



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: JUN 16 2006

IN RE:

Petitioner:

[REDACTED]

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

ON BEHALF OF THIRD PARTY:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

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DISCUSSION: The director, California Service Center, initially denied the employment-based visa petition but subsequently reopened and approved the petition on motion. Upon later review of the record, however, the director found considerable inconsistencies and a lack of evidence that did not warrant approval of the petition. The director therefore issued a Notice of Intent to Revoke (NOIR) and ultimately revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) pursuant to an appeal that was filed by a third-party corporation. The third-party appeal will be rejected and the director's revocation will be affirmed.

The petitioner, [REDACTED], is a company that incorporated in October 1994 in the State of California. It claims to engage in import, export, and international trading.¹ It seeks to employ the beneficiary as its president. Accordingly, it endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

This matter has a lengthy procedural history that will be discussed in detail. The petition was filed on November 18, 1996 and the director approved the petition on May 1, 1997. The beneficiary filed an I-485, Application to Register Permanent Residence or Adjust Status on May 12, 1997. Citizenship and Immigration Services (CIS), formerly the Immigration and Naturalization Service (INS), Los Angeles District Office interviewed the beneficiary regarding his I-485 application on October 28, 1998. Following the interview and a review of the beneficiary's alien file, the Los Angeles District Director requested an overseas investigation to confirm the parent/subsidiary relationship between the foreign entity and the petitioner.

Upon review of the totality of the record, including the investigative report, the California Service Center director issued an NOIR on March 12, 2004 noting the overseas investigative report and substantial inconsistencies in the evidence of record. **The petitioner did not provide a rebuttal to the NOIR. Instead, the beneficiary and the attorney² for his current employer, [REDACTED] submitted a response in which they argued that [REDACTED] and subsequently [REDACTED] had employed the beneficiary in the "same or similar occupation" for which the I-140 petition had been approved. Counsel for the beneficiary asserted that the beneficiary was entitled to "port" the I-140 approved on his behalf to [REDACTED], pursuant to the provisions of section 204(j) of the Act, 8 U.S.C. § 1154(j), as added by section 106(c) of the American Competitiveness in the Twenty First Century Act of 2000 (AC21).**

¹ The petitioner initially claimed to import and export scrap insulated copper wire from scrap motors or used motors. As discussed below and in greater detail in the director's Notice of Intent to Revoke and Revocation Decision, the record does not contain evidence that the petitioner continues to exist as a viable company. If the petitioner's business has been terminated, this fact would constitute grounds for the automatic revocation of the petition approval, without notice, retroactive to the date of the original approval. 8 C.F.R. § 205.1(a)(3)(iii)(D).

² Although counsel indicates in his letter dated April 2, 2004 that he represents the beneficiary with regard to the I-140 revocation proceeding, the G-28 signed by the beneficiary limits counsel's representation solely to the I-485 adjustment application.

The director ultimately revoked the approval pursuant to section 205 of the Act, 8 U.S.C. § 1155, observing that the petitioner had not responded to the NOIR and the issues of fraud and misrepresentation outlined therein. In addition, the director determined that the petitioner had failed to establish: (1) a qualifying relationship with the beneficiary's foreign employer; or (2) that the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity. The director also listed the numerous inconsistencies contained in the record.

CIS regulations and precedent specifically limit the filing of an appeal of a revocation to the petitioner or self-petitioner. 8 C.F.R. § 205.2(d); *see also Matter of Dabaase*, 16 I&N Dec. 720, 721-722 (BIA 1979). In this matter, the Form G-28, Notice of Entry of Appearance as Attorney or Representative, that was submitted for the record for the I-140 petition was signed by the president of [REDACTED] not by an authorized representative of the petitioner. Even if the beneficiary signed the G-28 and/or I-290B, the beneficiary of a visa petition is not a recognized party on appeal.³ *See* 8 C.F.R. § 103.2(a)(3). As the beneficiary and his employer, [REDACTED] are not recognized parties in this matter, the new employer's counsel would not generally be authorized to file the appeal in this matter. 8 C.F.R. § 205.2(d); 8 C.F.R. § 103.3(a)(1)(iii)(B); 8 C.F.R. § 103.3(a)(2)(v)(A)(1).

