

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY

A1

FILE: [REDACTED]
EAC-03-078-50302

OFFICE: BALTIMORE DISTRICT

Date:

MAR 26 2010

IN RE: Applicant: [REDACTED]

PETITION: Application to Register Permanent Residence or Adjust Status Pursuant to Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255

ON BEHALF OF APPLICANT:
[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.

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 District Director, Baltimore District, denied the employment-based application for adjustment of status. The director certified the decision to the Administrative Appeals Office (AAO) for review. The AAO affirmed the decision of the director in a decision dated September 19, 2008. On December 4, 2008, the AAO reopened the matter on its own motion. Pursuant to the regulation at 8 C.F.R. § 103.5(a)(5)(ii), this office afforded the applicant 30 days in which to submit a brief. The AAO will affirm, in part, its decision of September 19, 2008 and deny the application.

This case presents the AAO with an unusually complex issue. The applicant seeks to adjust status as the beneficiary of an approved employment-based immigrant visa petition, despite the fact that U.S. Citizenship and Immigration Services (USCIS) automatically revoked the approval of the original petition and a different alien utilized the approved labor certification. Although USCIS approved the applicant's original visa petition pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker, the applicant's original intending employer withdrew the applicant's petition and replaced the applicant with another alien worker.

The applicant seeks to adjust status under the provisions of section 245(a) of the Act, 8 U.S.C. § 1255(a), and use the provisions of section 245(i) of the Act, 8 U.S.C. § 1255(i). The applicant asserts that the labor certification requirement at section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i), does not disqualify her from adjustment of status because she meets the job flexibility provisions of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21) (Public Law 106-313); section 204(j) of the Act, 8 U.S.C. § 1154(j). The director determined that the applicant was ineligible for adjustment of status because a valid labor certification no longer supported the adjustment application and, accordingly, denied the application.

The director then issued a denial notice and certified that decision to the AAO for review pursuant to 8 C.F.R. § 103.4(a). Certifications by district directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

On certification, former counsel for the applicant referenced a USCIS interoffice memorandum, entitled "Continuing Validity of Form I-140 Petition in accordance with Section 106(c) of [AC21]," dated August 4, 2003 (2003 Memo).¹ USCIS issued a second memorandum, authored by William R. Yates (Mr. Yates), U.S. Citizenship and Immigration Services (USCIS) Associate Director for Operations, on May 12, 2005. This second memorandum is entitled "Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by [AC21]" (2005 Memo). In a subsequent brief, the applicant's current counsel referenced the 2005 memorandum for the premise that because the applicant's application to adjust status was pending for more than 180 days when the petitioner withdrew the approved Form I-140 visa petition, USCIS should approve the

¹ The applicant's prior attorney of record is suspended from practice in New York (and was suspended from practice in Virginia until February 2010) on the basis of her guilty plea and conviction of misprision of a felony. See [REDACTED] accessed on March 22, 2010, copy incorporated into the record of proceeding. Specifically, [REDACTED] admitted to drafting a fraudulent employment history letter to support an alien labor certification and a Form I-140 petition on behalf of an employer seeking to employ an alien as a geriatric caregiver/nurse aid in Leesburg, VA. See [REDACTED] accessed on March 22, 2010, copy incorporated into the record of proceeding.

applicant's adjustment application regardless of whether or not the labor certification formed the basis for another alien's adjustment to lawful permanent resident status.

The AAO upheld the director's decision, concluding that regardless of whether the Form I-140 petition could "remain valid" pursuant to section 204(j) of the Act, the underlying labor certification could not "remain valid" pursuant to section 212(a)(5)(A)(iv) of the Act because it had been utilized by a substituted beneficiary. The AAO also noted the lack of evidence that the beneficiary would work in the same or a similar occupation.

On motion, counsel asserts that sections 212(a)(5)(A)(iv) and 204(j) of the Act mandate the approval of the application. In the alternative, counsel asserts that if it is the position of USCIS that only one alien can adjust status based on a single labor certification, USCIS should rescind the substituted beneficiary's status pursuant to section 246 of the Act in order to allow the applicant to adjust status based on the labor certification used by the substituted beneficiary. The applicant submits evidence that she is working in the same or a similar occupation. For the reasons discussed below, we withdraw our finding that the petitioner had not established that the beneficiary's intended employment is "same or similar" for purposes of sections 212(a)(5)(A)(iv) and 204(j) of the Act. We affirm, however, our previous decision and note that the applicant has failed to establish that the substituted alien improperly adjusted status. Accordingly, section 246 of the Act does not permit rescission simply because the applicant wishes to regain the previously used labor certification.

