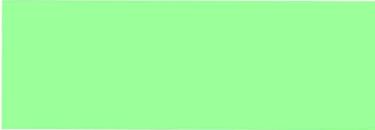


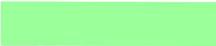
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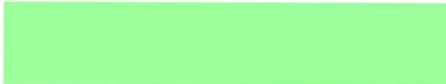
U.S. Citizenship  
and Immigration  
Services



DATE: **MAR 13 2013**

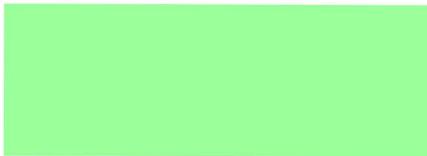
OFFICE: TEXAS SERVICE CENTER FILE: 

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:

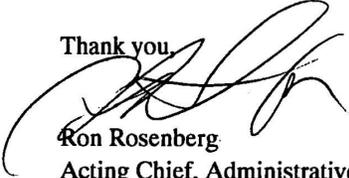


INSTRUCTIONS:

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 immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a construction firm that assembles pre-engineered metal buildings. It seeks to employ the substituted instant beneficiary<sup>1</sup> permanently in the United States as an assembler of pre-engineered metal buildings, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As part of the petition, the petitioner was required to file the original Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL). The director denied the petition because the original Form ETA 750 with a priority date of April 27, 2001 had already been used in the original beneficiary's adjustment to permanent resident status.

On appeal, the petitioner, through counsel, submits additional evidence and contends that the petition merits approval.

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>2</sup>

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<sup>1</sup> The regulation at 20 C.F.R. § 656.30 provides in relevant part:

(c) Scope of validity. For certifications resulting from applications filed under this part or 20 CFR part 656 in effect prior to March 28, 2005, the following applies:

(2) 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 substitution procedure was enacted to accommodate U.S. employers to replace an alien named on a pending or approved labor certification with another prospective alien worker. Historically, this was permitted because of the length of time it took to obtain a labor certification or receive approval of the Form I-140. *See generally* Department of Labor Proposed 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," 71 Fed. Reg. 7656 (February 13, 2006).

<sup>2</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).

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other 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 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 priority date is the date that the Form ETA 750 was accepted for processing by any office within the employment service system of the Department of Labor. In this case, the priority date is April 27, 2001 as set forth on the labor certification. The record indicates the following:

- 1) The petitioner filed an Immigrant Petition for Alien Worker (Form I-140) on June 20, 2005. It sought to sponsor [REDACTED] as a skilled worker. The Form I-140 was supported by a Form ETA 750 with a priority date of April 27, 2001. On September 9, 2005, the director of the Vermont Service Center approved the Form I-140 on behalf of [REDACTED]
- 2) On April 13, 2006, the petitioner requests to withdraw the approved Form I-140 for [REDACTED] and states that it intends to substitute another foreign worker, but does not name the worker.
- 3) On September 22, 2006, the director acknowledged the request to withdraw the Form I-140 and automatically revokes the petition's approval pursuant to 8 C.F.R. § 205.1(a)(3)(iii)(C).
- 4) The petitioner files another Form I-140 on behalf of the instant beneficiary, [REDACTED] on July 11, 2007 and requests that he is considered as a substitution for [REDACTED] on the labor certification that had been previously submitted in support of the Form I-140 filed on behalf of [REDACTED] the original beneficiary.<sup>3</sup>
- 5) [REDACTED] had meanwhile been denied approval of his Form I-485, Application to Register Permanent Resident or Adjust Status by the district United States Citizenship and Immigration Services (USCIS) office in Baltimore, Maryland, and the office issued a Notice to Appear at the

<sup>3</sup> It is unclear whether the petitioner additionally sought to use the labor certification in a third file related to a beneficiary, [REDACTED]. The record shows that the petitioner requested to withdraw an I-140 on behalf of this individual.

Immigration Court on January 26, 2007.<sup>4</sup>

<sup>4</sup> It is unclear if the district director applied the guidelines of the Headquarters Memorandum dated May 12, 2005 and entitled "Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by [AC21]." It provided that if the applicant's application to adjust status was pending for more than 180 days when the petitioner withdrew the approved Form I-140 visa petition, then the Form I-140 remains valid for portability purposes under the job flexibility provisions of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21)(Public Law 106-313); section 204(j) of the Act, 8 U.S.C. § 1154(j) (AC21). [REDACTED] Form I-485 was originally filed on June 15, 2005.