However, given the novel issue raised by counsel on appeal, i.e., that AC21 permits the new employer to have legal standing in this proceeding, the AAO must address this as well as any related issues before it can properly conclude that the appeal has been improperly filed and must thereby be rejected. To make this determination, the AAO must therefore discuss the following: (1) whether a new employer takes the place of an original petitioner in AC21 situations, where the beneficiary's I-485 has been pending for 180 days or more; (2) whether a petition that has been revoked is still "valid" for purposes of 8 U.S.C. § 204(j) as added by section 106(c) of AC21; and (3) whether the petition in this matter was properly revoked.⁴

With regard to the first issue, counsel for the third party contends that his client, [REDACTED], is the "beneficial owner" or "successor employer" of the approved I-140 petition because the portability provisions of AC21 are applicable to this matter. Counsel also asserts that CIS may not deny the adjustment application because the application had been pending for more than 180 days at the time it was adjudicated.

³ It is noted for the record that, while the beneficiary does appear to have been an agent for the petitioner, there is no evidence in the record that the beneficiary was legally authorized to sign as a representative on behalf of the petitioner in this proceeding. Moreover, as noted above, the president of a third party corporation signed the I-140 G-28 and its counsel signed the G-28 and the I-290B; the beneficiary did not sign either of these documents.

⁴ Although no appeal lies from the denial of an application for adjustment of status under section 245 of the Act, 8 C.F.R. § 245.2(a)(5)(ii), the beneficiary's purported new job and the portability considerations of AC21 are properly addressed by the AAO, provided the review in this matter is limited to the I-140 petition. The issues related to the petition include its continued "validity," the "successor" petitioner construct proffered by counsel, and the revocation of the petition itself.

In general, an alien may acquire permanent resident status in the United States through two legal mechanisms: the alien may pick up their approved visa packet at an overseas consulate and be "admitted" to the United States for permanent residence;⁵ or, if the alien is already in the United States in a lawful nonimmigrant or parolee status, the alien may "adjust status" to that of an alien admitted for permanent residence. *Cf.* § 211 of the Act, 8 U.S.C. § 1181 ("Admission of Immigrants into the United States"); § 245 of the Act, 8 U.S.C. § 1255 ("Adjustment of Status of Nonimmigrant to that of Person Admitted for Permanent Residence").

Governing adjustment of status, section 245(a) of the Act, 8 U.S.C. § 1255(a), requires the adjustment applicant to have an "approved" petition:

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an *approved* petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1) or [sic] may be adjusted by the [Secretary of Homeland Security], in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if:

- (i) the alien makes an application for such adjustment,
- (ii) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and
- (iii) an immigrant visa is immediately available to him at the time his application is filed.

(Emphasis added.)

In this matter, as the beneficiary was present in the United States at the time the I-140 petition was approved, he was eligible to and chose to apply to adjust his status in the United States to that of a permanent resident instead of pursuing consular processing abroad. Furthermore, based on the record of proceeding, as the beneficiary's I-485 was pending more than 180 days at the time AC21 was enacted and the provisions of section 106(c) of this act came into effect on October 17, 2000, it would appear, absent revocation, that the approved petition would remain valid with respect to a new position with a different sponsor.⁶ Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000).

⁵ Counsel asserts on appeal that, if the beneficiary had pursued consular processing instead of applying for adjustment of status, he would have become a permanent resident in 1997. There is no evidence in the record to support this assertion. However, even assuming hypothetically that the beneficiary had chosen consular processing instead, it is quite possible the consular officer abroad would have noticed the same issues of ineligibility, denied the immigrant visa application, and referred the matter back to CIS for revocation.

⁶ It should be noted that at the time AC21 came into effect, legacy INS regulations provided that an alien worker could not apply for permanent resident status by filing a Form I-485, application to adjust status, until he or she obtained the approval of the underlying Form I-140 immigrant visa petition. *See* 8 C.F.R. § 245.2(a)(2)(i) (2000). Therefore, the process under section 106(c) of AC21 was as follows: first, an alien

Even so, this does not answer the more specific question of whether a new employer may take the place of and become the petitioner of an I-140 petition in AC21 situations. To address this issue, it is important to closely analyze section 106(c) of AC21 and determine the interpretation of the statute as intended by Congress. Specifically, section 106(c) of AC21 added the following to section 204(j) to the Act:

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 unadjudicated 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.

