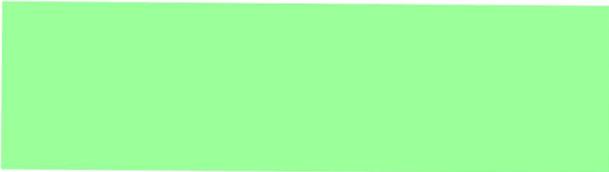


(b)(6)

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

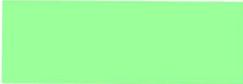


U.S. Citizenship
and Immigration
Services

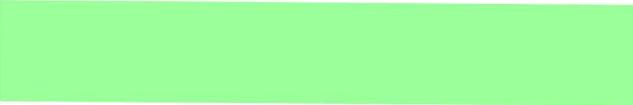


Date: **MAY 29 2013**

Office: TEXAS SERVICE CENTER

FILE: 

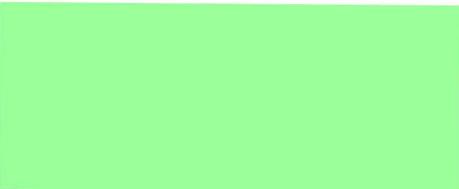
IN RE:

Petitioner: 

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Professional or Skilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as a curry cook. 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 had not established that the labor certification accompanying the petition represented a timely request for substitution of the beneficiary and denied the petition accordingly.

On appeal, the petitioner, through counsel asserts that United States and Citizenship and Immigration Services (USCIS) policy supports treating the labor certification as valid.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The procedural history in this case is documented by the record and incorporated. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(3)(A)(i) of the Act 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 "priority date" is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. 8 C.F.R. § 204.5(d). In this matter, the priority date is April 30, 2001.

The petitioner initially filed a Form I-140, Immigrant Petition for Alien Worker [REDACTED] with a Form ETA 750 on January 8, 2007, requesting a substitution of the original beneficiary with the instant beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656).¹ Thus, Form I-140 petitions using a substituted beneficiary on an approved labor certification must have been filed before July 16, 2007. The director adjudicated the Form I-140 with the substituted beneficiary and denied it on April 21, 2008, determining that the petitioner had failed to establish the continuing ability to pay the proffered wage.² The petitioner filed the instant Form I-140 on

¹The regulation at 20 C.F.R. § 656.11(a) prohibits any request to change the identity of an alien beneficiary on any application for permanent labor certification that is submitted after July 16, 2007.

² The petitioner filed another Form I-140 ([REDACTED]) with the same Form ETA 750 and substituted beneficiary on August 17, 2007. The director also denied this petition on April 21, 2008, finding that the Form I-140 had been filed after July 16, 2007 with a request for a substituted

February 23, 2009, with the same Form ETA 750 used in the first filing from January 8, 2007 seeking again to substitute the instant beneficiary for the original beneficiary listed on the labor certification. The director denied the petition on November 13, 2012, determining that as the Form I-140 had been filed after July 16, 2007 using a substituted beneficiary, it was prohibited and did not represent a valid labor certification. *See* 20 C.F.R. § 656.11(a).

On appeal, counsel submits HQ 70/6.2, Interoffice Memorandum, “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,” (June 1, 2007)(hereinafter “Memo”). Counsel asserts that as the original request for substitution was timely filed on January 8, 2007 with the first Form I-140 petition, then the filing of the third I-140 on February 23, 2009 with the instant beneficiary as a substitution on the Form ETA 750 should be acceptable. The Memo provides that all Form I-140 petitions filed with requests for substitutions after the effective date of the DOL final rule should be rejected in accordance with 20 C.F.R. § 656.11. However, the Memo also provides that USCIS will continue to accept amended or duplicate Form I-140 petitions that are filed with a copy of a labor certification that is expired at the time the amended or duplicate Form I-140 petition is filed, as long as the original approved labor certification was used in support of a previously filed petition during the labor certification’s validity period.³ The Memo further states that USCIS will continue to accept Form I-140 petitions that request labor certification substitutions that are filed prior to July 16, 2007, and that such petitions will be adjudicated to completion.

As noted above, the petitioner initially filed a Form I-140 prior to July 16, 2007 with a request for substitution of the instant beneficiary for the original beneficiary. This petition’s adjudication was completed upon the director’s determination that the petitioner’s motion to reopen and motion to reconsider was untimely. No appeal was taken. As noted above, the regulation at 20 C.F.R. § 656.11(a) prohibits any request to change the identity of an alien beneficiary on any application for permanent labor certification that is submitted after July 16, 2007.⁴ As the instant petition was filed

beneficiary.

³The regulation at 20 C.F.R. §656.30(b) discusses the application of a 180-day validity period within which an employer must file the labor certification in support of a Form I-140.

⁴ Additionally, the regulation at 20 C.F.R. § 656.30(c)(2) provides:

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).

after July 16, 2007, on February 23, 2009, indicating that it requests a substitution of the instant beneficiary for the original beneficiary, it is prohibited. Moreover, the Memo specifically states that:

USCIS will reject all Form I-140 petitions requesting labor certification substitution that are filed on or after the effective date of the DOL final rule in accordance with new 20 C.F.R. § 656.11. Such petitions that are accepted by USCIS in error will be denied based on the fact that the petition was filed without a valid approved labor certification that identified the alien beneficiary on the Form I-140 petition as the alien named on the labor certification at the time that it was approved by DOL. In accordance with 8 CFR 103.1(f)(3)(iii)(B), petitioning employers may not file an appeal of USCIS' decision to deny a Form I-140 petition that is filed without an approved labor certification issued by DOL that is in the name of an alien other than the alien named in the Form I-140 petition.

(Memo at page 4, footnote omitted).

The AAO finds that the provision in the Memo, as set forth above, is most closely applicable to the instant case and is consistent with the regulation at 20 C.F.R. § 656.11(a). Since the instant case was filed 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).

The Secretary of the Department of Homeland Security (DHS) delegates the authority to adjudicate appeals to the AAO pursuant to the authority vested in him 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).

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.).

As alien labor certification substitution is no longer permitted and the petition is not accompanied by a valid labor certification, this office lacks jurisdiction to consider an appeal from the director's decision.

ORDER: The appeal is rejected.