Procedural History

The applicant's original intended employer, [REDACTED] in Leesburg, Virginia, filed a Form ETA-750 labor certification application for the beneficiary as a Practical Nurse with a wage of \$10.10 per hour. The Department of Labor (DOL) certified the ETA-750 on January 25, 2002. The petition's "priority date" is the date DOL accepted the labor certification application, April 23, 2001. See 8 C.F.R. § 204.5(d). Based on the certification of the Form ETA-750, [REDACTED] filed the Form I-140 petition on April 16, 2002 and USCIS approved the petition on July 11, 2002. The beneficiary of the Form I-140, the applicant in this proceeding, then filed the instant Form I-485, Application to Register Permanent Residence or Adjust Status, on December 9, 2002 based on the approved Form I-140.

Before the applicant could adjust status to permanent resident, however, [REDACTED] submitted a letter through counsel, dated January 15, 2004, stating that there had been a "misunderstanding" between the employer and the applicant and that the employer was no longer interested in employing the applicant. Accordingly, [REDACTED] requested to withdraw the applicant's approved visa petition.

On June 4, 2004, the Vermont Service Center issued a notice confirming that that it had automatically revoked the approval of the petition based on the withdrawal. 8 C.F.R. § 205.1(a)(3)(iii)(C). The director also noted that the petitioner had requested to substitute a new alien into the proffered position utilizing the applicant's original DOL-certified labor certification.² The record reveals that USCIS approved a

² For more information on the now prohibited practice of substituting alien beneficiaries on certified labor certifications, see Department of Labor, Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity*, 72 Fed. Reg. 27904, 27905 (May 17, 2007).

Form I-140 petition for a new “substituted” alien based on the original labor certification and that the new alien beneficiary has now adjusted to lawful permanent resident status.

The USCIS Baltimore District Office interviewed the applicant in the matter before us on May 19, 2005; the District Director subsequently denied the applicant’s adjustment application on January 26, 2006 and simultaneously certified it to the AAO for review. The director’s decision denied the applicant’s adjustment application because the director determined that “the petitioning employer submitted a request to withdraw the visa petition and use the labor certification on which it was based to substitute for another individual’s petition.” Therefore, the director stated that although the adjustment application had been pending for more than 180 days and the applicant was “employed in a same or similar job classification, [she is] ineligible to adjust, as [she does] not have a valid labor certification.”

As stated above, the director certified that decision to the AAO, which affirmed the director’s decision on January 19, 2008. The AAO reopened its decision *sua sponte* on December 11, 2008, pursuant to 8 C.F.R. § 103.5(a)(5). We now reaffirm the director’s denial.

Law

Section 204(a)(1)(F) of the Act provides that: “Any employer desiring and intending to employ within the United States an alien entitled to classification under section 1153(b)(1)(B), 1153(b)(1)(C), 1153(b)(2), or 1153(b)(3) of this title may file a petition with the Attorney General for such classification.”

Once an alien has an approved petition, section 245(a) of the Act, 8 U.S.C. § 1255, allows the beneficiary to adjust status to an alien lawfully admitted for permanent residence:

(a) The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the [Secretary of Homeland Security], in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if

- (1) the alien makes an application for such adjustment,
- (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and
- (3) an immigrant visa is immediately available to him at the time his application is filed.

Section 106(c) of AC21 amended section 204 of the Act by adding the following provision, codified as section 204(j) of the Act, 8 U.S.C. § 1154(j):

Job Flexibility For Long Delayed Applicants For Adjustment Of Status To Permanent Residence- A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained adjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i), states:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that –

- (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

Section 212(a)(5)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(5)(A)(iv), states further:

Long Delayed Adjustment Applicants- A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

Finally, with respect to an alien beneficiary of an approved third-preference petition who seeks to consular process, section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C), provides:

An immigrant visa may not be issued to an immigrant under subparagraph (A) until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section [212(a)(5)(A)] of this title.

