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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: LIN-07-151-52829 Office: NEBRASKA SERVICE CENTER Date: OCT 07 2008

IN RE: Petitioner: [redacted]
Beneficiary:

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:

[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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the petitioner's employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner is a general automotive repair business, and seeks to employ the beneficiary permanently in the United States as an auto mechanic. As required by statute, the petition filed was submitted with Form ETA 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).[1] The director determined that the petition was not properly filed as the petitioner had not signed the Form I-140 petition as required by regulation. Further, the director noted that the petitioner listed on Form I-140 was "Expressway Motors Business Trust," but that the labor certification listed the applicant as "Expresswaymotors Inc." The petitioner failed to establish that Expressway Motors Business Trust was qualified to use the labor certification that Expresswaymotors Inc. filed.[2] The director denied the petition accordingly.

A petition was filed to classify the beneficiary as a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and 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 nature, for which qualified workers are not available in the United States. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

Review of the record shows that the petition has not been properly filed, and therefore there is no legitimate basis to continue with this proceeding.

The Form I-140 petition identifies Expressway Motors Business Trust as the employer and the petitioner. The regulation at 8 C.F.R. § 103.2(a)(2) requires that the petitioner sign the petition. In this instance, no employee or

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[1] We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was formerly permitted by the DOL. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to Citizenship and Immigration Services ("CIS") based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

[2] Counsel does not address, and has not provided any evidence related to this issue on appeal. The petitioner, therefore, cannot overcome this issue on appeal. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

officer of Expressway Motors Business Trust signed Form I-140.[3] The only signatures on Form I-140 are that of who purports to be a "representative agent" of the employer, and ., who represents the petitioner as counsel.[4] Mr. signed Part 8 of the Form I-140, "Petitioner's Signature," thereby attempting to file the petition on behalf of the actual United States employer.[5] However, the regulations do not permit , who is not the petitioner, to sign Form I-140 on behalf of a United States employer.

The regulation at 8 C.F.R. § 204.5(c) states:

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[3] On appeal, counsel provided a copy of the I-140 signed by the petitioner's president, , which he signed under s name. The signature does not contain both the original signature of the petitioner and counsel. On appeal, counsel submitted another Form I-140 copy, which endorsed in his capacity as the petitioner's President on February 12, 2008. The Form I-140 as initially submitted does not contain the original signature of both the petitioner and its attorney. The petitioner's signature is not original. Further, counsel's signature is not original either. *See* 8 C.F.R. § 103.2(b)(4) ("Application and petition forms must be submitted in the original.") The petition as initially submitted was deficient. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). A petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

[4] This office notes that counsel did not submit a properly executed Form G-28, Notice of Entry of Appearance as Attorney or Representative, signed by the petitioner until nearly one year after the Form I-140 petition was filed.

[5] In response to the RFE, counsel submitted a copy of a letter titled "Appointment of Representative Agent." The letter was signed by , in his capacity as President of Expressway Motors Inc. on April 11, 2005, and by in his capacity as President of Empower, Inc., on April 20, 2005. The letter states that the petitioner appointed Empower, Inc. as agent to act on its behalf and to perform services involving alien Employment Certification before the DOL, immigrant petitions before CIS, and visa processing by a Consular Officer of the United States Department of State at an American Embassy abroad. The letter also delegated to Empower, Inc. the revocable power to execute all documents in the name of the petitioner, including the execution of labor certification applications and immigrant petitions. This office notes that the agent designated on the "Appointment of Representative Agent" letter submitted by counsel is Empower, Inc. According to the Virginia State Corporation Commission's website, Empower, Inc. is a fictitious name used by Empower Import & Export, Inc. *See* http://s0302.vita.virginia.gov/servlet/resqportal/resqportal (accessed February 7, 2008). Empower Import & Export, Inc. is no longer in good standing in the state of Virginia. The term of the corporation ended in November 2003. Therefore, Empower, Inc. was not an active corporation at the time that the petitioner signed the "Appointment of Representative Agent Form, when the Form ETA 9089 was filed on March 29, 2006, or at the time the Form I-140 petition was filed on May 1, 2007. Further, counsel states in his on appeal that Mr. Yoon signed the I-140 in his capacity as the petitioner's representative agent. According to the Virginia State Corporation Commission's website, Empower-Visa, Inc. was incorporated in January 2003. *See Id.* The record of proceeding does not contain an "Appointment of Representative Agent" letter for Empower-Visa, Inc., nor is there any evidence of the relationship between Empower, Inc. and Empower-Visa, Inc. in the record of proceeding. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

> *Filing petition.* Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act. An alien, or any person in the alien's behalf, may file a petition for classification under section 203(b)(1)(A) or 203(b)(4) of the Act (as it relates to special immigrants under section 101(a)(27)(C) of the Act).

The regulation at 8 C.F.R. § 103.2(a)(2) states:

> *Signature.* An applicant or petitioner must sign his or her application or petition. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the application or petition, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the application or petition, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. Unless otherwise specified in this chapter, an acceptable signature on an application or petition that is being filed with the [CIS] is one that is either handwritten or, for applications or petitions filed electronically as permitted by the instructions to the form, in electronic format.

No regulatory provision waives the signature requirement for a petitioning United States employer or that permits a petitioning United States employer to designate a "representative agent," attorney or accredited representative to sign the petition on behalf of the United States employer. The petition has not been properly filed because the petitioning United States employer, Expressway Motors Business Trust, did not sign the petition. Pursuant to 8 C.F.R. § 103.2(a)(7)(i), an application or petition which is not properly signed shall be rejected as improperly filed, and no receipt date can be assigned to an improperly filed petition. The petitioner cannot cure this defect on appeal. *Matter of Izummi*, 22 I&N Dec. at 176.

Counsel notes on appeal that CIS approved other petitions that had been previously filed by Empower, Inc. on behalf of other employers. The director's decision does not indicate whether he reviewed the prior approvals of the other immigrant petitions. If the previous immigrant petitions were approved without the proper signatures of the petitioning United States employers, the approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved immigrant petitions filed by Empower, Inc. on behalf of other employers, the AAO would not be bound to follow the contradictory decisions of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The petition has not been properly filed by a United States employer. Therefore, we must reject the appeal.

ORDER: The appeal is rejected.