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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

D2



FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUN 04 2010

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed.

The petitioner is a food store specializing in pizza products. It seeks to employ the beneficiary as a refrigeration mechanic. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition, finding that the petitioner had failed to demonstrate that the beneficiary qualified for an exemption to the six year limitation on H-1B nonimmigrants. Specifically, the director found that the record contained no evidence to establish that an Immigrant Petition for Alien Worker (I-140) was filed on behalf of the beneficiary prior to the expiration of the beneficiary's permanent labor certification.

Counsel submitted a timely Form I-290B on December 7, 2009 and indicated by checking Box C in Part 2 of the form that no supplemental brief or evidence would be submitted. In the space provided for statements on Form I-290B, counsel stated:

The service failed to locate the record of pending i - 140 form filed in behalf of the beneficiary for the petition in question. Service's error caused the denial of the petition as pendency of the immigrant petition alien worker is sufficient for approval of the petition.

The director provided a detailed analysis and specifically cited the deficiencies in the evidence in the course of the denial. Moreover, in the request for evidence issued by the director on August 7, 2009, the petitioner was asked to provide a copy of Form I-797, Notice of Action, to demonstrate that either (1) an employment-based immigrant petition had been filed by or on behalf of the beneficiary and that 365 days had passed since the filing of the petition; or (2) an appeal of a denied I-140 petition had been filed with the AAO.

In a response dated September 2, 2009, counsel submitted a copy of the labor certification approved on November 23, 2007, and claimed that the "employer" filed an I-140 petition on behalf of the beneficiary after receipt of said approval. The petitioner claimed that it had not yet had a response from United States Citizenship and Immigration Services (USCIS) regarding the I-140 petition, and thus failed to submit Form I-797 as requested by the director.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner failed to submit any evidence to demonstrate that an I-140 petition was in fact filed on behalf of the beneficiary. Even if the petitioner was not in possession of a Form I-797 verifying receipt of the petition by USCIS, the petitioner could have submitted other documentary evidence such as a photocopy of the petition or a copy of the canceled check representing the filing fee paid in support of the claimed petition. The petitioner, however, produced no such documentation. Instead, counsel on appeal asserts that USCIS error in failing to locate the pending I-140 petition was the cause of the denial.

Counsel's assertion is misplaced. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner's failure to submit documentation in support of the beneficiary's eligibility in this matter, coupled with counsel's failure to specifically identify any errors on the part of the director, renders the appeal insufficient to overcome the well-founded and logical conclusions the director reached based on the evidence, or lack of evidence, submitted by the petitioner. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. 8 C.F.R. § 103.3(a)(1)(v). Counsel fails to specify how the director made any erroneous conclusion of law or statement of fact in denying the petition. As discussed above, it is the responsibility of the petitioner to establish eligibility in this matter. The director's failure to locate a pending I-140 petition for the beneficiary further undermines the veracity of the petitioner's claims. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

As neither the petitioner nor counsel presents additional evidence on appeal to overcome the well-founded decision of the director, the appeal will be summarily dismissed in accordance with 8 C.F.R. § 103.3(a)(1)(v).

As stated above, the burden of proof in this proceeding rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is summarily dismissed.