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

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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 12 2008

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IN RE: Petitioner:
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:

SELF-REPRESENTED

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 employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a staffing service. It seeks to employ the beneficiary permanently in the United States as a financial analyst pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). The petitioner submitted a copy of a certification from the Department of Labor and a request to substitute the beneficiary of the instant petition for the original beneficiary on the certification. The director concluded that the petitioner had failed to provide sufficient information that would allow Citizenship and Immigration Services (CIS) to procure a copy of the original certification, Form ETA 750.

On appeal, the petitioner submits a receipt notice for the petition filed for the previous beneficiary and a request to withdraw that petition.[1] The petitioner also submits substitution instructions downloaded from CIS' website that specifically provide:

> Additionally, a written notice of withdrawal of any pending or approved Form I-140 initially submitted for the original beneficiary or any previously substituted alien *must* be included.

(Emphasis added.)

On October 18, 2007, the director noted that the original Form ETA 750 was not part of the record and requested a "complete list of all I-140 petitions (approved and pending alike) filed by [the petitioner] where the beneficiaries have not obtained lawful permanent residence." In response, the petitioner submitted what is now shown to be only a partial list of petitions. Notably, the petition for the original beneficiary is not included, although the petition was no longer pending at that time. Nevertheless, even in response to the director's notice of intent to deny, the petitioner did not provide the receipt number for the petition filed for the original beneficiary or a withdrawal of that petition. Rather, the petitioner provides that information for the first time on appeal.

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's October 18, 2007 notice. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

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[1] It is questionable whether the March 30, 2007 withdrawal request was properly submitted to CIS on or around that date as CIS electronic records reflect that a response to a request for additional evidence for the petition on behalf of the original beneficiary was received March 15, 2007 and the director, California Service Center, *denied* the petition three months after the date on the withdrawal request, whereas a withdrawal would have been annotated in the electronic records as such.

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

> In general.-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.

The regulation at 20 C.F.R. § 656.30(c)(2) provides:

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

The Act does not provide for the substitution of aliens in the permanent labor certification process. Similarly, the regulations of both CIS and the Department of Labor are silent regarding substitution of aliens. The substitution of alien workers is a procedural accommodation that permits U.S. employers to replace an alien named on a pending or approved labor certification with another prospective alien employee. Historically, this substitution practice was permitted 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).

CIS may not approve a visa petition when the approved labor certification has already been used by another alien. *See Matter of Harry Bailen Builders, Inc.*, 19 I&N Dec. 412 (Comm. 1986). Thus, a petition must be supported by the original Form ETA 750. 8 C.F.R. § 204.5(g)(1). The instructions provided by the petitioner on appeal explicitly advise that a request for substitution where the Form ETA 750 has already been submitted in support of a petition filed on behalf of the original beneficiary "must" include a written notice of withdrawal. As the petitioner did not submit this required evidence or even provide the receipt number of the petition filed on behalf of the original beneficiary, we must uphold the director's decision.

Even if we were to consider the evidence submitted on appeal, the petition would not be approvable. First, the petition would not be approvable until such time as the original Form ETA 750 was

retrieved from the original beneficiary's file to ensure that it was not, in fact, already the basis of a different substitution.

Of more concern, the petitioner submitted tax returns for [redacted], which bear the petitioner's Federal Employment Identification Number (FEIN). The California Business Portal, http://kepler.sos.ca.gov, however, reflects that this corporation has been forfeited. Thus, it does not appear that the petitioner is able to make a valid job offer.

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.