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U.S. Citizenship
and Immigration
Services

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BC

File: [Redacted] SRC 04 126 51396

Office: TEXAS SERVICE CENTER Date: JUN 30 2008

In re: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

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

The petitioner is a telecommunications business, and seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner had failed to meet the requirements for labor certification substitution under legacy Immigration and Naturalization Service (INS) procedures for substitution and denied the petition accordingly.

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

As set forth in the director's June 1, 2005 denial, the single issue in this case is whether or not the petitioner met the requirements for labor certification substitution under legacy INS procedures for substitution.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

On March 31, 2004, the petitioner filed the current I-140, Immigrant Petition for Alien Worker, for the current beneficiary as a substitute for a previous beneficiary.¹ Counsel states:

The approved labor certification is for the position of Senior Applications Developer I at the company's Richardson, Texas facility.² [The petitioner] seeks to substitute beneficiaries because the original beneficiary, [REDACTED], is no longer with the company. The company's immigrant petition (I-140) filed on [REDACTED]'s behalf was approved by the Service on March 28, 2002 (SRC-02-104-52328). On May 6, 2002, [REDACTED] filed for adjustment of status based on the company's I-140 petition approval (SRC-02-167-53812). [The petitioner] has withdrawn the immigrant petition (I-140) filed with the TSC on Mr. [REDACTED]'s behalf, as evidenced by the enclosed letter submitted to TSC on January 30, 2004. Therefore, the approved labor certification for the position of Senior Applications Developer I in Richardson, Texas remains available to be used in support of an I-140 petition.

¹ It is noted that the petitioner filed the current Form I-140 a day after the director issued a Notice of Intent to Deny the Form I-485 for the original beneficiary. At that time, the attorney of record for the original beneficiary was current counsel. On April 9, 2004, current counsel notified the original beneficiary of his receipt of the Notice of Intent to Deny and informed the original beneficiary to notify the Texas Service Center that the original beneficiary was no longer represented by current counsel.

² [The petitioner] is not in the possession of the original Form ETA 750, which was certified by the U.S. Department of Labor; instead, the original certified application was submitted to the Texas Service Center as part of the following I-140 filing: SRC-02-104-52328.

[The petitioner] hereby seeks to use that approved labor certification for this preference petition submitted on [the beneficiary's] behalf.

On March 31, 2004, the present beneficiary concurrently filed Form I-145, Application to Register Permanent Residence or Adjust Status.

On February 13, 2002, the petitioner filed Form I-140 (SRC-02-104-52328) for the previous beneficiary, [REDACTED] which was approved on March 27, 2002. On May 6, 2002, [REDACTED] filed Form I-485 with the Texas Service Center (SRC-02-167-53812). In a letter, dated May 2, 2003,³ counsel on behalf of the petitioner withdrew the approved I-140 submitted on behalf of [REDACTED]. On March 30, 2004, the director issued an automatic revocation of the petitioner's approved petition (Form I-140) for [REDACTED] under 8 C.F.R. § 205.1(a)(3)(ii) and also issued a notice of intent to deny (NOID) [REDACTED]'s Form I-485 based on the withdrawal of the approved I-140 by the petitioner. The director informed [REDACTED] that:

Under new U.S. Citizenship and Immigration Services (CIS) policy (memo HQBCIS 70/6.2.8 – P), an applicant for adjustment of status may retain a valid, previously approved I-140 petition even if the petitioner has withdrawn the petition if the applicant pursues another employment in the same or similar occupational classification as the original job. The Service shall issue the applicant its Notice of Intent to Deny on the adjustment application to inquire about the applicant's new employment.

In response to the director's NOID, [REDACTED]'s new counsel states:

[REDACTED] does wish to continue with his adjustment application and is eligible to accept new employment with National Systems, Inc. pursuant to the portability of AC21 because his I-485 application has been pending for longer than 180 days and his position as Sr. Programmer Analyst/Developer is in the same occupational classification as the position for which labor certification was obtained. Therefore his approved I-140 shall remain valid.

