

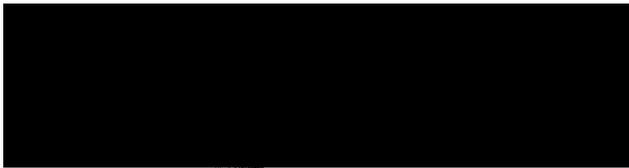
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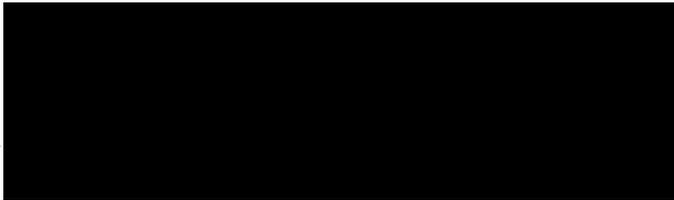
FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **DEC 13 2005**

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IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant 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:



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 director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a programmer/analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The petitioner stated that it was substituting another individual for the original beneficiary, whom the petitioner claimed no longer worked for the petitioner, and whose I-140 petition had been withdrawn. The director determined that the original beneficiary named on the ETA 750 had already received lawful permanent residence, and therefore the Form ETA 750 could not be used on behalf of a substituted beneficiary.

On appeal, counsel states that the person identified in the director's denial notice as the original beneficiary is not the original beneficiary of the approved ETA 705 that the petitioner submitted with the initial petition. Counsel submits a brief and additional evidence.

An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from [REDACTED] Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996). Even if a petition has been withdrawn by the petitioner, the petitioner has the right to substitute a new beneficiary on an ETA 750 labor certification application by filing a new I-140 petition, supported by a new ETA 750B for the new beneficiary. The ETA 750's underlying any withdrawn petitions remain valid, with the same priority dates. *see* Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure*, vol. 4, § 43.04 (Mathew Bender & Company, Inc. 2004) (available at "LexisNexis" Mathew Bender Online).

With the petition, counsel stated that the petitioner wished to substitute [REDACTED] for the beneficiary named on the Form ETA 750 submitted with the I-140 petition. Counsel stated the petitioner was submitting the following documents:

Form I-140 petition for [REDACTED]

A letter to Citizenship and Immigration Services (CIS) signed by counsel that stated the approved I-140 petition filed on behalf of the original beneficiary was withdrawn. This letter is dated August 5, 2003 and identifies the original beneficiary as [REDACTED]

Labor Certification Form ETA 750 Part A bearing the endorsement of the Department of Labor (DOL) chief certifying officer, and Part B for the original beneficiary. Counsel stated that this individual is identical to the beneficiary listed on the withdrawn I-140 petition;

Form ETA 750, Part B, for Mr. [REDACTED], as the substituted beneficiary to the endorsed Form ETA 750;

Copy of [REDACTED] educational credentials, including [REDACTED] diploma dated June 2000, for his master's degree in electrical and computer engineering from the University of California, Irvine, as well as his master's degree coursework;

Copy of [REDACTED] Form I-94 Arrival/Departure record, and Form I-797 as evidence of his valid H-1B visa status; and

Copy of the 2003 annual report of the [REDACTED]. This report contains a statement by [REDACTED] and [REDACTED] Accounting Firm, Detroit, Michigan, that the consolidated balance sheets for the [REDACTED] Corporation had been audited. This statement is dated 2003.

With regard to the labor certification documents submitted by counsel and found in the record, the ETA 750 certification page, identified as "Final Determination" lists the beneficiary as [REDACTED] with the proffered position identified as programmer/analyst. The petitioner is identified as a different company in North Carolina. The priority date indicated on the certification cover sheet is August 18, 2000. Parts A and B of the Form ETA 750 also identify the beneficiary as [REDACTED] and the petitioner as the North Carolina company. Part B is signed by [REDACTED] and dated August 15, 2000.

An additional second page of a Form ETA 750, Part B, Section 15, Work Experience, is also found in the record. This page is signed by [REDACTED] and dated May 19, 1999. The employer of [REDACTED] as of the date he signed the ETA 750 Part B, is identified as [REDACTED]. In addition, a complete and signed ETA 750 Part B for [REDACTED] the individual to be substituted for the original beneficiary, is found in the record. The document is signed by [REDACTED] and dated September 2, 2003.

On May 10, 2004, the director denied the petition. In doing so, the director noted that a review of [REDACTED] immigration records revealed that he had received lawful permanent resident status through the approval of his Form ETA 750, Form I-140, and Form I-145. The director then stated that the Form ETA 750 submitted by the petitioner for [REDACTED] the substituted beneficiary, could not be used. Based on the lack of a valid certified Form ETA 750, the director denied the petition.

On appeal, counsel states that [REDACTED] is not the beneficiary of the certified ETA 750 filed by the petitioner, and the certified ETA 750 filed on behalf of [REDACTED] was never used by him or other aliens to gain U.S. permanent resident status, to the best of the petitioner's knowledge. Counsel, in his brief, states that the documents submitted in the initial petition, including copies of the DOL's final determination letter and certified Form ETA-750 all indicate the name of the original beneficiary as [REDACTED]. Counsel then states he is resubmitting copies of these documents. Counsel states that, according to the petitioner, [REDACTED] never obtained U.S. permanent residency based on the certified labor certificate and subsequently approved I-140 petition. Counsel also states that on August 5, 2003, the petitioner submitted a letter to CIS requesting the withdrawal of the approved I-140 petition filed on behalf of [REDACTED].

Counsel submits an I-797 approval notice for [REDACTED] dated April 3, 2000, along with a certified ETA750, that identifies [REDACTED] as the beneficiary. This document has a priority date of July 8,

1999 and identifies the petitioner as [REDACTED] and identifies the address where the beneficiary will work as Middleburg Heights, Ohio.

It is noted that the director was correct in denying the petition based on the lack of a valid certified ETA 750 on which a qualified second beneficiary could have been substituted. Upon review of the record, the petitioner did not submit the certified ETA 750 for [REDACTED] with the instant I-140 petition. On appeal, the petitioner submits a valid certified ETA 750 on behalf of [REDACTED] and claims that this is the Form ETA 750 originally submitted with the instant petition. It is further noted that the petitioner has submitted evidence on appeal that conflicts with the original ETA 750 found in the record. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Without further clarification of the discrepancies between the original ETA 750 and the Form ETA 750 submitted on appeal, the petitioner has not established that it submitted a valid certified ETA 750 that could have been used to support the I-140 petition submitted on behalf of [REDACTED]. Therefore the director's decision shall stand, and the petition will be denied.

It is further noted that the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 submitted with [REDACTED] I-140 petition is dated August 18, 2000, while the Form ETA 750 submitted on appeal is dated July 8, 1999. In either case, if the petitioner was submitting an audited annual report to establish its ability to pay the proffered wage, such annual report would necessarily have been for either the tax year 1999 or tax year 2000.

As stated previously, the petitioner has not established that it submitted a valid certified Form ETA 750 for which a new beneficiary could have been substituted. It is also unclear whether the petitioner has provided sufficient evidence with regard to its ability to pay the proffered wage as of the priority date. Therefore, the director's decision shall stand, and the petition shall be denied. This decision does not preclude the petitioner from filing a new I-140 based on the correct Form ETA 750 and asserting the substitution of the beneficiary.

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 dismissed.