U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: MAY 29 2014 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Elizabeth McCormack

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director) denied the employment-based immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The matter will be remanded to the director for further consideration and the entry of a new decision.

The petitioner describes itself as a gas station and convenience store. It seeks to employ the beneficiary permanently in the United States as an assistant night manager pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), with a priority date of April 24, 2001, the date on which DOL accepted it for processing.

In his June 3, 2013 decision, the director found that the underlying labor certification had expired and, therefore, that the visa petition was not supported by a valid labor certification, as required by the regulation at 8 C.F.R. § 204.5(l)(3)(i). He also found that the beneficiary could not be substituted. He denied the visa petition accordingly.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted on appeal.[1] The appeal is properly filed, timely and makes a specific allegation of error in law or fact.

Procedural History

The petitioner filed the instant labor certification on April 24, 2001 on behalf of the beneficiary. On November 17, 2003, the petitioner used the labor certification in support of a Form I-140, Immigrant Petition for Alien Worker, filed on behalf of another beneficiary, [redacted] That petition was approved on April 27, 2005, but was withdrawn by the petitioner in a September 9, 2008 letter.

On September 11, 2008, the petitioner submitted a visa petition on behalf of the beneficiary using the labor certification that had previously supported its 2003 visa petition for Mr. [redacted] United States Citizenship and Immigration Services (USCIS) denied the petition on February 24, 2009 after determining that the labor certification had been used by Mr. [redacted] to adjust his status to that of Lawful Permanent Resident.[2] On July 14, 2009, the

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1).

[2] Mr. [redacted] adjusted to lawful permanent resident status on January 12, 2013 based on a family-based visa petition. He did not, therefore, use the instant labor certification, as indicated by the director in his February 24, 2009 decision.

petitioner filed the current petition on behalf of the beneficiary, again supported by the labor certification filed with DOL on April 24, 2001. On October 30, 2009, the director issued a Notice of Intent to Deny (NOID) to the petitioner, granting it 30 days (33 days if mailed) in which to respond. After receiving no response, the director denied the petition for abandonment on December 15, 2009. *See* 8 C.F.R. § 103.2(b)(13).

On January 8, 2010, the petitioner filed a motion to reopen and a motion to reconsider the director's decision, indicating that it had not received the NOID. On August 1, 2012, the director granted the motions, withdrew his December 15, 2009 decision and ordered an adjudication of the visa petition on its merits. On August 2, 2012, he again issued a NOID to the petitioner, to which the petitioner responded on August 31, 2012. On June 3, 2013, the director denied the Form I-140 petition, finding the underlying labor certification to have expired and, therefore, that the petition had been filed without a valid labor certification, as required by the regulation at 8 C.F.R. § 204.5(l)(3)(i). The director also noted that DOL regulation prohibited the petitioner from substituting the beneficiary on the labor certification.

Acceptance of Form I-140 Petitions with Expired Labor Certifications

On appeal, counsel asserts that the beneficiary in this matter is the original beneficiary of the labor certification and, therefore, that DOL's regulatory prohibition against beneficiary substitution does not apply here. He further contends that while the validity of the underlying labor certification would be expired under a different set of facts, USCIS policy allows the petitioner to file the instant visa petition in this case, as the labor certification was previously utilized in support of a Form I-140 petition during the initial validity period of the labor certification. In support of his assertions, counsel references a June 1, 2007 USCIS memorandum issued by Donald Neufeld, Acting Associate Director, Domestic Operations, "Interim Guidance Regarding the Impact of the Department of Labor's (DOL) final role, *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,* on Determining Labor Certification Validity and the Prohibition of Labor Certification Substitution Requests." Counsel states that as the labor certification was originally submitted in support of the visa petition filed by the petitioner on behalf of Mr. [redacted] in 2003, the visa petition may be accepted by USCIS even though the labor certification would have otherwise expired.

We note that on May 17, 2007 DOL amended its regulation at 20 CFR § 656 to establish a 180-day validity period for individual labor certifications approved on or after July 16, 2007. Labor certifications approved by DOL prior to that date were to be considered valid only if submitted to USCIS in support of a Form I-140 petition filed by January 12, 2008. However, pursuant to the guidance provided in the June 1, 2007 USCIS memorandum noted by counsel, now found in Chapter 22.2(b)(3)(F) of the USCIS Adjudicators Field Manual (AFM), USCIS has continued to accept "amended or duplicate Form I-140 petitions that are filed with a copy of a labor certification that is expired at the time the amended or duplicate Form I-140 petition is filed, if

the original labor certification was submitted in support of a previously filed petition during the labor certification's validity period."

Here, an amended Form I-140 petition has been filed for the original beneficiary of the labor certification. Therefore, the regulation at 20 C.F.R. § 656.11, which prohibits a petitioner from substituting a new beneficiary for the original beneficiary of a labor certification, does not apply in this matter. Further, the underlying labor certification was submitted in support of a previously filed Form I-140 petition, the 2003 visa petition filed by the petitioner on behalf of Mr. during the initial validity period. Accordingly, we find the petition in this matter to be properly filed pursuant to the guidance found in Chapter 22.2(b)(3)(F) of the AFM and will withdraw the director's decision.

Nevertheless, the petition may not be approved as the director has not determined whether the record establishes the beneficiary's qualifications for the offered position or the petitioner's ability to pay the proffered wage.[3] Therefore, we will remand this matter to the director for his consideration of these issues.

Prior to reaching a decision, the director shall provide the petitioner with the opportunity to provide additional evidence.[4] Upon receipt of the submitted evidence, the director shall review

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[3] Although the director requested additional evidence relating to the beneficiary's qualifications for the offered position and the petitioner's ability to pay in the NOID he issued on August 2, 2013, he did not address these issues in his June 3, 2013 decision.

[4] USCIS databases indicate that the petitioner has filed at least three Form I-140 petitions on behalf of other beneficiaries since April 24, 2001. The record, however, contains no evidence that relates to these individuals and the director has not previously requested such evidence. Therefore, prior to determining ability to pay in this matter, the director must provide the petitioner with the opportunity to submit evidence establishing that in addition to paying the beneficiary the proffered wage, it is also able to pay the proffered wages of its other sponsored workers from their respective priority dates forward.

The evidence of record also fails to establish that the beneficiary has the two years of experience required by the labor certification as of the August 24, 2001 priority date. The record contains a July 30, 2008 statement from the payroll coordinator at Inc. that indicates the beneficiary is employed there as a General Manager and has been with the company since December 8, 1991. The payroll coordinator does not, however, state how long the beneficiary has held the position of General Manager with Moreover, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) requires that experience letters come from "trainers or employers" and payroll coordinator does not fall within either of these categories. Further, the record fails to establish the duties performed by the beneficiary as a General Manager for A position description for a General Manager, Operations accompanies the July 30, 2008 statement from payroll coordinator and lists the duties to be performed by a General Manager in operating a restaurant. However, nothing in

the record and enter a new decision, which if adverse to the petitioner shall be certified to the AAO for review

ORDER: The matter is remanded to the director for further action, including the entry of a new decision. If adverse to the petitioner, the decision shall be certified to the AAO for review.

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this generic document establishes that the duties described are those performed by the beneficiary for The position description at no point references Inc. Neither is it signed by the beneficiary or a representative, although the position description requires the signatures of the position's incumbent and his or her supervisor.