**Job Flexibility For Long Delayed Applicants For Adjustment Of Status To Permanent Residence.** - A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained adjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Section 212(a)(5)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(5)(A)(iv), states further:

**Long Delayed Adjustment Applicants-** A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

Section 204(j) of the Act prescribes that "A petition . . . shall remain valid with respect to a new job if the individual changes jobs or employers." The term "valid" is not defined by the statute, nor does the congressional record provide any guidance as to its meaning. *See* S. Rep. 106-260, 2000 WL 622763 (Apr. 11, 2000); *see also* H.R. Rep. 106-1048, 2001 WL 67919 (Jan. 2, 2001). However, the statutory language and framework for granting immigrant status, along with recent decisions of three federal circuit courts of appeals, clearly show that the term "valid," as used in section 204(j) of the Act, refers to an approved visa petition.

It is noted that the available legislative history does not shed light on Congress's intent in specifically enacting section 106(c) of AC21 in relation to the matter at hand. While the legislative history for AC21 discusses Congressional concerns regarding the nation's economic competitiveness, the shortage of skilled technology workers, U.S. job training, and the cap on the number of nonimmigrant H-1B workers, the legislative history does not specifically mention section 106(c) or any concerns regarding backlogs in adjustment of status applications. *See* S. REP. 106-260, 2000 WL 622763 at \*10, \*23 (April 11, 2000). In the 2001 Report on the Activities of the Committee on the Judiciary, the House Judiciary Committee summarized the effects of AC21 on immigrant visa petitions: "[I]f an employer's immigrant visa petition for an alien worker has been filed and remains adjudicated for at least 180 days, the petition shall remain valid with respect to a new job if the

5) The immigration court approved the visa petition and adjusted [REDACTED] status to a permanent resident on October 7, 2008. The beneficiary immigrated as an E36, skilled worker.

6) On April 25, 2009, the director of the Texas Service Center denies the instant Form I-140 filed on behalf of [REDACTED] because the labor certification was no longer available as the original beneficiary of the labor certification had used the certified Form ETA 750 position to adjust to permanent resident status. He concluded that the instant visa petition was not properly supported by an individual labor certification. It is noted that the director incorrectly stated the beneficiary's adjustment date as December 23, 2008, not October 7, 2008.

On appeal, counsel asserts that the original beneficiary, [REDACTED] was not eligible to adjust his status on December 23, 2008 and may have misrepresented his intent and occupation. Counsel submits various materials related to [REDACTED] employment and worker's compensation claim, and asserts that [REDACTED] adjustment of status should be rescinded and the labor certification be made available for the use of the petitioner and the instant beneficiary, [REDACTED]

At the outset, it is noted that the immigration court, not USCIS has approved [REDACTED] adjustment of status based on the employment-based visa petition. The AAO has no jurisdiction to overturn the court's decision.<sup>5</sup> Moreover, as stated above, the adjustment date of [REDACTED] was October 7, 2008, not December 23, 2008. Section 212(a)(5)(A)(iv) of the Act cannot be interpreted as allowing the adjustment of status of an alien [REDACTED] 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 interpret section 212(a)(5)(iv) 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 (1994).

Further, 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).<sup>6</sup> When Congress enacted the job flexibility provision of section 204(j) (AC21) of the Act, it

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alien changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed." H.R. Rep. 106-1048, 2001 WL 67919 (January 2, 2001).

Notably, this report further confuses the question of Congressional intent since the report clearly refers to "immigrant visa petitions" and not the "application for adjustment of status" that appears in the final statute. However, there is no mention in AC21 of more than one beneficiary's sponsorship arising from the same approved labor certification or any other language that would support counsel's theory that the current beneficiary should benefit from the certified labor certification in addition to the substituted beneficiary.

<sup>5</sup> At most, the AAO may refer the materials to the U.S. attorney's office that handled the case.

<sup>6</sup> 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 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*

made no corresponding 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 aliens. It must be assumed 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 instant petition is based has already served as the basis of admissibility for a different beneficiary and is no longer "valid."

Even if it had jurisdiction to rescind [REDACTED]'s case, USCIS is not required to approve applications or petitions where eligibility has not been demonstrated, 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). USCIS or any agency need not treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6<sup>th</sup> Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988). Once a labor certification has been used for the original beneficiary, even in error, that labor certification is no longer available. Accordingly, the labor certification is no longer available to support the petitioner's I-140 petition filed on behalf of the current beneficiary in that instant matter.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.