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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC 99 011 52474 Office: VERMONT SERVICE CENTER Date: MAR - 7 2001

IN RE: Petitioner:
Beneficiary: [redacted]

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

IN BEHALF OF PETITIONER:

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

for Robert P. Wiemann, Acting Director
Administrative Appeals Office

PUBLIC COPY

DISCUSSION: The immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The director's decision will be withdrawn and the petition will be approved.

The petitioner is a household in Jamaica Estates, New York. It seeks to employ the beneficiary as a tutor, at a salary of $601.80 per week. The petitioner filed the current petition to classify the beneficiary 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). The director found that the petitioner "no longer seem[ed] able to offer the job described on [the] labor certification," since two of the petitioner's three children were college students and were of graduation age. Based on this conclusion, the director denied the visa petition.

On appeal, counsel for the petitioner states that the director's conclusion is erroneous. Counsel asserts that the duties described in the labor certification are duties which will continue to be performed while the petitioner's children are in college and notes that one child remains in high school.

Section 204.5(l) of title 8, Code of Federal Regulations states:

> (3) Initial evidence --
>
> > (i) 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 . . . . The job offer portion of an individual labor certification, Schedule A application, or Pilot Program application for a professional must demonstrate that the job requires the minimum of a baccalaureate degree.
> >
> > (ii) Other documentation --
> >
> > > (A) General. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> > >
> > > (B) Skilled workers. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor

> certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

In the present case, the petitioner filed the Application for Alien Employment Certification (Form ETA-750) on May 13, 1996, at a time when the petitioner's three children were 13, 18, and 19 years of age. The petitioner described the job to be performed as "[t]eaches academic subjects such as Russian, Russian culture, mathematics, geometry, science, physics, adapting curriculum to meet children [sic] needs. Help with homework. Teach learning discipline." The Department of Labor approved the labor certification application on September 2, 1998. The petitioner filed the immigrant petition (Form I-140) with the Service on October 14, 1998. After requesting additional information, the director denied the immigrant petition on July 1, 1999, at which time the petitioner's three children were 16, 21, and 22 years of age.

The primary issue in this proceeding is whether the director has stated sufficient grounds to deny the immigrant visa petition. Upon review, it is determined that the director did not raise any issue that would be sufficient to deny the petition or invalidate the labor certification.

In his decision, the director did not establish that the offered position no longer existed, but instead speculated that the beneficiary's services would no longer be needed due to the age of the children. The director did not establish that the beneficiary was not qualified to perform the duties of the certified position. See 8 CFR 204.5(l)(3)(ii)(C). Nor did the director establish that the petitioner lacked the ability to pay the proffered wage. See 8 CFR 204.5(g)(2). Instead, the director questioned the validity of the labor certification and concluded that it was no longer valid.

A determination regarding the validity of a labor certification lies exclusively with the Department of Labor; such determinations are not subject to review by the Service, absent a finding of fraud or willful misrepresentation. See Hassanali v. Attorney General, 599 F. Supp. 189 (D.D.C. 1984). As long as the beneficiary and the employer maintain a bona fide intent that the latter will be employed in the job upon which the labor certification was based, and that job offer remains outstanding, the labor certification remains valid. See Pei-Chi Tien v. INS, 638 F.2d 1324, 1328 (5th Cir. 1981).

It is further noted that the director did not cite sufficient grounds to invalidate the labor certification. Title 20, Code of Federal Regulations section 656.30(d) states:

> After issuance labor certification are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application.

The director's final decision does not contain a finding of fraud or the willful misrepresentation of a material fact which would warrant the invalidation of the labor certification under 20 CFR 656.30(d).

Accordingly, the director did not raise sufficient grounds for the denial of the petition.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has sustained that burden.

ORDER: The director's decision of July 1, 1999 is withdrawn. The petition is approved.