

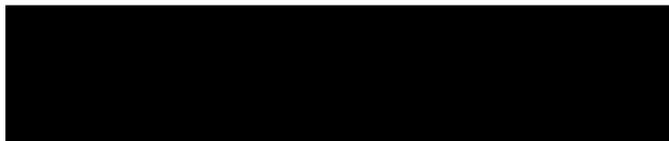
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

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U.S. Citizenship
and Immigration
Services



B5

DATE: **JUL 07 2011** Office: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the director for further investigation and entry of new decision.

The petitioner is a software consultancy and development firm. It sought to employ the beneficiary permanently in the United States as a software engineer. As required by statute, a Form ETA 750, Application for Alien Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition.

The petitioner, through counsel, filed the Immigrant Petition for Alien Worker (Form I-140) with the original Form ETA 750 seeking to substitute the instant beneficiary for the beneficiary identified on the Form ETA 750. The director denied the petition on May 2, 2008 on the basis that the petitioner's Form I-140 was received on/after July 17, 2007. Labor substitution requests were prohibited after that date pursuant to 20 C.F.R. § 656.11. The director concluded that because the petition was not accompanied by a valid labor certification sponsoring the current beneficiary, the director advised that there was no appeal from this decision.

Counsel filed an appeal on May 28, 2008, asserting that the Form I-140 and accompanying documents, including a request for substitution of beneficiaries was timely submitted and was delivered to the Service Center on July 13, 2007. Submitted with counsel's appeal are copies of FedEx confirmation that the delivery was accomplished on July 13, 2007.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The regulation at 20 C.F.R. § 656.11 states the following:

Substitution or change to the identity of an alien beneficiary on any application for permanent labor certification, whether filed under this part or 20 CFR part 656 in effect prior to March 28, 2005, and on any resulting certification, is prohibited for any request to substitute submitted after July 16, 2007.

Additionally, the regulation at 20 C.F.R. § 656.30(c)(2) provides:

A permanent labor certification involving a specific job offer is valid only for the particular job opportunity, the alien named on the original application (unless a substitution was approved prior to July 16, 2007), and the area of

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

intended employment stated on the *Application for Alien Employment Certification* (Form ETA 750) or the *Application for Permanent Employment Certification* (Form ETA 9089).

The Act does not provide for the substitution of aliens in the permanent labor certification process. DOL's regulation became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications, as well as prohibiting the sale, barter, or purchase of permanent labor certifications and applications. The rule continues the Department's efforts to construct a deliberate, coordinated fraud reduction and prevention framework within the permanent labor certification program. *See* 72 Fed. Reg. 27904 (May 17, 2007).

In this case, it is noted that both a stamp on the Form I-140, with a filing fee annotated above, and USCIS electronic records indicate that the Form I-140 was not received until July 20, 2007. Another date stamp of "July 17, 2007" is stamped on the side of page 1 of the Form I-140. There is no indication that the petition was rejected due to a lack of or improper filing fee. Counsel has provided evidence that the petition was actually delivered on July 13, 2007. The AAO finds that there is reason to question the receipt date of the Form I-140 as the basis of the director's denial based on an untimely filing of a Form I-140 with a labor substitution request. For this reason, the AAO finds that director's decision was premature and will be withdrawn. The case will be remanded for further investigation and reentry of a new decision.

Because the AAO withdraws the director's decision as to whether a valid labor certification accompanied the Form I-140, the AAO has jurisdiction of an appeal arising from this decision.² Based on the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation relevant to the above and request any additional evidence from the petitioner deemed necessary. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

² The Secretary of the Department of Homeland Security (DHS) delegates the authority to adjudicate appeals to the AAO 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.).

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.