

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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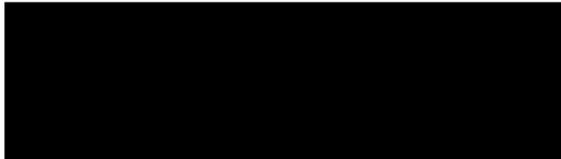
DATE: NOV 28 2012 OFFICE: TEXAS SERVICE CENTER

FILE: 

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,



Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center (director). The petitioner filed a motion to reconsider with the director. The motion was granted and the director affirmed the prior denial. The petitioner appealed and the matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a drycleaners. It seeks to permanently employ the beneficiary in the United States as an alteration tailor. 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 petition was filed with a labor certification approved by the U.S. Department of Labor (DOL) on behalf of another beneficiary. The director denied the petition as the petitioner failed to file it with a valid labor certification pursuant to 8 C.F.R. § 204.5(1)(3)(i).

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.<sup>1</sup>

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. § 656.11 states the following:

Substitution or change to the identity of an alien beneficiary on any application for permanent labor certification, whether filed under this part or 20 CFR part 656 in effect prior to March 28, 2005, and on any resulting certification, is prohibited for any request to substitute submitted after July 16, 2007.

Additionally, the regulation at 20 C.F.R. § 656.30(c)(2) provides:

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<sup>1</sup> 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).

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 Act does not provide for the substitution of aliens in the permanent labor certification process. DOI's regulation became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications, as well as prohibiting the sale, barter, or purchase of permanent labor certifications and applications. The rule continues the Department's efforts to construct a deliberate, coordinated fraud reduction and prevention framework within the permanent labor certification program. *See* 72 Fed. Reg. 27904 (May 17, 2007).

As the filing of the instant case was after July 16, 2007, the petitioner is not able to substitute the beneficiary. The petition was, therefore, filed without a valid certified labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i) and must be denied.

On appeal, counsel states that the director erred in his decision because the director did not adjudicate the case in accordance with a memorandum dated June 1, 2007, from Donald Neufeld, Acting Associate Director, Domestic Operations, USCIS, regarding labor certification validity and substitution (Neufeld Memorandum).<sup>2</sup> *See* Memorandum from Donald Neufeld, Acting Associate

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<sup>2</sup> The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9<sup>th</sup> Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9<sup>th</sup> Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5<sup>th</sup> Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.") *See also* Stephen R. Viña, Legislative Attorney, Congressional Research Service (CRS) Memorandum, to the House Subcommittee on Immigration, Border Security, and Claims regarding "Questions on Internal Policy Memoranda issued by the Immigration and Naturalization Service," dated February 3, 2006. The memorandum addresses, "the specific questions you raised regarding the legal effect of internal policy memoranda issued by the former Immigration and Naturalization Service (INS) on current Department of Homeland Security (DHS) practices." The memo states that, "policy memoranda fall under the general category of nonlegislative rules and are, by definition, legally nonbinding because they are designed to 'inform rather than control.'" CRS at p.3 citing to *American Trucking Ass'n v. ICC*, 659 F.2d 452, 462 (5<sup>th</sup> Cir. 1981). *See also Pacific Gas & Electric Co. v. Federal Power Comm'n*, 506 F.2d 33 (D.C. Cir. 1974), "A general statement of policy . . . does not establish

Director, Domestic Operations Interim Guidance Regarding the Impact of the Department of Labor's (DOL) final 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*, on Determining Labor Certification Validity and the Prohibition of Labor Certification Substitution Requests. HQ70/6.2 ADO7-20, June 1, 2007.

The Neufeld Memorandum that counsel cites allows for the refiling of Form I-140 petitions after the validity period of the underlying labor certification in cases where the previously denied petition was filed during the validity period of the labor certification and the labor certification was not invalidated due to material misrepresentation or fraud.

In the instant case, the petitioner originally filed Form I-140 with a valid labor certification and request to substitute the beneficiary on August 4, 2006 (prior filing). The prior filing was denied and the labor certification was not invalidated. The petitioner then refiled Form I-140 on August 20, 2007 (instant petition) with a then expired labor certification and request to substitute the beneficiary. The instant petition was denied.

Counsel asserts that if the director had adjudicated the instant petition according to the Neufeld Memorandum, the instant petition would have been approved because although the labor certification was no longer valid, it had been previously filed in support of an identical I-140 petition. Counsel maintains that the instant Form I-140 petition was in fact filed with a valid certified labor certification pursuant to 8 C.F.R. § 204.5(1)(3)(i).

Counsel would be correct if the instant petition did not also contain a request to substitute the beneficiary into an approved labor certification. The instant petition was denied not because the Form I-140 was filed after the validity period of the labor certification, but because the Form I-140 was filed with a request to substitute the beneficiary into an approved labor certification after July 16, 2007. The regulations at 20 C.F.R. § 656.30(c)(2) clearly state that the labor certification is valid only for the specific job opportunity, job location and alien named in the original application, unless a substitution has been approved prior to July 16, 2007.

In the instant petition, the substitution was not approved before the deadline. The Neufeld Memorandum does not create an exception to allow the substitution of the beneficiary into an

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a binding norm. It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy announces what the agency seeks to establish as policy." The memo notes that "policy memoranda come in a variety of forms, including guidelines, manuals, memoranda, bulletins, opinion letters, and press releases. Legislative rules, on the other hand, have the force of law and are legally binding upon an agency and the public. Legislative rules are the product of an exercise of delegated legislative power." *Id.* at 3, citing to [REDACTED] *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like - Should Federal Agencies Use them to Bind the Public?*, 41 Duke L.J. 1311 (1992).

approved labor certification after July 16, 2007. The petition for the beneficiary was, therefore, filed without a valid certified labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i) and must be denied.

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.