

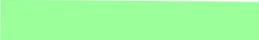


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: MAR 20 2015 OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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 approval was subsequently revoked by the Director. The case is now on appeal before the Chief, Administrative Appeals Office (AAO). The Director's decision will be withdrawn and the case remanded for further consideration.

The petitioner is Japanese restaurant. It seeks to permanently employ the beneficiary in the United States as a "Japanese cook" pursuant to section 203(b)(3)(A)(i) or (ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i) or (ii). Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to "[q]ualified immigrants who are capable . . . of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States." Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to "[q]ualified immigrants who hold baccalaureate degrees and are members of the professions."

The Form I-140, Immigrant Petition for Alien Worker, was filed on February 1, 2008, along with supporting materials. As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was filed at the Department of Labor (DOL) on August 29, 2007, and certified by the DOL (labor certification) on September 10, 2007. Counsel for the petitioner was [REDACTED] who prepared the Form I-140 petition and submitted a Form G-28, Notice of Entry of Appearance as Attorney or Representative, with the petition.

On March 19, 2009 the Director issued a Request for Evidence (RFE). The petitioner was requested to submit additional evidence of its ability to pay the proffered wage from the priority date of the petition, August 29, 2007, up to the present.

The petitioner responded on April 30, 2009, with copies of the 2007 and 2008 U.S. Individual Income Tax Returns of its owner, [REDACTED] and a list of monthly household expenses of Ms. [REDACTED] and her family. The petitioner's response to the RFE was submitted by a new attorney, [REDACTED] who submitted the required Form G-28.

The petition was approved on May 12, 2009.

On September 23, 2014, the Director issued a Notice of Intent to Revoke (NOIR) the approval of the petition on the grounds that the record failed to establish (1) the petitioner's ability to pay the proffered wage and (2) that the beneficiary had two years of qualifying work experience, as required on the labor certification. The petitioner was given 30 days to submit additional evidence in support of the petition. The NOIR was incorrectly addressed, however, to the petitioner's first attorney, Mr. [REDACTED] not to the subsequent attorney of record, Mr. [REDACTED]. Compounding this error, no copy of the NOIR was mailed to the petitioner directly.

In the NOIR the Director stated that "at the time of filing, the petitioner failed to provide sufficient documentation establishing the ability to pay the proffered wage to the beneficiary as of August 29, 2007." The Director did not mention the materials the petitioner submitted in response to the RFE in

2009, which were judged sufficient to approve the petition at that time, and did not explain why those materials were considered insufficient five years later. The only new evidence requested by the Director in the NOIR, on the ability to pay issue, were the petitioner's current work schedules for its U.S. employees and the 2013 Forms W-2 (Wage and Tax Statements) issued to each U.S. employee. The Director also indicated that the evidence provided at the time of filing was insufficient to establish that the beneficiary had two years of qualifying experience, as required on the labor certification. Without specifying exactly how the evidence provided with the petition – which included a “Certificate of Employment” from a Japanese restaurant in [REDACTED] South Korea, stating that the beneficiary had been employed as a Japanese cook for three years during the time period of 2003 to 2006 – was insufficient, the Director requested additional evidence providing “specific duties of prior work experiences . . . and previous place(s) of employment.”

No response to the NOIR was received during the prescribed 30-day period. The Director proceeded to issue a decision on November 24, 2014, revoking the prior approval of the petition on the ground that no additional evidence had been submitted to establish the petitioner's ability to pay the proffered wage and the beneficiary's two years of qualifying work experience. Unlike the NOIR, the decision was mailed to the correct attorney, Mr. [REDACTED]

On December 12, 2014 the petitioner filed a timely appeal on Form I-290B, accompanied by a new Form G-28 from Mr. [REDACTED] an appeal brief, and supporting documentation. Mr. [REDACTED] asserts that the revocation decision was erroneous because the petitioner had no opportunity to respond to the NOIR and because the specific evidence requested in the NOIR, as far as could be deduced from the revocation decision, was already in the record at the time the Director approved the petition in 2009. The petitioner's owner, [REDACTED], submits a declaration, dated December 9, 2014, stating that she became aware around October 8, 2014 that a notice had been sent to her prior attorney, who was no longer in business. She thereupon tried unsuccessfully to obtain a copy of the notice from U.S. Citizenship and Immigration Services (USCIS), and was assisted in these efforts by Mr. [REDACTED]. As evidence thereof copies of electronic correspondence with USCIS are appended to Ms. [REDACTED] declaration. Despite these efforts, Ms. [REDACTED] and Mr. [REDACTED] state that no copy of the NOIR was received prior to the issuance of the revocation decision on November 24, 2014. With regard to the grounds for revocation, the petitioner highlights the evidence before the Director at the time of the initial approval in 2009, which is now supplemented by the beneficiary's resume that provides a detailed description of his job duties at the Japanese restaurant in South Korea from 2003 to 2006. According to the petitioner, the evidence of record establishes its ability to pay the proffered wage from the priority date onward as well as the beneficiary's qualifying work experience, which exceeded the two year minimum required on the labor certification.

Without addressing the substance of the petitioner's appeal, it is clear that the Director committed procedural errors by (1) mailing the NOIR in September 2014 to the petitioner's first attorney, whose Form G-28 was dated January 29, 2008, rather than the attorney of record, [REDACTED] whose Form G-28 was dated April 27, 2009, and (2) not mailing a copy of the NOIR directly to the petitioner. In addition, USCIS apparently failed to furnish a copy of the NOIR to the petitioner and/or counsel even after they contacted USCIS in October 2014.

Based on the evidence of record, we conclude that the NOIR was not properly mailed to either the petitioner or counsel of record at any time prior to the revocation decision on November 24, 2014. As a result, the petitioner did not have an opportunity to respond to the grounds for revocation before the decision was issued.

Accordingly, the Director's revocation decision will be withdrawn, and the case remanded for further consideration. The Director may reissue the existing NOIR or issue a new NOIR, sending it to the petitioner and counsel of record, Mr. [REDACTED] at their current addresses. The Director may also take any other action deemed appropriate.

We note that the record includes a Form G-325, Biographic Information, signed by the beneficiary, [REDACTED] on April 22, 2013, stating that he has been the owner since 2006 of [REDACTED] (a restaurant doing business as [REDACTED]), as well as an affidavit by the petitioner's owner, [REDACTED] dated February 3, 2014, stating that she has been the owner of [REDACTED] since May 2007. According to Ms. [REDACTED] she and Mr. [REDACTED] met at [REDACTED] in June 2007 and discussed the possibility of her working there. In September or October of that year, according to Ms. [REDACTED] she talked to Mr. [REDACTED] about working at [REDACTED]. Ms. [REDACTED] indicated that she and Mr. [REDACTED] subsequently filed petitions on each other's behalf. It is unclear how [REDACTED] and [REDACTED] could own their own restaurants and be employed in each other's restaurant at the same time. This is a subject for the Director to address in remand proceedings.

ORDER: The Director's revocation decision dated November 24, 2014, is withdrawn. The petition is remanded to the Director for further consideration in accordance with the foregoing discussion.