U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

OCT 10 2004

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

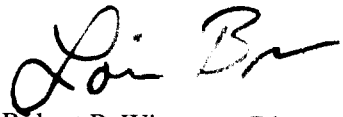
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.



for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner is a gas station and deli. It seeks to employ the beneficiary permanently in the United States as a cook.

The petition is accompanied by a photocopy of an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor. However, the Form ETA 750 was filed not by the petitioner but by Yosemite Trails Inn Restaurant (hereinafter referred to as Yosemite). The original of the Form ETA 750 is also in the file, in a record of proceeding for a prior I-140 petition submitted by Yosemite, a petition which was approved.

In a letter dated November 15, 2002 accompanying the instant petition the petitioner's owner states that the original petitioning employer is unable to continue the labor certification application on behalf of the beneficiary and that the instant petition is "in substitution of the original application." In a letter dated July 30, 2003 the owner states that the petitioner is not a successor in interest to Yosemite. Rather, the owner states that the petitioner qualifies as a substituted employer under Immigration and Nationality Act § 204(j), because an I-485 application to adjust status submitted by the beneficiary has remained pending for more than six months.

The director examined the record and found that the evidence did not establish that the petitioner is a successor in interest to Yosemite. The director therefore denied the instant petition for lack of an appropriate labor certification filed with the petition.

On appeal, counsel submits a brief and additional evidence.

Although the director's decision advised the petitioner's counsel that an appeal was available, that information was in error. The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra* ; 8 C.F.R. § 103.3(a)(iv).

Among the appellate authorities are appeals from denials of petitions for immigrant visa classification based on employment, "except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act." 8 C.F.R. § 103.1(f)(3)(iii)(B) (2003 ed.).

The director concluded that since the petitioner does not claim to be the successor in interest to Yosemite, the labor certification for Yosemite may not be used to support the instant petition. The director, therefore, denied the instant petition for lack of a labor certification from the Department of Labor. Consequently, this office has no jurisdiction to consider an appeal from the director's decision.

Petitioner's claim to qualify as a substituted employer under INA § 204(j) is an argument which would be relevant to the beneficiary's I-485 application to adjust status. *See generally* Memorandum from William R. Yates, Acting Associate Director for Operations, Bureau of Citizenship and Immigration Services, Department of Homeland Security, to Service Center Directors, BCIS and Regional Directors, BCIS, *Continuing Validity of Form I-140 Petition in accordance with Section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (AD03-16)* (August 4, 2003). The beneficiary's I-485 application to adjust status, however, is not before the AAO on appeal.

ORDER: The appeal is rejected.