

BANDER LAW FIRM, P.L.L.C.

AN IMMIGRATION LAW PRACTICE

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April 7, 2015

Amicus: Standing

ENC: AMICUS
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Avenue, N.W., MS 2090
Washington, District of Columbia 20529-2090

RECEIVED
ADMINISTRATIVE APPEALS
OFFICE
2015 APR 14 PM 12:00

RE: Request for Amicus Brief

Dear Administrative Appeals Office:

In 2013, U.S. Citizenship and Immigration Services ("USCIS") was requested to reopen and approve an I-140 petition because a May 6, 2013 request for evidence had an unintended and unfair outcome resulting in severe prejudice to the beneficiary [REDACTED], an obstetrician and gynecologist. The petition was denied because petitioner [REDACTED] did not submit its most recent federal tax return. As explained below, petitioner [REDACTED] complied with the terms of the request for evidence and there was no issue as to its ability to pay. The petition should therefore not have been denied. Significantly, the denial caused severe prejudice because petitioner [REDACTED] would no longer assist the beneficiary [REDACTED] as he had ported to another medical practice (as allowed under 8 U.S.C. §1154(j), INA §204(j), titled "Job Flexibility For Long Delayed Applicants For Adjustment of Status to Permanent Residence") and [REDACTED] had no standing to move to reconsider or reopen or to appeal.

In its May 6, 2013 request for evidence, USCIS requested "the 2012 annual report or 2012 federal income tax returns with all schedules and attachments or 2012 audited financial statement." The request then stated, "If you have not filed your federal tax documents, submit a copy of the response from IRS indicating that your request for an extension has been accepted."

In response to these very specific instructions, petitioner [REDACTED] submitted a copy of its Form 7004, Application for Automatic Extension of Time to File Certain Business Income Tax, Information and Other Returns as it had not filed its 2012 federal income tax return.

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_____ submitted to USCIS exactly what was requested to be submitted and no more.

Despite compliance with the terms of the request for evidence, the petition was denied for failure to submit the 2011 tax return. If only a copy of the 2012 application for an extension was inadequate and the 2011 tax return was required, the May 6, 2013 request should have included a specific request for a copy of the 2011 federal income tax return. If USCIS had specifically requested the 2011 federal income tax return, _____ would have most definitely submitted it in response because it wanted to assist _____ at that time when he was being employed.

However, at the time of the denial, circumstance had become such that _____ would no longer assist _____ and provide USCIS its financial information to support an appeal, motion to reopen or reconsider, or a new I-140 petition based on the approved labor certification. This is because shortly before the denial was received, _____ informed _____ that he was changing employers. _____ M.D., P.A., a medical office in Hialeah, Florida, was to employ _____ in the same professional position he was employed by _____. When he made the determination to change employer, _____ adjustment application had been processing over 180 days.

After _____ changed employer, _____ became unwilling to support an appeal, motion to reopen or reconsider, or a new I-140 petition on _____ behalf with copies of its federal income tax returns to correct the 8 CFR 204.5(g)(2) regulatory omission identified in the denial.¹

As an unintended result, USCIS's failure to specifically request a copy of the 2011 federal

¹ _____ ability to pay the proffered salary to _____ had never been in doubt. USCIS adjudicators should conclude a petitioner has the ability to pay where "the petitioner not only is employing the beneficiary but also *has paid or currently is paying the proffered wage.*" Memo, Yates, Assoc. Dir. Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*(May 4, 2004) (emphasis added). In its Oct. 30, 2013 decision denying the I-140 petition, USCIS acknowledged that the petitioner submitted _____ 2012 W-2 showing he was paid the proffered \$170,000 salary and copies of paystubs for 2013. This documentation established that the petitioner paid _____ the proffered \$170,000 annual salary in 2012 and continued to pay the proffered wage at the time of the response.

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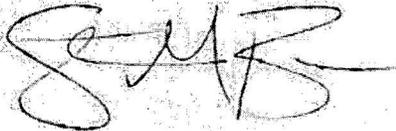
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income tax return caused [REDACTED] to lose the opportunity to be employed permanently in his profession. This should not have been the consequence under these good faith circumstances where [REDACTED] was employed by [REDACTED] for a long period of time; [REDACTED] paid [REDACTED] the \$170,000 proffered salary; and [REDACTED] provided exactly what was requested in response to the request for evidence. No U.S. employer should have the ability to exact this type of retribution on an employee who simply changed employer, as permitted by law, after a long delayed adjustment of status application.

Based on the foregoing, the AAO is requested to find that beneficiaries of an immigrant visa petition, like [REDACTED] was, have standing to participate in the administrative adjudication process, including standing to appeal to the AAO. Fortunately for [REDACTED] USCIS reconsidered and approved the I-140 petition, even though [REDACTED] did not have official standing to make such a motion.

Sincerely,



Stephen M. Bander

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