[REDACTED]'s Form I-485 was approved on May 10, 2004 with his lawful permanent resident card completed on October 26, 2004.

On June 1, 2005, the director denied the petitioner's current Form I-140 and the current beneficiary's Form I-485 stating that the petitioner has failed to meet the requirements for labor certification substitution under legacy INS procedures for substitution.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal⁴. Relevant evidence submitted on

³ It is noted that both the director and counsel acknowledge that the withdrawal letter was not received by CIS until January 1, 2004.

⁴ 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). The record in the instant case

appeal includes counsel's brief, a copy of the notice of automatic revocation of the approved I-140 for Mr. [REDACTED], a copy of a memorandum, dated August 4, 2003, for Service Center Directors, BCIS Regional Directors, BCIS from William R. Yates/s/Janis Sposato, Acting Associate Director for Operations, Bureau of Citizenship and Immigration Services, Department of Homeland Security, entitled *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)*, and a copy of an interoffice Memorandum, dated May 12, 2005, from William R. Yates /S/, Associate Director of Operations, United States Citizenship and Immigration Services, Department of Homeland Security, entitled *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)(Public Law 106-313)*. Other relevant evidence in the record of proceeding includes a copy of a memorandum, dated March 7, 1996, from the Office of Examinations, entitled *Substitution of Labor Certification Beneficiaries*.

On appeal, counsel claims that the director used an incorrect application of law and Service policy with respect to Form I-140 petitions based on labor certification substitutions, pursuant to the March 7, 1996 Service Memorandum HQ 204.25-P as well as Service memoranda providing guidance regarding the implementation of the American Competitiveness in the 21st Century Act of 2000 (specifically, Aug. 4, 2003 Service Memorandum HQBCIS 70/6.2.8-P and May 12, 2005 Service Memorandum HQPRD 70/6.2.8-P). Counsel states:

As described below, [the petitioner] submitted a timely request to revoke the I-140 petition approval obtained on behalf of the original beneficiary of the approved labor certification. Mr. [REDACTED]. The Service revoked the I-140 petition approval before adjudicating Mr. [REDACTED]'s adjustment of status application, making the revocation effective as of the date of the I-140 approval in 2002. Accordingly, [the petitioner] is not using the same labor certification more than once and the company's substitution-based I-140 petition is consistent with the Legacy INS Headquarters Memorandum cited by the Service⁵ as well as other Service memoranda interpreting section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000 ("AC21"), titled "Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence" (hereinafter "I-140 portability"). Although Mr. [REDACTED] subsequently obtained permanent resident status based on a new job offer from another employer pursuant to the I-140 portability benefits conferred under AC21, nothing in the AC21 or its legislative history suggests that Congress intended to take away the petitioner's long-standing ability to timely revoke its I-140 petition and rely on the underlying labor certification in attempting to fill the certified job opportunity with another foreign national employee (*i.e.*, a successful claim for the I-140 portability does not mean that the underlying labor certification has been "used" for purposes of substitution under the Crocetti Memorandum and the principles stated therein). In the absence of any authority for the proposition that the petitioner is precluded from using (after properly revoking its I-140 petition) the underlying labor certification that the employer (not the beneficiary) obtained from the U.S. Department of Labor ("DOL") for a particular job opportunity, the decision of the Texas Service Center is in error. Accordingly, we respectfully request that the Service reconsider its decision in this case

provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

⁵ Memorandum on "Substitution of Labor Certification Beneficiaries" dated March 7, 1996. *See* HQ 204.25-P, Memorandum from Louis D. Crocetti, Associate Commissioner (hereinafter referred to as the "Crocetti Memorandum").

and apply the law consistent with its policy on substitutions and public statements made in connection with the implementation of AC21 portability.

At the outset, it should be noted that CIS memoranda merely articulate internal guidelines for CIS personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F. 3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F. 2d 1262, 1264 (5th Cir. 1987)). See also *R.L. Inv. Partners, Ltd. v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. Mar. 3, 2000) *aff'd* 273 F. 3d 874 (9th Cir.) for the proposition that unpublished decisions from this office and General Counsel opinions carry no precedential weight and are not binding on CIS.

