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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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DATE: OFFICE: VERMONT SERVICE CENTER FILE: 

MAY 30 2012

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (the director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be rejected.

The petitioner is a restaurant. It seeks to permanently employ the beneficiary in the United States as a cook. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). The director denied the petition, finding that the petitioner failed to demonstrate the continuing ability to pay the proffered wage from the priority date.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

Upon *de novo* review, the AAO finds that the petition is not accompanied by an individual labor certification as required by USCIS regulation at 8 C.F.R. § 204.5(a).² Specifically, that regulation

¹ 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).

² In adjudicating the appeal, the AAO observes that the petitioner initially filed the individual labor certification (Form ETA 750) on behalf of an alien beneficiary named [REDACTED]. The DOL accepted and certified the Form ETA 750 filed for [REDACTED] in November 2003. After the DOL's certification, the petitioner substituted [REDACTED] with another alien beneficiary named [REDACTED]. This substitution was allowed as it was done before July 16, 2007 (the final rule prohibiting the substitution of beneficiaries). *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656).

USCIS records show that the employment-based petition (Form I-140) filed on behalf of [REDACTED] was approved on November 29, 2005 [REDACTED]. On March 21, 2007 the petitioner, however, requested that the approved petition for [REDACTED] be canceled, and that the name of [REDACTED] on the approved individual labor certification be replaced by the beneficiary in the instant case. While the employment-based petition filed for the beneficiary in this case was pending adjudication, the director revoked the approval of the petition for [REDACTED] on November 6, 2007. USCIS records show that the petitioner appealed that decision to the AAO [REDACTED] before the AAO finally dismissed the appeal on December 20, 2011.

By appealing the revocation decision to the AAO, the petitioner continued to prosecute the employment-based petition for [REDACTED] while at the same time, it continued to prosecute the employment-based petition for the beneficiary in the instant case. The AAO cannot allow the petitioner to contemporaneously use one individual labor certification for two different alien beneficiaries.

states that a petition is considered properly filed if it is accompanied by a required individual labor certification.

As the petition in this case is not accompanied by an individual labor certification, the petition is improperly filed, and the appeal must be rejected. Since the appeal is rejected, the question of whether or not the petitioner has the ability to pay is moot, and we will not address that issue.

ORDER: The appeal is rejected.