History of AC21

To understand the law underlying this case, it is helpful to examine section 106(c) of AC21 and its relation to the long standing adjustment-of-status process provided for at section 245(a) of the Act. *See generally Lee v. USCIS*, 592 F.3d 612, 614 (4th Cir., 2010) (discussing the history of the adjustment of status process and its interplay with other statutory provisions).

At the time AC21 went into effect, legacy Immigration and Naturalization Service (INS) regulations provided that an alien worker could not apply for permanent resident status by filing a Form I-485, application to adjust status, until he or she obtained the approval of the underlying Form I-140 immigrant visa petition. *See* 8 C.F.R. § 245.2(a)(2)(i) (2000). Therefore, the process under section 106(c) of AC21 at the time of enactment was as follows: first, an alien obtains an approved employment-based immigrant visa petition; second, the alien files an application to adjust status; and third, if USCIS did not process the adjustment application within 180 days, the underlying immigrant visa petition remained valid even if the alien changed employers or positions, provided the new job was in the same or similar occupational classification.

The available legislative history does not shed light on Congress' intent in specifically enacting section 106(c) of AC21. While the legislative history for AC21 discusses Congressional concerns regarding the nation's economic competitiveness, the shortage of skilled technology workers, U.S. job training, and the cap on the number of nonimmigrant H-1B workers, the legislative history does not specifically mention section 106(c) or any concerns regarding backlogs in adjustment of status applications. The legislative history briefly mentions "inordinate delays in labor certification and INS visa processing" in reference to provisions relating to the extension of an H-1B nonimmigrant alien's period of stay. See S. Rep. 106-260, 2000 WL 622763 at *10, *23 (April 11, 2000). In the 2001 Report On The Activities Of The Committee On The Judiciary, the House Judiciary Committee summarized the effects of AC21 on immigrant visa petitions: "[I]f an employer's immigrant visa petition for an alien worker has been filed and remains adjudicated for at least 180 days, the petition shall remain valid with respect to a new job if the alien changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed." H.R. Rep. 106-1048, 2001 WL 67919 (January 2, 2001). Notably, this report further confuses the question of Congressional intent since the report clearly refers to "immigrant visa petitions" and not the "application for adjustment of status" that appears in the final statute. Even if more specific references were available, the legislative history behind AC21 would not provide guidance in the current matter since, as previously noted, an approved employment-based immigrant visa was required to file for adjustment of status at the time Congress enacted AC21.

Policy Memoranda

As stated in our previous decision, counsel relied on the 2005 Memo for the proposition that a Form I-140 remains valid even when approval is revoked based on a withdrawal as long as the related Form I-485 has been pending 180 days.

In this matter, the 2005 memorandum simply does not cover the factual situation before us. Unlike the situation described in the 2005 memorandum, after the petitioner withdrew the beneficiary's Form I-140, the petitioner utilized the labor certification in support of a new Form I-140 in behalf of a substituted alien, who has now used the labor certification to obtain lawful permanent resident status. Significantly, the language in the 2005 memorandum on which counsel relies discusses whether the *Form I-140* remains valid pursuant to section 204(j) of the Act. At issue in this matter is whether the underlying labor certification remains valid, a separate issue under sections 212(a)(5)(A)(i) and (iv) of the Act. Thus, the Act, any pertinent regulations and binding precedent decisions are controlling in this matter.

Legal Analysis

A. Validity of I-140

As noted by counsel on motion, the AAO does not contest that USCIS approved the underlying Form I-140 in this matter. Under the job flexibility provisions of AC21, the alien's decision to work for a new employer after an adjustment application has been pending for 180 days does not by itself invalidate the labor certification. Nevertheless, the labor certification must still remain valid under other relevant provisions.

B. Validity of the Labor Certification

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act. The statutory provisions governing issuance of a third-preference visa prohibit issuance of an immigrant visa unless the consular officer is in receipt of the labor certification. Section 203(b)(3)(C) of the Act.

The DOL regulation in effect at the time the district director denied the applicant's adjustment of status application, 20 C.F.R. § 656.30(c)(2) (1991), provided:

A labor certification involving a specific job offer is valid only for the particular job opportunity and for the area of intended employment stated on the Application for Alien Employment Certification form.

With respect to permanent labor certifications resulting from applications filed prior to March 28, 2005, the DOL regulation at 20 C.F.R. § 656.30(c)(2) (May 17, 2007) now provides, in pertinent part:

A permanent labor certification involving a specific job offer is valid only for the particular job opportunity, the alien named on the original application (unless a substitution was approved prior to July 16, 2007), and the area of intended employment.