In general, an alien may acquire permanent resident status in the United States through two legal mechanisms: the alien may pick up their approved visa packet at an overseas consulate and be "admitted" to the United States for permanent residence; or, if the alien is already in the United States in a lawful nonimmigrant or parolee status, the alien may "adjust status" to that of an alien admitted for permanent residence. Cf. Section 211 of the Act, 8 U.S.C. § 1181 ("Admission of Immigrants into the United States"); Section 245 of the Act, 8 U.S.C. § 1255 ("Adjustment of Status of Nonimmigrant to that of Person Admitted for Permanent Residence").

Governing adjustment of status, section 245(a) of the Act, 8 U.S.C. § 1255(a), requires the adjustment applicant to have an "approved" petition:

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1) or [sic] may be adjusted by the Attorney General [now the CIS], in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if:

- (i) the alien makes an application for such adjustment,
- (ii) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and
- (iii) an immigrant visa is immediately available to him at the time his application is filed.

In 2000, Congress passed the American Competitiveness in the Twenty-First Century Act (AC21), Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000). Section 106(c) of AC21 amended section 204 of the Act by adding the following provision, codified as 8 U.S.C. § 1154(j):

Job Flexibility For Long Delayed Applicants For Adjustment Of Status To Permanent Residence- A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained adjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Section 212(a)(5)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(5)(A)(iv), states further:

Long Delayed Adjustment Applicants- A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

At the time AC21 went into effect, legacy INS regulations provided that an alien worker could not apply for permanent resident status by filing a Form I-485, application to adjust status, until he or she obtained the approval of the underlying Form I-140 immigrant visa petition. *See* 8 C.F.R. § 245.2(a)(2)(i) (2000). Therefore, the process under section 106(c) of AC21 at the time of enactment was as follows: first, an alien obtains an approved employment-based immigrant visa petition; second, the alien files an application to adjust status; and third, if the adjustment application was not processed within 180 days, the underlying immigrant visa petition remained valid even if the alien changed employers or positions, provided the new job was in the same or similar occupational classification.

The available legislative history does not shed light on Congress' intent in specifically enacting section 106(c) of AC21. While the legislative history for AC21 discusses Congressional concerns regarding the nation's economic competitiveness, the shortage of skilled technology workers, U.S. job training, and the cap on the number of nonimmigrant H-1B workers, the legislative history does not specifically mention section 106(c) or any concerns regarding backlogs in adjustment of status applications. The legislative history briefly mentions "inordinate delays in labor certification and INS visa processing" in reference to provisions relating to the extension of an H-1B nonimmigrant alien's period of stay. *See* S. Rep. 106-260, 2000 WL 622763 at *10, *23 (April 11, 2000). In the 2001 Report On The Activities Of The Committee On The Judiciary, the House Judiciary Committee summarized the effects of AC21 on immigrant visa petitions: "[I]f an employer's immigrant visa petition for an alien worker has been filed and remains adjudicated for at least 180 days, the petition shall remain valid with respect to a new job if the alien changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed." H.R. Rep. 106-1048, 2001 WL 67919 (January 2, 2001). Notably, this report further confuses the question of Congressional intent since the report clearly refers to "immigrant visa petitions" and not the "application for adjustment of status" that appears in the final statute. Even if more specific references were available, the legislative history behind AC21 would not provide guidance in the current matter since, as previously noted, an approved employment-based immigrant visa was required to file for adjustment of status at the time Congress enacted AC21.

In the instant case and with regard to _____ the conditions of AC21 were met, and _____ was entitled to adjust his status to that of lawful permanent resident under AC21.

