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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER Date:

JUL 14 2009

EAC 06 111 50021

IN RE:

Petitioner:



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:



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).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The denial was appealed to the Administrative Appeals Office (AAO). On April 13, 2009, the AAO dismissed the appeal, finding that the petitioner had withdrawn the appeal. The previous decision of the AAO will be vacated. The director's decision will be withdrawn. The matter will be remanded to the director.

The petitioner¹ is a consulting business. The petitioner seeks to employ the beneficiary permanently in the United States as a consultant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). 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.

The petitioner submitted a copy of Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL), an approval notice for the original beneficiary of the ETA 750, a withdrawal of the approved petition and a request to substitute the beneficiary of the instant petition for the original beneficiary listed on the ETA 750. The director determined that the original beneficiary had already adjusted status to that of a lawful permanent resident and denied the petition accordingly. The director denied the subject petition on June 17, 2006.

On appeal, counsel asserts that the initial alien beneficiary of the labor certification adjusted status to lawful permanent resident through marriage to a U. S. citizen and not through the labor certification of the employment based immigrant visa petition filed on her behalf.

The petitioner filed three employment based I-140 petitions for three beneficiaries accompanied by the original or copy of the same labor certification ("labor certification"), albeit with substitution requests, from 2002 to 2006.

The petitioner filed an I-140 petition (first petition) accompanied by the labor certification on September 6, 2002, for [REDACTED] which was approved on May 27, 2003. Subsequently, [REDACTED] adjusted her immigration status to legal permanent resident ("LPR") on March 29, 2005 as a spouse of a U.S. citizen.² On June 30, 2005, the petitioner requested the withdrawal of [REDACTED]'s Form I-140.

The petitioner then submitted an I-140 petition (second petition)³ for another beneficiary, Mr. [REDACTED], with a copy of the labor certification and with a request that Mr. [REDACTED] be substituted as a beneficiary under the labor certification. [REDACTED] petition was approved on December 19, 2005.⁴ Internal U.S. Citizenship and Immigration Services (USCIS) records do not show that [REDACTED] ever filed an application to adjust status to LPR.

¹ The petitioner changed its name on April 15, 2004. It was formerly known as Cap Gemini Ernst & Young U.S. LLC.

² USCIS receipt number EAC 03 132 52159.

³ USCIS receipt number EAC 05 197 53339.

⁴ According to counsel's letter dated March 3, 2006, [REDACTED] left the employ of the petitioner as of February 11, 2006.

Lastly, the petitioner filed a third petition⁵ on March 9, 2006 for [REDACTED] the instant beneficiary, accompanied by a request dated March 3, 2006 to withdraw the petition filed on behalf of [REDACTED]. The petitioner again submitted a copy of the labor certification naming Ms. [REDACTED] with a request that [REDACTED] be substituted as a beneficiary under the labor certification.

On June 17, 2006, the director denied the instant petition as she determined 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:

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 USCIS's and DOL'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).

⁵ The instant petition, USCIS receipt number EAC 06 111 50021.

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).⁶ Moreover, USCIS 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 USCIS 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 USCIS policy permits substitutions of beneficiaries, once the labor certification has been used for the original beneficiary, meaning that the approved I-140 immigrant visa petition and underlying labor certification were submitted as a basis for filing an I-485 application to adjust to lawful permanent resident and that application was approved and the alien admitted, that labor certification is no longer available.

However, if the original beneficiary does not adjust status by means of the I-140 petition associated with the labor certification, and the petitioner withdraws the approved I-140 petition, and, as in this case, the beneficiary adjusts to lawful permanent residency through some other means, then the labor certification would remain available for a substituted alien beneficiary.

As already noted, the beneficiary, _____ adjusted her immigration status to legal permanent resident (“LPR”) on March 29, 2005, as a spouse of a U.S. citizen. The director erred when she found that _____ obtained LPR status under the I-140 petition (first petition). Thus, the labor certification has not been used by another alien to adjust status to LPR, and is available to the instant beneficiary.

Therefore, this matter will be remanded for the director to take action in accordance with this decision. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The AAO’s April 12, 2009 decision is vacated. The director’s decision of June 17, 2006 is withdrawn; however, the petition is remanded to the director for issuance of a new decision.

⁶ 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).