The Act does not provide for the substitution of aliens in the permanent labor certification process. Similarly, until 2007, both the USCIS and the DOL regulations were silent regarding substitution of aliens. Instead, the substitution of alien workers was a procedural accommodation that permitted U.S. employers to replace an alien named on a pending or approved labor certification with another prospective alien employee. Historically, DOL's Employment and Training Administration permitted this substitution practice because of the length of time it took to obtain a labor certification or receive approval of the Form I-140 petition. *See generally* Department of Labor Proposed Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity*, 71 Fed. Reg. 7656 (February 13, 2006), and *Labor Certification for the Permanent Employment of Aliens in the United States: Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity*, (72 Fed. Reg. 27904, 27905 (May 17, 2007)). Effective July 16, 2007, DOL terminated the practice of labor certification substitution. *Id.*

Further, a labor certification is only valid until it is used. Binding agency precedent has long precluded USCIS from approving a visa petition when the approved labor certification has already been used by another alien, even during the period that DOL and USCIS permitted the substitution of aliens on labor certifications. *See Matter of Harry Bailen Builders, Inc.*, 19 I&N Dec. 412, 414 (Comm. 1986).³

³ While *Harry Bailen*, 19 I&N Dec. at 414, relies in part on language in 8 C.F.R. § 204.4(f) that no longer exists in the regulations, the decision also relies on DOL's regulations, which continue to hold that a labor certification is valid only for a specific job opportunity. 20 C.F.R. § 656.30(c)(2). Moreover, the reasoning in *Harry Bailen*, 19 I&N Dec. at 414 has been adopted in recent cases. *See Matter of Francisco Javier Villarreal-Zuniga*, 23 I&N Dec. 886, 889-90 (BIA 2006).

USCIS cannot interpret sections 204(j) and 212(a)(5)(A)(iv) of the Act as allowing the adjustment of status of two aliens based on the same labor certification when section 212(a)(5)(A)(i) of the Act explicitly requires a labor certification as evidence of an individual alien's admissibility. To construe sections 204(j) and 212(a)(5)(A)(iv) of the Act in that manner would violate the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Dept. of Revenue of Or. v. ACF Industries, Inc.*, 510 U.S. 332, 340 (1994) (quoting *Mtn. States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)) (internal quotation marks omitted).

When Congress enacted the job flexibility provision of sections 204(j) and 212(a)(5)(iv) of the Act, Congress made no correlative amendments to waive the admissibility requirements of section 212(a)(5)(A)(i) of the Act for one alien or to allow a single labor certification to be used as evidence of admissibility for two or more aliens. We must assume that Congress was aware of the binding precedent decision and the agency's previous interpretation that a labor certification can only support the adjustment of one alien under the Act when it enacted AC21 and did not specifically alter that interpretation. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). The labor certification on which the underlying petition is based has already served as the basis of admissibility for a different alien and is no longer "valid." Counsel provides no legal authority, and we know of none, that would allow USCIS to rely on the labor certification of an adjusted alien to adjust a second alien.

On motion, counsel asserts that section 204(j) of the Act provides no discretion and "dictates" that the petition shall remain valid, requiring that, even if USCIS determines that a labor certification can only be used once, it should be the alien switching employers pursuant to section 204(j) of the Act who should be able to use the labor certification.

However, section 204(j) of the Act does not "dictate" that USCIS must adjust the status of any beneficiary of a valid petition who switches employers after having an adjustment application pending 180 days or more. Rather, the plain language of sections 204(j) and 212(a)(5)(A)(iv) of the Act merely states that where the beneficiary switches employers after the adjustment application has been pending 180 days or more, the visa petition and labor certification "shall remain valid with respect to a new job." Other admissibility and visa availability issues may arise, as acknowledged by the federal court in *Matovski v. Gonzales*, 492 F. 3d 722, 737 (6th Cir. 2007) (remanding matter to the Immigration Judge to make a determination under section 204(j) of the Act in removal proceedings).