On appeal, counsel contends:

The Service guidance clearly envisions situations where the original employer withdraws the I-140 petition after the I-485 has been pending for 180 days. The Service did not, explicitly or implicitly, state that the original employer would be precluded from submitting a substitution-based I-140 petition in those cases, assuming of course that the withdrawal was submitted before adjustment of status by the initial beneficiary. Consistent with the Crocetti Memorandum, an I-140 withdrawal submitted after the initial beneficiary had already adjusted his status would not enable the original employer to reuse the labor certification; a timely I-140 revocation, however, must be honored by the Service and the original employer should be able to pursue a substitution filing because the initial beneficiary's pending

adjustment would be based on different employment, as noted in the Yates 2005 Memo cited above. Accordingly, the petitioner would not be using the same labor certification twice. If your ruling stands, the petitioner does not get to use the labor certification at all. The employer should be permitted to use its approved labor certification application on behalf of another alien who will assume the certified position described in the application.

The Service's decision in this case is inconsistent with the policy behind employment-based immigrant petitions because it would prevent a legitimate U.S. employer from filling an unmet need. As noted by the court in *Medellin v. Bustos*, "a decision by the DOL to grant a labor certification constitutes an assessment that employment of an alien under the circumstances in question will not adversely affect INA policy."⁶ In this case, [the petitioner] identified such unmet need and obtained the required labor certification with an intent to **employ [REDACTED] in the certified job opportunity. By timely withdrawing its I-140 petition and re-filing a new I-140 petition on behalf of [the beneficiary], [the petitioner] was trying to respond to changing circumstances and still fulfill the same need by employing a different alien in the same position for which the determination was made that it would have no adverse effect (i.e., the labor certification was granted).**

By denying [the petitioner's] I-140 petition, the Service is effectively preventing [the petitioner] from filling the need identified in the labor certification it obtained from the DOL. As explained above, [REDACTED]'s adjustment of status was based on a different job offer with a different employer (who did not have to obtain a new labor certification due to a statutory exception under AC21 that conferred such benefit on [REDACTED] as a member of a limited yet protected class). That statutory exception, however, should not adversely impact [the petitioner's] ability to fill its need based on the approved labor certification.

* * *

The Service should not, therefore, interpret the AC21 and its effect on long-standing labor certification substitution practice in a way that would negate the congressional intent behind employment-based immigration, by disallowing U.S. employers the necessary flexibility to meet their employment needs when changing circumstances warrant a substitution of beneficiaries under a particular labor certification. If the Service, as a matter of policy, wants to ensure that only one alien is able to adjust status on the basis of a single labor certification, it can do so by adjudicating adjustment of status applications within six months rather than by infringing on the rights of U.S. employers.

Upon review, counsel's assertions are not persuasive. On March 31, 2004, following a request to withdraw the petition in behalf of the original beneficiary, the petitioner filed the current I-140 for the current beneficiary as a substitute for [REDACTED]. Mr. [REDACTED] adjusted to lawful permanent resident status on May 10, 2004. Thus, on June 1, 2005, the director denied the instant petition as the labor certification was no longer available for substitution.

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

⁶ 854 F.2d 795, 797 (5th Cir. 1988).

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).

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 policy permits substitutions of beneficiaries, once the labor certification has been used for the original beneficiary, even in error, that labor certification is no longer available.

At the time of filing of the instant petition, CIS policy permitted substitutions of beneficiaries. However, once the labor certification has been used for the original beneficiary, even in error, that labor certification is no longer available.⁷ The labor certification on which this petition is based already served as the basis of admissibility of the original beneficiary. Section 212(a)(5)(A) of the Act. Counsel provides no legal

⁷ It should be noted that the original Form I-140 could not have been approved without a valid labor certification from DOL. Thus, the adjustment of status of a beneficiary based on a Form I-140 must still contain a valid labor certification. Since the labor certification, in this case, has been previously used with the adjustment of status of [REDACTED], that labor certification is no longer available to the current beneficiary. *See Matter of Harry Bailen Builders, Inc.*, 19 I&N Dec. 412 (Comm. 1986).

authority, and we know of none, that would allow CIS to rely on the labor certification of an adjusted alien to correct an error or to allow a second beneficiary to adjust to lawful permanent resident.

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. The director's decision is affirmed. The petition remains denied.