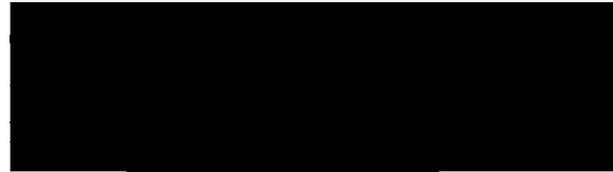




U.S. Citizenship  
and Immigration  
Services

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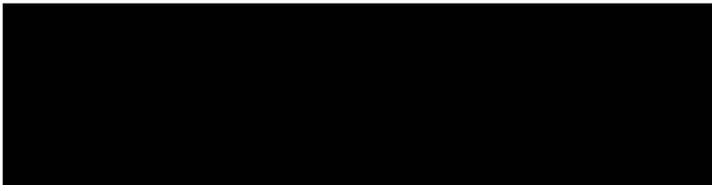
Office: TEXAS SERVICE CENTER

Date:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Peggy 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 appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had failed to establish that the petition was properly supported by an individual labor certification and denied the petition accordingly.<sup>1</sup>

On appeal, the petitioner, through counsel, asserts that the underlying labor certification initially submitted on behalf of the original beneficiary was still available to support the current beneficiary's

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<sup>1</sup> It is further noted that the petitioner failed to document that it could pay the proffered wage of \$11.87 per hour (annualized to \$24,689.60) as of the priority date pursuant to the regulation at 8 C.F.R. 204.5(g)(2). It provides that a petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date until the beneficiary obtains permanent residence. USCIS reviews 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 provided federal tax returns for 2001, 2002, 2003, and 2004 but did not submit any regulatory prescribed evidence for 2005 or 2006. The returns reflect that the petitioner is structured as an S Corporation. Where an S Corporation's income is exclusively from a trade or business, U.S. Citizenship and Immigration Services (USCIS) considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. Where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2001, 2002, and 2003) line 17e (2004 and 2005) or line 18 (2006) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007)(indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Here, the petitioner's net income is reflected on line 23 in 2001 through 2004. The net income reported in those years was -\$378 in 2001; -\$204 in 2002; -\$8,636 in 2003 and -\$62 in 2004. In reviewing the petitioner's net current assets, which are derived from the difference between current assets (line(s) 1 through 6) on Schedule L of the respective federal income tax return) and current liabilities (line(s) 16 through 18), the petitioner's net current assets are shown to be \$7,986 in 2001; \$4,829 in 2002; \$4,496 in 2003; and \$6,676 in 2004. Although the beneficiary claimed employment with the petitioner since March 2005, no evidence of compensation paid was submitted to the record. As the petitioner exhibited negative net income for 2001, 2002, 2003 and 2004, as well as insufficient net current assets in each of those years to cover the proffered wage of \$24,689.60, the petitioner would not be able to demonstrate its continuing ability to pay the beneficiary the proffered wage. Additionally, no factors of a framework of profitability, reputation or historical growth are indicated in this case or demonstrated by the petitioner's consistent negative figures shown for net income and modest net current assets. See *Matter of Sonogawa* 12 I&N Dec. 612 (BIA 1967). Therefore, regardless of whether 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.

Immigrant Petition for Alien Worker (I-140) because the original beneficiary had adjusted to permanent residence status based on portability and a new job offer.

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).

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 nature, for which qualified workers are not available in the United States.

The priority date is the date that the Form ETA 750 was accepted for processing by any office within the employment service system of the Department of Labor.

The chronology of this case may be stated as follows:

- 1) The petitioner filed the Form ETA 750 on April 24, 2001, thus establishing the priority date.<sup>2</sup> On April 17, 2003, the Form ETA 750 was approved on behalf of the original beneficiary;
- 2) On June 18, 2003, the petitioner filed an I-140 on behalf of the original beneficiary. The beneficiary also filed a Form I-485, Application to Register Permanent Residence or Adjust Status on June 26, 2003.
- 3) On July 9, 2004, the I-140 filed on behalf of the original beneficiary was approved.
- 4) On April 19, 2006, the original beneficiary was interviewed at the district office pertinent to his I-485.
- 5) On May 3, 2006, the petitioner filed an I-140 petition on behalf of the present beneficiary, requesting that he be accepted as a substitution for the original beneficiary.

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<sup>2</sup> It is noted that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by DOL at the time of filing this petition. DOL amended the administrative regulations at 20 C.F.R. part 656 through a final rulemaking published on May 17, 2007, which took effect on July 16, 2007 (71 Fed. Reg. 27904). The regulation at 20 C.F.R. § 656.11 prohibits the alteration of any formation contained in the labor certification after the labor certification is filed with DOL, to include the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. For individual labor certifications filed with [DOL] prior to March 28, 2005, a new Form ETA 750 (sic), Part B signed by the substituted alien must be included with the preference petition. For individual labor certifications filed with the DOL on or after March 28, 2005, a new ETA Form 9089 signed by the substituted alien must be included with the petition. USCIS continued to accept Form I-140 petitions that requested labor certification substitution, which were filed prior to July 16, 2007.

