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



U.S. Citizenship
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Services

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BC

FILE:

[REDACTED]
LIN 07 101 53129

Office: NEBRASKA SERVICE CENTER

Date: **MAY 26 2009**

IN RE:

Petitioner:

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:

[REDACTED]

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 Director, Nebraska Service Center, denied the employment-based immigrant visa petition and dismissed a subsequent motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a motel manager 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)(i) of 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 petitioner submitted a copy of a certification from the United States Department of Labor (DOL), a Form I-140 approval notice for the original beneficiary of that certification, a request for withdrawal and revocation of the approved Form I-140 petition from the petitioner dated February 8, 2007, a request for revocation of the approved Form I-140 petition from [REDACTED] dated January 29, 2007, and a request to substitute the beneficiary of the instant petition for the original beneficiary on the certification.¹ The director determined that the original beneficiary had already adjusted status to that of a lawful permanent resident and denied the petition accordingly.

On appeal, counsel asserts that the petitioner, [REDACTED], is the successor-in-interest to [REDACTED]. Counsel states that the approval notice of the Form I-485 for the original beneficiary is the only document that may be relied upon in making the determination as to the beneficiary's date of adjustment. Counsel asserts that the approval notice is dated February 22, 2007, and therefore, that the petitioner should have been permitted to withdraw the Form I-140 on behalf of the original beneficiary because she had not yet adjusted to permanent resident status. Counsel states that the USCIS website did not update the original beneficiary's case status on its website after her Form I-485 application was approved. Counsel assert that USCIS failed to follow the regulations in denying the petition on behalf of the substituted beneficiary.

The petitioner filed the instant petition on February 20, 2007, accompanied by a request to withdraw the petition on behalf of the original beneficiary dated May 18, 2004. On January 25, 2007, the original beneficiary adjusted to lawful permanent resident status. The AAO reviewed the file of the original beneficiary and confirmed the date of her adjustment of status. The Form I-485 is clearly

¹ The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary filed prior to July 16, 2007 retains the same priority date as the original ETA 750. Memo. From Donald Neufeld, Acting Associate Director, Domestic Operations, United States Citizenship and Immigration Services (USCIS), to Regional Directors, *et al.*, *Interim Guidance Regarding the Impact of the [DOL's] final rule, Labor Certification for Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity, on Determining Labor Certification Validity and the Prohibition of Labor Certification Substitution Requests*, <http://www.uscis.gov/files/pressrelease/DOLPermRule060107.pdf> (accessed February 26, 2008).

marked “approved” on January 25, 2007. The fact that the petitioner in this matter may have not become aware of this until a later date is irrelevant. The original beneficiary became a permanent resident on January 25, 2007, regardless of the petitioner’s later discovery of this fact. Thus, on May 11, 2007, 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:

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. 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). Effective July 16, 2007, the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications is prohibited.²

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).³

² 20 C.F.R. § 656.11(a).

³ 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

Thus, while USCIS policy formerly permitted substitutions of beneficiaries, once the labor certification has been used for the original beneficiary, that labor certification is no longer available.

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 authority, and the AAO knows of none, that would allow USCIS to rely on the labor certification of an adjusted alien.

Accordingly, the director correctly denied the petition, and the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that is a successor-in-interest to ABGS, Inc. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In this case, the labor certification was issued to ABGS, Inc. and a Form I-140 petition was filed by ABGS, Inc. That Form I-140 petition was approved, and the beneficiary of that petition adjusted to permanent resident status on January 25, 2007. On February 20, 2007, the petitioner filed the instant Form I-140 accompanied by a request to withdraw the petition on behalf of the original beneficiary and to substitute the instant beneficiary for the original beneficiary. The petitioner claims to be the successor-in-interest to ABGS, Inc. If the original employer is purchased, merges with another company, or is otherwise under new ownership, a successor-in-interest relationship must be established. The successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. In addition, in order to maintain the original priority date, the successor-in-interest must demonstrate that the original employer had the ability to pay the proffered wage from the priority date in 2001 until the date of the change in ownership. Moreover, the successor-in-interest must establish its financial ability to pay the certified wage from the date of the change in ownership. *See Matter of Dial Repair Shop*, 19 I&N Dec. 481 (Comm. 1981).⁴

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).

⁴ The AAO notes that the date of the purported change of ownership is not reflected in the record. The petitioner submitted unaudited balance sheets for the period ending September 30, 2006 to establish its ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial

The record does not establish that the petitioner is the successor-in-interest to [REDACTED]. The record contains an undated, unsigned assumption agreement between [REDACTED] and the petitioner. The unsigned, undated agreement does not establish that the petitioner is the successor-in-interest to [REDACTED]. Further, neither the Certificate of Registration dated June 14, 2005, issued by the State of Georgia to the petitioner, nor the Tourist Accommodation Permit dated August 19, 2005, issued by the Georgia Department of Human Resources, demonstrates that the petitioner assumed all of the rights, duties, obligations, and assets of [REDACTED]. **Going on record without supporting** documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The petitioner has not established its ability to pay the proffered wage from the date of the change in ownership.

⁵ The AAO notes that [REDACTED] operated a Rodeway Inn, and the petitioner claims that it operates a Travelodge.