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File: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 07 2007  
SRC-04-196-51254

In re: Petitioner: [redacted]  
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:



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 Acting Director (“director”), Texas Service Center, denied the immigrant visa petition. The petitioner filed a Motion to Reopen or Reconsider the director’s decision. The director granted the motion and forwarded it to the Administrative Appeals Office (“AAO”) for review. We note that there is no authority for the director to forward a granted motion to the AAO. Alternatively, the director should have made a determination on the merits of the petition and certified the decision to the AAO for review.<sup>1</sup> The AAO will exercise discretion and accept the filing as an appeal.<sup>2</sup>

The petitioner is in the business of hospitality management, and seeks to employ the beneficiary permanently in the United States as an accountant, a professional worker, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). The petition was filed with a copy of Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor on behalf of another alien.

The petitioner has filed to obtain an immigrant visa and classify the beneficiary as a professional. The regulation at 8 C.F.R. § 204.5(l)(2) provides that a third preference category professional is a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.”

The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d).

The chronology of the case may be summarized as follows:

- On June 4, 2003,<sup>3</sup> the petitioner filed the Form ETA 750 on behalf of the original beneficiary;<sup>4</sup>

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<sup>1</sup> Directors may certify decisions to the AAO “when a case involves an unusually complex or novel issue of law or fact.” 8 C.F.R. § 103.4(a)(1).

<sup>2</sup> The AAO’s jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO’s jurisdiction is limited to those 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) (2005 ed.). The AAO does not have jurisdiction to review a case where the director has properly determined that there is no labor certification in the record of proceeding. In this case, however, a labor certification was submitted but it has been used for one alien to adjust to lawful permanent residence and now the petitioner proposes to use the labor certification again.

<sup>3</sup> We note that there is a discrepancy in the date on which the labor certification was submitted. The DOL final determination page lists that the labor certification was filed on January 4, 2003, however, the actual Form ETA 750 was stamped received by the local office on June 4, 2003. The Form ETA 750 was additionally stamped in two other locations that it was received in June 2003, so that the January 4, 2003 receipt date on the final determination is likely in error.

<sup>4</sup> We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v.*

- On July 28, 2003, the Form ETA 750 was approved on behalf of the original beneficiary;
- On August 20, 2003, the petitioner filed the Form I-140 petition, while the original beneficiary concurrently filed Form I-485 Adjustment of Status application;<sup>5</sup>
- On December 9, 2003, the Form I-140 petition was approved on behalf of the original beneficiary;
- On July 6, 2004, the petitioner filed a petition on behalf of the present substituted beneficiary, and requested that the initial Form I-140 petition be revoked.
- On October 28, 2004, the initial beneficiary's Form I-485 Adjustment of Status was approved based on the position offered in the January 4, 2003 labor certification;
- On January 27, 2005, the director issued a Notice of Intent to Deny ("NOID"), which noted that the petitioner sought to substitute the present beneficiary based on a labor certification on which basis the original beneficiary had already adjusted status to lawful permanent resident on October 28, 2004. The petitioner was allowed a four week time period to respond and to provide another alien labor certification, or to withdraw the petition.
- In response to the NOID, the petitioner provided that by letter of July 5, 2004, it had instructed Citizenship and Immigration Services ("CIS") to "revoke" the Form I-140 immigrant petition approved on behalf of the original beneficiary, initially approved on December 9, 2003, and provided the I-140 receipt number for the prior petition, along with a request to substitute the present beneficiary into the labor certification.
- On November 22, 2005, the director denied the instant petition as the labor certification was no longer available for substitution as the original beneficiary of the labor certification had used the certified ETA 750 position to adjust to permanent resident status. The labor certification was therefore no longer available for the present beneficiary to use. The decision also provided that the denial was based on the lack of a valid labor certification, but that there may be other deficiencies in the petition.<sup>6</sup>

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*Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to Citizenship and Immigration Services ("CIS") based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule becomes effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

<sup>5</sup> On July 31, 2002, CIS published an interim rule allowing for the concurrent filing of Form I-140 and Form I-485. *See*: 67 Fed. Reg. 49561 (July 31, 2002).

