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U.S. Citizenship and Immigration Services

B6

[redacted]

FEB 24 2004

FILE: EAC 01 112 52194 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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:

[redacted]

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

An individual [redacted] said to be in salon and spa services, claims to be both the petitioner and the beneficiary in the instant Immigrant Petition for Alien Worker (I-140). Through the I-140, she seeks to employ herself in the United States permanently, as a physical therapist. A physical therapist is subject to certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I (1), (herein Schedule A).

On the other hand, Mario Badescu Skin Care, Inc. (Skin Care) signed the uncertified Application for Alien Employment Certification (ETA 750), submitted with the I-140. This lone exemplar of a Form ETA 750 contradicts the I-140 and states that the job title is "staff assistant." Hence, the I-140 and Form ETA 750 conflict as to the position. The Department of Labor has not certified the Form ETA 750 exemplar, so that it does not support an I-140 for a staff assistant. 20 C.F.R. § 656.20(a)(1). The Form ETA 750 for a Schedule A occupation must accompany the I-140 when presented to Citizenship and Immigration Services (CIS), formerly the Service or INS. 20 C.F.R. § 656.22(a) and 8 C.F.R. § 204.5(a)(2). As already noted, the Form ETA 750 exemplar references a staff assistant. Finally, the uncertified copy of Form ETA 750 does not comply with regulations for filing the I-140. 8 C.F.R. § 204.5(a)(2) and 8 C.F.R. § 204.5(d).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Eligibility in this matter hinges on the qualifications of the beneficiary for the position at the priority date. Employment-based petitions depend on priority dates. The priority date for Schedule A occupations is established when the completed and signed I-140 is properly filed with CIS. 8 C.F.R § 204.5(d).

Skin Care initially submitted insufficient evidence that the duties, as listed on Form ETA 750, sufficed to qualify the beneficiary for classification under Schedule A as a physical therapist. The manifold request for evidence, dated September 10, 2001 (RFE), returned Form ETA 750 and exacted, in its place, an individual labor certification with evidence that the beneficiary met qualifications for the relevant job offer. The RFE specified the format of letters to verify requisite experience and training and, also, ordered transcripts of education pertinent to eligibility.

The beneficiary responded with her transcripts. In an accompanying letter, she denied that Skin Care was a prospective employer. She denounced the Form ETA 750 for staff assistant, a copy of which is in the record, as having "nothing to do" with the personal self-employment that she intended to pursue. She has submitted no further or amended Form ETA 750. Finally, she admitted that she had filed Form I-140 for herself.

The director determined that Zdrite had returned no Form ETA 750, had denounced the only one ever sent, and had attempted to file an I-140 for herself. The director concluded that the petitioner was not a valid U.S. employer and denied the petition.

Counsel appeared on appeal and claimed to represent the "petitioner and beneficiary." Counsel asserts that [redacted] qualifies for certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I (1), as a physical therapist. Counsel, also, testifies that [redacted] President of [Skin Care], does wish to petition for [redacted] The record, as presently constituted, contains no such petition.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In response to the RFE, the beneficiary denied that Skin Care was even a prospective employer and stated that Skin Care had "nothing to do" with any work that she intended to undertake. An I-140 petition, pursuant to § 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), cannot exist without a United States employer to file it. Zdrite has no such status.

Statutory provisions require that an employer file the petition for the alien beneficiary. *See* Section 204(a)(1)(F) of the Act, 8 U.S.C. § 204(a)(1)(F). Regulatory provisions in 8 C.F.R. § 204.5(c) state, "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification under section ... 203(b)(3) of the Act."

This visa classification makes no provision for an alien beneficiary to self-petition. Hence, this I-140 lacks both a petition and a petitioner. *See* 8 C.F.R. § 103.2(a)(1). It does not even have the signature of a United States petitioner. *See* 8 C.F.R. § 103.2(a)(2). The attorney for the beneficiary has no power to save it. *See* 8 C.F.R. § 103.2(a)(3).

These proceedings are starkly bereft of a valid I-140 signed by a United States employer, and the beneficiary denounced the only Form ETA 750 that ever was presented. *See* 8 C.F.R. §§ 204.5(a)(2) and (3) and 8 C.F.R. § 103.2(b)(1). The lack of a valid petition and of a certified Form ETA 750 leaves nothing to appeal.

Only an authorized party may maintain an appeal. 8 C.F.R. § 103.3(a)(2)(v) states:

> *Improperly filed appeal*—(A). *Appeal filed by person or entity not entitled to file it-- (1) Rejection without refund of filing fee.* An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed. In such a case, any filing fee [CIS] has accepted will not be refunded.

Zdrite had legal standing neither to execute an I-140 for herself nor to appeal. Provisions of 8 C.F.R. § 103.3(a)(1)(iii) state:

> (B) *Meaning of affected party.* For purposes of this section and sections 103.4 and 103.5 of this part, *affected party* means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition.

8 C.F.R. § 103.3(a)(2)(v)(A) explicitly excludes counsel for a beneficiary from the power to file an appeal:

> *(2) Appeal by attorney or representative without proper Form G-28—(i) General.* If an appeal is filed by an attorney or representative without a properly executed Notice of Entry of Appearance as Attorney or Representative (Form G-28) entitling that person to file the appeal, the appeal is considered improperly filed. In such a case, any filing fee [CIS] has accepted will not be refunded regardless of the action taken.

In sum, the beneficiary improperly filed the I-140, and the beneficiary and counsel cannot submit an appeal. Consequently, this appeal must be rejected.

With the appeal, received December 11, 2001, counsel for the beneficiary, it may be noted, requested 210 days to submit a brief or further evidence. Almost 800 days have elapsed without any further representation.

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 met that burden.

ORDER: The appeal is rejected.