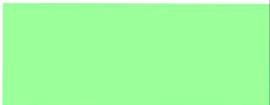




U.S. Citizenship
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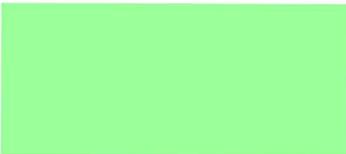


DATE: **MAR 07 2013** OFFICE: TEXAS SERVICE CENTER FILE: 

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.

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 (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The matter will be remanded to the director.

The petitioner describes itself as a business consulting firm. It seeks to permanently employ the beneficiary in the United States as a business systems analyst. 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 is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is January 17, 2008. See 8 C.F.R. § 204.5(d). The DOL certification was valid from March 19, 2008 to November 15, 2008.

The director's decision denying the petition concludes that the record failed to establish that a valid labor certification was submitted in support of the Form I-140 petition.

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

The issue in this proceeding is whether the petition was filed without a valid labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i) as the I-140 petition in this case was filed on January 5, 2009, after the expiration of the DOL certification on November 15, 2008.

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

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).

(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(b)(1) provides: “An approved permanent labor certification *granted on or after July 16, 2007 expires if not filed in support of a Form I-140 petition with the Department of Homeland Security within 180 calendar days* of the date the Department of Labor granted the certification.” (Emphasis added).

As noted above, the instant petition was filed on January 5, 2009 with a labor certification approved by the U.S. Department of Labor (DOL) on March 19, 2008 and valid until September 15, 2008. The director deemed the petition as being filed without a valid labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i) as the filing of the instant case was after the labor certification’s expiration, and therefore, denied the petition.

On appeal, counsel states that the director erred in her 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).² See Memorandum from Donald Neufeld, Acting Associate

² 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 (9th 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 (9th 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 (5th 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 (5th 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 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

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 () on May 27, 2008 with the same labor certification approved by the U.S. Department of Labor (DOL) on March 19, 2008 and valid until September 15, 2008 for the beneficiary (prior filing). The prior filing was denied (on October 14, 2008) and the labor certification was not invalidated. The petitioner then refiled the Form I-140 on January 5, 2009 (instant petition) with the then expired labor certification. The instant petition was denied on April 26, 2011.

Counsel asserts that the director should have adjudicated the instant petition according to the Neufeld Memorandum, 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(l)(3)(i).

The AAO agrees that the instant petition was denied only because the instant Form I-140 was filed after the validity period of the labor certification. The AAO also agrees that the instant petition is identical to the previous I-140 petition () which was denied, but had been timely filed with a valid labor certification that has not been invalidated. Therefore, the AAO finds that the instant petition for the beneficiary is deemed filed with a valid certified labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i).

The Secretary of the Department of Homeland Security (DHS) delegates the authority to adjudicate appeals to the AAO pursuant to the authority vested in her through the Homeland Security Act of 2002, Pub. L. 107-296. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). See DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv).

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 Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use them to Bind the Public?*, 41 Duke L.J. 1311 (1992).

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Among the appellate authorities are appeals from denials of petitions for immigrant visa classification based on employment, "except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act." 8 C.F.R. § 103.1(f)(3)(iii)(B) (2003 ed.).

In view of the foregoing, the director's denial will be withdrawn. The petition is remanded to the director. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's denial decision is withdrawn. The petition is remanded to the director of for further action in accordance with the foregoing and entry of a new decision.