<sup>6</sup> We note that there are substantial deficiencies in the filed I-140 petition both in terms of the beneficiary's documented qualifications, as well as in the petitioner's ability to pay the proffered wage. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the

education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The regulation at 8 C.F.R. § 204.5(1)(3)(ii) specifies for the classification of a professional that:

(C) *Professionals*. If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

Further, a petitioner is required to document that the beneficiary has the requisite work experience. See 8 C.F.R. § 204.5(1)(3):

(ii) *Other documentation*—

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner failed to document that the beneficiary has the required education as set forth in the certified ETA 750. Specifically, the Form ETA 750 requires that the individual have a Bachelor's degree in Accounting. The petitioner did not submit any documentation in accordance with 8 C.F.R. § 204.5(1)(3)(ii) that the beneficiary had the relevant degree. Further, the petitioner did not provide an evaluation to show that the beneficiary's foreign studies listed on Form ETA 750B would be equivalent to the U.S. degree requirement. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

Further, the experience letter provided on behalf of the beneficiary is deficient in that it does not document that the beneficiary has the required experience in all the special requirements listed in Box 15 on the ETA 750A job offer. Additionally, we note that a prior petitioner filed a labor certification on behalf of the

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>7</sup>

The record shows that the appeal is properly filed, timely and makes an allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

On appeal, counsel asserts that the petitioner followed all of the substitution procedures set forth in the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) Memorandum, "Substitution of Labor Certification Beneficiaries," Louis Crocetti, Associate Commissioner, HQ 204.25-P (March 7, 1996). This memorandum provides that a request for substitution where a petition for the original beneficiary is already approved should be accompanied by a request to withdraw the original petition.<sup>8</sup> Upon

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beneficiary. The description set forth on the prior ETA 750B describes her experience as more of an export, quality control clerk than as an "accountant" or Accounts Manager. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

Further, the petitioner failed to document that it could pay the proffered wage under 8 C.F.R. § 204.5(g)(2) where the petitioner must demonstrate that it can pay the proffered wage from the priority date until the beneficiary obtains permanent residence from its net income, or net current assets as illustrated on tax returns, annual reports, or audited financial statements, or wages already paid to the beneficiary. The petitioner represented the following information on the I-140 Petition related to the petitioning entity: date established: March 7, 1997; gross annual income: \$1,108,612; net annual income: \$114,621; and current number of employees: 10. The proffered wage as stated on Form ETA 750 is \$29,100 per year. The petitioner submitted only its 2002 federal tax return, but did not submit any regulatory prescribed evidence for the years 2003 or 2004.

The 2002 federal tax return reflects that the petitioner is formed and operates as a limited liability company (LLC). Although structured and taxed as a partnership, the owners of an LLC enjoy limited liability similar to corporation owners. Where a partnership's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 22 of page one of the petitioner's Form 1065, which reflects the following net income: -\$73,204. In examining the petitioner's net current assets, Schedule L, lines 1(d) through 6(d), minus year-end current liabilities, shown on lines 15(d) through 17(d), the petitioner's 2002 net current assets were: -\$195,582. As the petitioner exhibited negative net income and negative net current assets, the petitioner would not be able to demonstrate its ability to pay the beneficiary the proffered wage. Therefore, regardless of the procedural issue in this case and/or whether or not there is a labor certification available for the proposed substituted beneficiary, the record of proceeding as it currently stands does not demonstrate the petitioner's eligibility for the benefit sought.

<sup>7</sup> 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).

<sup>8</sup> The authority to substitute labor certification beneficiaries was delegated to CIS solely at the discretion of DOL pursuant to a memorandum of understanding.

receipt of such a request, the director is instructed to automatically revoke the original petition and transfer the labor certification to the substituted beneficiary's file. The purpose is to "ensure that the petitioner is not using the same labor certification more than once."

While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions, memos, or private discussions and correspondence solicited to obtain advice from CIS are not binding on the AAO or other CIS adjudicators and do not have the force of law. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). *See also Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); *see also*, Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).

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, both the CIS and the Department of Labor's regulations 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). The final rule related to labor certification substitution prohibits substitution, as well as 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) (to be codified at 20 C.F.R. § 656).

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). Moreover, CIS is not

required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988). Thus, while CIS currently permits substitutions of beneficiaries because of the delegation of authority from DOL, once the labor certification has been used for the original beneficiary, even in error, that labor certification is no longer available. The labor certification on which this petition is based already served as the basis of admissibility for the original beneficiary. Section 212(a)(5)(A) of the Act. Accordingly, the labor certification is no longer available to support the petitioner's application for the present beneficiary in the instant matter.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.