U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B-5

[redacted]

FILE: WAC 02 200 51425 Office: CALIFORNIA SERVICE CENTER Date: AUG 0 3 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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.

for Robert P. Wiemann, Director
Administrative Appeals Office

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DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is a computer software company. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as member of the professions holding an advanced degree. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined the petitioner had failed to meet the requirements for labor certification substitution under legacy Immigration and Naturalization procedures for substitution.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(4)(i) states in pertinent part that:

> Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor.... The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

The Form I-140, Immigrant Petition for Alien Worker, was filed in behalf of the beneficiary on June 4, 2002. Counsel's cover letter accompanying the petition, dated June 3, 2002, requested labor certification substitution. Counsel's letter states:

> On March 25, 1998, the Department of Labor approved Oracle Corporation's labor certification for [redacted] [this labor certification had a November 21, 1997 priority date]. [redacted] did not utilize this approved labor certification with [redacted] and although an immigrant petition was filed, a request to withdraw the immigrant visa petition was made...

A policy memorandum from [redacted] Associate Commissioner, entitled *Substitution of Labor Certification Beneficiaries* (March 7, 1996), states:

> As part of its interim regulations implementing the Immigration Act of 1990 (IMMACT 90), the Department of Labor (DOL) eliminated labor certification substitution. See 56 Fed. Reg. 54920-54930 (Oct 23, 1991). The Court of Appeals for the District of Columbia recently enjoined enforcement of

> DOL's regulation precluding substitution of labor certification beneficiary's based on the Administrative Procedure Act. *See Kooritsky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994). As a result of this decision, employers may request substitution of labor certification beneficiaries. Since the *Kooritsky* decision, the Service has processed some requests for substitution pursuant to a May 4, 1995 DOL Field Memorandum. The DOL Field Memorandum reinstated the procedures which existed before the implementation of IMMACT 90. Based on the attached memorandum of understanding with the Service, the DOL has now delegated responsibility for substituting labor certification beneficiaries to the Service.
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> * * *
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> The petitioner must attach a photocopy of the original Form ETA-750, Parts A and B, a photocopy of the DOL certification, and a copy of a notice of approval (if any) of a previous Form I-140 petition to the new Form I-140 filed at the service center on behalf of the substituted alien.
>
> The petitioner must also submit a written notice of withdrawal of the initial I-140 petition which was based on the labor certification.
>
> The service center should ensure that the petitioner is not using the same labor certification more than once. The adjudicator, using the Central Index System, must determine whether the original labor certification beneficiary has immigrated or applied for adjustment of status based on the labor certification and I-140 petition filed by the employer. The adjudicator must also look up the status of any previous petition in CLAIMS.
>
> If the original I-140 petition with the labor certification is located at the service center, the adjudicator should retrieve the original petition, send out a notice of automatic revocation of the initial I-140 petition approval, and place the original labor certification with the second I-140 petition.

The above policy memorandum makes it clear that a petitioner may not use the same labor certification more than once.

Documentation in the record indicates that [redacted] was the beneficiary of two approved labor certifications filed in his behalf by [redacted] with priority dates of November 21, 1997 and December 1, 1999. In the present case, the petitioner is requesting substitution of the labor certification with the November 21, 1997 priority date. The record contains correspondence from the petitioner to the service center requesting that two I-140 petitions accompanied by the November 21, 1997 labor certification and filed in behalf of [redacted] be withdrawn (WAC9824352239 and WAC9923952660).

On January 30, 2004, the director denied the present petition stating that "the original [November 21, 1997 labor certification] had already been used [by [redacted] Therefore, the request for substitution [of the November 21, 1997 labor certification] cannot be accomplished."

It has long been held that subsequent to an alien's admission for permanent residence based on a particular job offer, the labor certification for that same job offer cannot be used again. *See Matter of Harry Bailen*

Builders, 19 I&N Dec. 412 (Comm. 1986). In the present case, however, the petitioner is not requesting that the beneficiary be permitted to use the same labor certification previously used for [redacted] admission to lawful permanent residence.

The AAO has obtained and reviewed [redacted] A-file in order to determine which of the two approved labor certifications was used as a basis for his adjustment of status to lawful permanent residence. Citizenship and Immigration Services' records reflect that on November 16, 2001, [redacted] Application to Register Permanent Residence or Adjust Status, Form I-485, was approved based on an approved I-140 petition (WAC0105152513) that was accompanied by the labor certification with the **December 1, 1999** priority date. Furthermore, the Form I-181, Memorandum of Creation of Record of Lawful Permanent Residence, contained in [redacted] A-file indicates a priority date of December 1, 1999 (for issuance of his visa by the State Department). In light of this documentation, we must conclude that the original labor certification filed in [redacted] behalf with a priority date of November 21, 1997 was not used for his admission to lawful permanent residence. Rather, [redacted] used the labor certification with the December 1, 1999 priority date. Therefore, we find that the labor certification with the priority date of November 21, 1997 remains available for substitution of the current beneficiary.

In this matter, we find that the petitioner has overcome the deficiencies noted in the director's decision and met the guidelines for substitution as specified in the March 7, 1996 Crocetti policy memorandum.

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 sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.