued a Request for Evidence (RFE). The contents of the RFE are unclear because only the cover page is in the record. On October 19, 2010, counsel responded to the RFE by submitting a copy of the petitioner’s 2009 U.S. Income Tax Return for an S Corporation, Form 1120S. On October 20, 2010, an Approval Notice was issued by the Nebraska Service Center and sent to the petitioner’s counsel.

On October 26, 2010, despite having just issued an Approval Notice, the Director issued another RFE. Like the previous RFE of October 1, 2010, the contents of the second RFE are unclear because only the cover page is in the record. On November 12, 2010, the petitioner responded to the second RFE with a letter from counsel, dated November 3, 2010, advising the Nebraska Service Center that a notice had been sent to the AAO at the direction of the petitioner’s owner withdrawing a pending appeal, Receipt No. [REDACTED] (actually, a motion to reconsider), on behalf of the instant beneficiary.¹ As far as the record shows, this submission was the petitioner’s only response to the second RFE.

¹ The motion related to an earlier Form I-140 filed by the petitioner which also sought skilled worker classification for the beneficiary. That petition was filed on August 13, 2007 (Receipt No. [REDACTED]), and denied by the Director on May 19, 2008, on the grounds that the petitioner failed to establish (1) its continuing ability to pay the proffered wage from the priority date up to the present and (2) that the beneficiary met the experience requirement on the labor certification. The petitioner filed an appeal, which was dismissed by the AAO on November 19, 2009. The petitioner then filed its motion to reconsider. Pursuant to the petitioner’s letter request dated November 3, 2010, the AAO issued a decision on January 3, 2011, dismissing the motion based on its withdrawal by the petitioner.

Nearly two years later, on September 29, 2012, the Director issued its third RFE. The Director requested that additional evidence be submitted of the petitioner's continuing ability to pay the proffered wage of the job offered, and additional evidence that the beneficiary met the experience requirement of 24 months in the job offered. Furthermore, the Director requested specific documentation to show that the proffered position of retail store manager represented a *bona fide* job opportunity available to all U.S. workers in view of the familial relationship (brothers-in-law) between the beneficiary and the petitioner's sole owner.

On December 11, 2012, the petitioner responded to the third RFE with a letter from counsel. In its letter, dated December 10, 2012, counsel pointed out that the instant petition was already approved on October 20, 2010, and asked for clarification as to why the documentation previously submitted was insufficient. A copy of the Approval Notice was submitted with counsel's letter.

On December 19, 2012, the Director issued its fourth RFE. Once again, the contents are not clear since only the cover page is in the record. It may have been a duplicate of the third RFE, though, since the petitioner's response on March 8, 2013 included documentation which addressed the issues of its ability to pay the proffered wage, the beneficiary's work experience, and the *bona fides* of the job offer vis-à-vis U.S. workers at large.

On April 18, 2013, the Director issued a decision denying the petition and invalidating the labor certification. The Director found that the failure to divulge the familial relationship between the petitioner's owner and the beneficiary during the labor certification process constituted fraud or willful misrepresentation of a material fact, and warranted the invalidation of the labor certification. The Director then denied the petition because it was not accompanied by a valid labor certification.

The petitioner filed a timely appeal, which was forwarded by the Nebraska Service Center to the AAO. We conduct appellate review on a *de novo* basis. See *Soltane v. Department of Justice*, 381 F.3d 143, 145 (3d Cir. 2004).

On September 12, 2014, we issued a Notice of Intent to Dismiss (NOID) the appeal. The petitioner was afforded the opportunity to submit additional documentation on the issues previously identified by the Director. The petitioner responded to the NOID on October 9, 2014, with letters from its sole shareholder and counsel, as well as additional documentation.

After a thorough review of the record, we find no evidence in the beneficiary's A-file or in U.S. Citizenship and Immigration Services (USCIS) records that the initial approval of the immigrant petition on October 20, 2010, was ever revoked. If it has not been revoked, then it would appear the approval is still in effect. In that case, the approval notice and the subsequent denial decision are in direct legal conflict.

To clear up this confusion, the case will be remanded to the Director for reconsideration of its prior approval and denial decisions. The Director shall take appropriate steps to resolve the procedural conflict, and may request additional evidence from the petitioner if needed, before issuing a new

(b)(6)



NON-PRECEDENT DECISION

Page 4

decision, or decisions, on the petition. If the decision(s) is (are) not favorable to the petitioner, the Director shall certify the case to the AAO for further review.

ORDER: The petition is remanded to the Director for further consideration, in accordance with the foregoing discussion, and the entry of a new decision, or new decisions, as appropriate. In particular, the Director shall resolve the conflict between the previously issued approval notice and denial decision. If the petition is not approved, the Director shall certify the case to the AAO for further review.