Significantly, Congress knows how to exempt aliens from the normal adjustment requirements. For example, the Immigration Nursing Relief Act of 1989, Public Law 101-238(a), exempted certain nurses from the numerical limitations for immigrants. Nothing in sections 204(j) or 212(a)(5)(A)(iv) of the Act suggests that Congress intended to exempt aliens from the requirement that they each have an unused labor certification as evidence of admissibility in visa petition proceedings. *Harry Bailen*, 19 I&N Dec. at 414.

Congress is presumed to be "aware of existing law when it passes legislation." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990)). The normal assumption is that "where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole." *Markham v. Cabell*, 326 U.S. 404, 411 (1945). *See Erlenbaugh v. U.S.*, 409 U.S. 239, 244 (1972) (citing *Markham* for "the principle that individual sections of a single statute should be construed together"). If sections 212(a)(5)(A)(iv) and 204(j) of the Act are each read to allow the adjustment of an alien regardless of the alien's inadmissibility

under section 212(a)(5)(A)(i) of the Act, then section 212(a)(5)(A)(i) of the Act is rendered meaningless. Yet, when read together, these sections still allow an alien to change his or her employment as long as the labor certification is unused and therefore still valid. This interpretation reads the statute as a whole and comports with fundamental canons of statutory construction.

On motion, counsel proposes that USCIS should resolve the issue by rescinding the lawful permanent resident status of the substituted beneficiary. Section 246 of the Act provides, in pertinent part:

If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 245 or section 249 of the Act or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person.

Counsel has not explained what basis USCIS might have to rescind the substituted beneficiary's status. When requesting that USCIS rescind the status of the substituted beneficiary, the applicant must establish that the substituted alien who utilized the labor certification to adjust status was not eligible to do so for a reason other than the simple fact that the alien who adjusted status was a substituted beneficiary.

Counsel's concern that the prior policy of permitting the substitution of a beneficiary can produce unfair results is well founded. In justifying its proposal to eliminate substitution of beneficiaries, DOL stated:

The DOL acknowledges that concerns have been expressed that substitution is unfair to other aliens waiting in queue for visas because, under existing practices, the substituted alien obtains a priority date [footnote omitted] based on an application filed for a different alien and the date is often years earlier than the substituted alien would receive if named in a newly filed application.

Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity, 71 Fed. Reg. 7656, 7659 (proposed February 13, 2006) (enacted 72 Fed. Reg. 27904 (May 17, 2007)).

We acknowledge that after enactment of AC21, DOL's practice of substitution effectively created a race between the employer seeking to use the labor certification to fill the proffered position on a permanent basis and the alien beneficiary named on the labor certification seeking to use the labor certification to demonstrate admissibility under section 212(a)(5)(A)(i) of the Act in order to adjust status. However, the 2007 DOL rule has remedied the inherent unfairness of permitting employers to substitute beneficiaries. In terminating the policy of substitution, DOL acknowledged that the labor certification is evidence of an individual alien's admissibility:

The statute itself could not be clearer that the labor certification process is alien specific. In defining the Department's role in the admission of an alien for employment-based permanent residence, INA section 212(a)(5)[(A)](i) ties the required certification to "the place where *the* (emphasis added) alien is to perform such skilled or unskilled labor[.]" and the necessity of certifying that "the employment of *such* (emphasis added) alien will not adversely affect the wages * * *." The plain language of these provisions (i.e., the use

of terms such as “the alien” and “such alien”) is meant to focus not on the process but solely on its use to admit one, specific alien.

72 Fed Reg. at 27908 (alteration in original).

It remains that the applicant has not established that the substituted beneficiary who adjusted status based on the underlying labor certification that the applicant now seeks to use did so illegitimately. The applicant has not presented USCIS with a basis to rescind that alien’s status. While counsel has asserted that our decision is reviewable in federal court, counsel has not explained how rescinding the substituted beneficiary’s status would eliminate USCIS’ risk of being sued in federal court as that alien would be sure to contest such a rescission.

Conclusion

Section 245(a) of the Act states that the Secretary of Homeland Security may adjust the status of an alien as a matter of discretion. Here, the applicant has not established that she has a valid labor certification. Accordingly, she is inadmissible under section 212(a)(5)(A)(i) of the Act. Section 245(a) of the Act requires an alien to be admissible to the United States, therefore a favorable exercise of discretion is not warranted. The burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden.

ORDER: The AAO’s September 19, 2008 decision finding that the applicant is ineligible for adjustment of status is affirmed. The application remains denied.