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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

[Redacted]

DATE: **FEB 05 2013** OFFICE: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner: [Redacted]
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:

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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an individual. He seeks to employ the beneficiary permanently in the United States as a mechanic 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 labor certification from the United States Department of Labor (DOL), an approval notice for the original beneficiary of that certification, a withdrawal of the approved petition and a request to substitute the beneficiary of the instant petition for the original beneficiary on the certification. The director determined that the original beneficiary had already adjusted status to that of a lawful permanent resident and denied the petition accordingly.

The petitioner filed the instant petition on April 24, 2007 accompanied by a request dated March 14, 2007 to withdraw the petition on behalf of the first substituted beneficiary. On October 18, 2007, U.S. Citizenship and Immigration Services (USCIS) withdrew the Form I-140 based on the petitioner's request. However, the original beneficiary of the labor certification was the beneficiary of a Form I-140 and was still able to utilize the original Form ETA 750 because (Form I-140) was approved on April 10, 2002. USCIS records indicate that the original alien, adjusted status to that of a legal permanent resident using this Form ETA 750 on March 4, 2005, even though the Form I-140 was withdrawn by the petitioner. Thus, 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.

As the petition was filed prior to July 16, 2007,¹ the regulation at 20 C.F.R. § 656.30(c)(2) in effect at that time stated the following: “A labor certification involving a specific job offer is valid only for the particular job opportunity and for the area of intended employment stated on the Application for Permanent Employment Certification form.”

As the time the petition was filed, the Act did not provide for the substitution of aliens in the permanent labor certification process. Similarly, both the USCIS and the DOL’s regulations were silent regarding substitution of aliens. The substitution of alien workers was a procedural accommodation that permitted 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.

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).² 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, even in error, that labor certification is no longer available.

Section 212(a)(5)(A)(iv) of the Act cannot be interpreted as allowing the adjustment of status of an alien based on a labor certification that formed the basis for another alien’s admissibility when section 212(a)(5)(A)(i) of the Act explicitly requires a labor certification as evidence of an individual alien’s admissibility. To construe section 212(a)(5)(A)(iv) of the Act in that manner would violate the “elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.” *Dept. of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 340 (1993).

When Congress enacted the job flexibility provision of section 204(j) of the Act, Congress made no correlative amendments to the admissibility requirements of section 212(a)(5)(C) of the Act that would allow a labor certification to be used as evidence of admissibility for two or more aliens.³ The

¹ As of July 16, 2007, substitution requests are no longer permitted according to 20 C.F.R. §§ 656.11 and 656.30(c).

² 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 the 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).

³ Conceivably, a substituted alien could also “port” to a new employer under AC21, allowing the employer to once again legitimately substitute a new beneficiary, resulting in a theoretically unlimited number of aliens adjusting status pursuant to a single labor certification.

AAO must assume that Congress was aware of the agency's previous interpretation that a labor certification can only support the adjustment of one alien under the Act when AC21 was passed and did not specifically alter that interpretation. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). The labor certification on which the underlying petition is based has already served as the basis of admissibility for a different alien and is no longer "valid." 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 to adjust a second alien.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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.