The petitioner provided a letter, dated April 17, 2006, from counsel requesting the substitution. Copies of letters, dated March 28, 2006 and April 7, 2006, from the petitioner's owner and counsel, respectively, requesting withdrawal of the original I-140 and substitution of the current beneficiary are provided on appeal. These letters were submitted to the original beneficiary's case.

- 6) On May 30, 2007, the original beneficiary's Form I-485 was approved based on the certified position described in the Form ETA 750 submitted in support of the I-140 approved in that proceeding and subsequently submitted in this proceeding on behalf of the substituted beneficiary.

On October 11, 2007, the director denied the instant petition because the labor certification was no longer available as the original beneficiary of the labor certification had used the certified ETA 750 position to adjust to permanent resident status. He concluded that the instant visa petition was not properly supported by an individual labor certification.

On appeal, counsel asserts that the original beneficiary did not actually use the labor certification because he had utilized the portability provisions of 204(j) of the Act, 8 U.S.C. § 1154(j), as added by section 106(c) of the American Competitiveness in the Twenty First Century Act of 2000 (AC21).<sup>3</sup> Counsel asserted that because a different job offer was involved, the original labor certification remained available to be used by the petitioner.

Section 204(j) of the Act prescribes that "A petition . . . shall remain valid with respect to a new job if the individual changes jobs or employers." The term "valid" is not defined by the statute, nor does the congressional record provide any guidance as to its meaning. *See* S. Rep. 106-260, 2000 WL 622763 (Apr. 11, 2000); *see also* H.R. Rep. 106-1048, 2001 WL 67919 (Jan. 2, 2001). However, the statutory language and framework for granting immigrant status, along with recent decisions of three federal circuit courts of appeals, clearly show that the term "valid," as used in section 204(j) of the Act, refers to an approved visa petition.

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<sup>3</sup> 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 unadjudicated 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.

It is noted that the available legislative history does not shed light on Congress's intent in specifically enacting section 106(c) of AC21 in relation to the matter at hand. 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. *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 unadjudicated 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. However, there is no mention in AC21 of more than one beneficiary’s sponsorship arising from the same approved labor certification or any other language that would support counsel's theory that the current beneficiary should benefit from the certified labor certification in addition to the substituted beneficiary.

Specifically, 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 provides in relevant part:

- (c) Scope of validity. For certifications resulting from applications filed under this part or 20 CFR part 656 in effect prior to March 28, 2005, the following applies:
  - (2) 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 intended employment stated on the Application for Alien Employment Certification (Form ETA 750) or the Application for Permanent Employment Certification (Form ETA 9089).

The substitution procedure was enacted to accommodate U.S. employers to replace an alien named on a pending or approved labor certification with another prospective alien worker. Historically, this was permitted because of the length of time it took to obtain a labor certification or receive approval

of the Form I-140. *See generally* Department of Labor Proposed Rule, “Labor Certification for the Permanent Employment of Aliens in the Untied States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity,” 71 Fed. Reg. 7656 (February 13, 2006).

Section 212(a)(5)(A)(iv) of the Act cannot be interpreted as allowing the adjustment of status of an alien based on a labor certification that formed the basis for another alien’s admissibility when section 212(a)(5)(A)(i) of the Act explicitly requires a labor certification as evidence of an individual alien’s admissibility. To interpret section 212(a)(5)(iv) in that manner would violate the “elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.” *Dept. of Revenue of Or. V. ACF Indus., Inc.*, 510 U.S. 332, 340 (1994).

Further, USCIS 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).<sup>4</sup> When Congress enacted the job flexibility provision of section 204(j) (AC21) of the Act, it made no corresponding amendments to the admissibility requirements of section 212(a)(5)(C) of the Act that would allow a labor certification to be used as evidence of admissibility for two aliens. It must be assumed that Congress was aware of the agency’s previous interpretation that a labor certification can only support the adjustment of one alien under the Act when AC21 was passed and did not specifically alter that interpretation. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). The labor certification on which the underlying instant petition is based has already served as the basis of admissibility for a different beneficiary and is no longer “valid.”<sup>5</sup> Counsel cites no legal authority that would permit USCIS to rely on the labor certification of an adjusted alien to approve the employment-based immigrant petition of a second alien.

USCIS is not required to approve applications or petitions where eligibility has not been demonstrated, 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 USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6<sup>th</sup> Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988). Once a labor certification has been used for the original beneficiary, even in error, that labor certification is no longer available. Accordingly, the labor certification is no longer available to support the petitioner’s I-140 petition filed on behalf of the current beneficiary in that 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.

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<sup>4</sup> While *Harry Bailen*, 19 I&N Dec. at 414, relies in part on language in 8 C.F.R. § 204.4(f) that no longer exists in the regulations, the decision also relies on DOL’s regulations, which continue to hold that a labor certification is valid only for a specific job opportunity. 20 C.F.R. § 656.30(c)(2). Moreover, the reasoning in *Harry Bailen*, 19 I&N Dec. at 414 has been adopted in recent cases. *See Matter of Francisco Javier Villarreal-Zuniga*, 23 I&N Dec. 886, 889-90 (BIA 2006).

<sup>5</sup> The prior beneficiary was granted the priority date of the original labor certification, April 24, 2001.



**ORDER:** The appeal is dismissed.