



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE:

MAY 01 2015

OFFICE: TEXAS SERVICE CENTER

FILE:



IN RE:

PETITIONER:

BENEFICIARY:



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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center (the director), and the Administrative Appeals Office (AAO) dismissed the appeal and a subsequent motion to reopen and motion to reconsider. The matter is now before us on a second motion to reopen and motion to reconsider. The motions will be dismissed, our previous decisions will be affirmed, and the petition will remain denied.

The petitioner¹ describes itself as a restaurant. It seeks to permanently employ the beneficiary in the United States as an Indian cook. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).² The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is October 30, 2005. *See* 8 C.F.R. § 204.5(d). The director's decision denying the petition concluded that the petitioner did not establish its ability to pay the proffered wage.

On appeal, the petitioner filed a Form I-290B, Notice of Appeal or Motion through its counsel. On August 21, 2014, we found that [REDACTED] did not establish that it is a valid successor-in-interest to the petitioner and that the petitioner did not establish its ability to pay the proffered wage. Beyond the decision of the director,³ we found that the beneficiary did not possess the required education or experience for the offered position and that the beneficiary willfully misrepresented his qualifications to obtain an immigration benefit. We invalidated the labor certification pursuant to 20 C.F.R. § 656.30(d).

On November 13, 2014, we dismissed a motion to reopen and reconsider filed by the beneficiary. We noted that the motions were improperly filed pursuant to 8 C.F.R. § 103.5(a)(2)(v)(A)(i), as the beneficiary is not an affected party. We further noted that, even if the motions had been properly filed, the petitioner did not overcome the grounds for denial of the petition and dismissal of the appeal.

The instant motions were also filed by the beneficiary. We note that the attorney who signed the Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, accompanying the instant motions represents the beneficiary on motion and not the petitioner. As such, the instant motion is not filed on behalf of an affected party and the motion is improperly filed pursuant to 8 C.F.R.

¹ The petitioner is [REDACTED] Federal Employer Identification Number (FEIN) [REDACTED] [REDACTED] also filed the ETA Form 9089, Application for Permanent Employment Certification. The appeal was filed by [REDACTED]

² Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

³ 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).

§ 103.3(a)(2)(v)(A)(I). There is no evidence in the record that the petitioner consented to the filing of the instant or the previous motions.

Even if the motions were properly filed, the petitioner still has not overcome the grounds for denial of the petition and dismissal of the appeal. On June 12, 2014, we issued a notice of derogatory information and notice of intent to dismiss (NDI/NOID) informing the petitioner that the documentation submitted to establish the beneficiary's education and experience had been confirmed to be fraudulent. In the previous motions, the beneficiary submitted a statement that he had not made any "fraudulent declaration." The motions did not include any evidence contradicting the derogatory information discussed in our NDI/NOID or in support of the beneficiary's statement.⁴ The instant motions fail to address the derogatory information discussed in our NDI/NOID and again provide no supporting evidence.

Further, counsel for the beneficiary submits the same documentation already in the record regarding the petitioner's successor-ship and ability to pay the proffered wage. This evidence has been fully reviewed and discussed in our prior decision dismissing the appeal.

On the instant motion, the petitioner does not provide any affidavits or documentary evidence to establish any new facts and has not established that our previous decisions were based on an incorrect application of law or Service policy based on the evidence of record at the time of the initial decision.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motions will be dismissed, the proceedings will not be reopened or reconsidered and our previous decision and the previous decision of the director will not be disturbed.

ORDER: The motions are dismissed. Our previous decisions are affirmed. The petition remains denied and the labor certification remains invalidated.

⁴ In addition to noting fraud confirmed in the beneficiary's experience letters, our NDI/NOID noted fraud confirmed in the beneficiary's education documents. In the previous motions, the beneficiary stated that he completed his "9th standard education from [REDACTED] India, before appearing as private candidate in 10th standard examination." This directly contradicts the education documents of record which were purportedly issued by the [REDACTED] State Board of Secondary and Higher Education, and not by any authority in the State of [REDACTED]. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).