



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **AUG 30 2013** OFFICE: TEXAS SERVICE CENTER

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, Texas Service Center. The petitioner filed two motions to reopen and reconsider and the director affirmed the denial in both decisions. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion to reopen and motion to reconsider. The motion to reconsider will be granted. The appeal is dismissed. The petition remains denied.

The petitioner describes itself as a retail store. It seeks to employ the beneficiary permanently in the United States as a retail manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner ([REDACTED]) had not established that it was a successor in interest to the company that filed the labor certification ([REDACTED]) and denied the petition. The director noted that in a letter dated July 9, 2009, former counsel had stated "[REDACTED] is unable to continue with the process of the petition, therefore, we are porting the petition under portability provision of AC21." The director stated that the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) does not pertain to the process of the Form I-140, but rather the portability provisions of AC21 pertain to the Form I-485, application to adjust status.

The petitioner filed a motion to reopen and explained that it was not a successor in interest to the company that filed the labor certification, but rather that the companies were "sister companies" that wished to port the beneficiary from one to the other pursuant to the Immigration and Nationality Act (the Act) § 204(j). The director explained that "visa petitions that have never been approved cannot be deemed to be valid and cannot be used to port to another petitioner." Therefore, the director again denied the petition on January 25, 2010, and affirmed the denial a second time on August 24, 2010. The AAO affirmed the director's decision and dismissed the petitioner's appeal on February 4, 2013, noting that the statute and regulations allow adjustment only where the alien has an approved petition for immigrant classification. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.¹ In this matter, the petitioner presented no new facts or evidence on motion that could be considered a proper basis for a motion to reopen.

Counsel asserts that the AAO's "denial is against the weight of the evidence, against the statutes and regulations, and the stated policy of the Service." Specifically, counsel asserted that the decision was not consistent with "the memo of Michael Aytes dated December 27, 2005." The motion to

¹The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . ." *Webster's II New Riverside University Dictionary* 792 (1984)(emphasis in original).

reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the director and the AAO made an erroneous decision through misapplication of law or policy.

Counsel asserts on appeal that the petition is still approvable due to the terms of AC21. However, "the memo of Michael Aytes" cited by counsel is not binding on the AAO and the AAO does not agree that the terms of AC21 make it so that the instant *immigrant petition* can be approved despite the fact that the petitioner has not demonstrated its eligibility. AC21 allows an *application for adjustment of status*² to be approved despite the fact that the initial job offer is no longer valid. The language of AC21 states that the I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer the new employer must be for a "same or similar" job. A plain reading of the phrase "will remain valid" suggests that the petition must be valid *prior* to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar. In other words, it is not possible for a petition to remain valid if it is not valid currently. The AAO would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petition for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, USCIS regulations required that the underlying I-140 was approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term "remains valid" was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer. *See Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010).

The regulation at 20 C.F.R. § 656.30(c)(2) provides:

² The AAO notes that after the enactment of AC21, USCIS altered its regulations to provide for the concurrent filing of immigrant visa petitions and applications for adjustment of status. This created a possible scenario wherein after an alien's adjustment application had been pending for 180 days, the alien could receive and accept a job offer from a new employer, potentially rendering him or her eligible for AC21 portability, prior to the adjudication of his or her underlying visa petition. A USCIS memorandum signed by William Yates, May 12, 2005, provides that if the initial petition is determined "approvable", then the adjustment application may be adjudicated under the terms of AC21. *See Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)* at 3. This memorandum was superseded by *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010), which determined that the petition must have been valid to begin with if it is to remain valid with respect to a new job.

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.

Counsel states on motion that [REDACTED] are in good standing and are owned by the same family. So, it is really just one company with two locations in the same family enterprise.” However, tax records submitted by the petitioner confirm that the two businesses are legally distinct and operate in different locations, regardless of whether the businesses share common owners.

In this case, the labor certification was filed by [REDACTED]. In a letter dated July 9, 2009, former counsel stated that [REDACTED] is unable to continue with the process of the petition.” Current counsel now states that “the petitioner would be happy to employ [the beneficiary] under the name of .. [REDACTED] at that location if necessary.” However, counsel has failed to offer any explanation for former counsel’s statement regarding that company’s inability to support the petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

A labor certification is valid only for the particular job opportunity. 20 C.F.R. § 656.30(c)(2). The job opportunity described on the petition is different than the job opportunity described on the labor certification. Therefore, the petition is not supported by a valid labor certification. The appeal is dismissed.

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 motion to reconsider is granted. The appeal is dismissed. The petition remains denied.