American Competitiveness in the Twenty-First Century Act of 2000 (AC21), Pub. L. No. 106-313, § 106(c), 114 Stat. 1251, 1254 (Oct. 17, 2000); § 204(j) of the Act, 8 U.S.C. § 1154(j).

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.

Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int'l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975 (2d Cir.), *cert. denied*, 112 S. Ct. 416 (1991).

In addition, we are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996).

obtains an approved employment-based immigrant visa petition; second, the alien files an application to adjust status; third, if the adjustment application was not processed within 180 days, the underlying immigrant visa petition remained valid even if the alien changed employers or positions, provided the new job was in the same or similar occupational classification.

Counsel asserts that section 106(c) of AC21 is "simple and straightforward, and so long as there is an approved I-140 and the adjustment of status has been pending for over 180 days without having been adjudicated, such petition remains valid for a job with a new employer provided that the new job is in the same or similar occupation as that for which the petition was filed." As a simple paraphrasing of the statute, the AAO concurs with counsel's statement. Absent revocation, the beneficiary would have been eligible for adjustment of status with a new employer provided, as counsel points out, that "the new job is in the same or similar occupation as that for which the petition was filed." However, critical to section 106(c) of AC21, the petition must be "valid" to begin with if it is to "*remain* valid with respect to a new job." Section 204(j) of the Act, 8 U.S.C. § 1154(j) (emphasis added).

Contrary to counsel's assertions and as discussed in greater detail below, the statutory language provides no benefit or right for a new employer to "substitute" itself for the previous petitioner as a "beneficial owner" or "successor employer." The statute simply permits the beneficiary to change jobs and remain eligible to adjust based on a prior approved petition if the processing times reach or exceed 180 days.

On appeal, counsel points to legislative history and asserts that Congress enacted AC21, and more specifically section 106(c) of AC21, in an effort to reduce all backlogs of immigration applications and ameliorate the negative consequences that these backlogs have on applicants. However, the available legislative history does not shed light on Congress's intent in specifically enacting section 106(c) of AC21. 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 support of his assertion, counsel cites the following comments that Senator Feinstein made in addressing the Senate on October 3, 2000:

It is unacceptable that millions of people who have followed our nation's laws, made outstanding contributions to our nation, and paid the requisite fess have had to wait months, and even years, to obtain the immigration services they need. These processing delays have had a negative impact on businesses seeking to employ or retain essential workers. . . . I believe enactment of these provisions [as part of the H-1B legislation] will send a strong Congressional directive to the INS that timely and efficient service is not merely a goal, but a mandate.

146 Cong. Rec. S9656 (2000) (quoted phrase in brackets omitted in counsel's brief).

While counsel's statement regarding the purpose of Public Law 106-313 and AC21 may be generally true, it should be noted that Senator Feinstein made these comments in regard to "the provisions of S. 2586, the 'Immigration Services and Infrastructure Improvement Act of 2000.'" *Id.* While the Immigration Services and Infrastructure Improvement Act of 2000 was added to and was passed together with AC21 as part of the same public law, it technically remains a separate act. In addition, S. 2586 as it was introduced to the Senate on May 18, 2000 did not contain any provisions that resembled section 106(c) of AC21. S. 2586, 106th Cong. (May 18, 2000). Section 106(c) of AC21 was added as an amendment together with S. 2586 on September 28, 2000, and

the Congressional Record does not contain any comments or discussion regarding this specific addition to AC21. See 146 Cong. Rec. S9526 (2000).

Even if Senator Feinstein's remarks were meant to include section 106(c) of AC21, it is apparent from her comments as well as the statutory language itself that, while the improvements in processing times should be considered a mandate, the provisions of the Immigration Services and Infrastructure Improvement Act of 2000 were meant to facilitate this "goal" and not create an immediate six-month deadline within which to adjudicate every non-frivolous employment-based immigrant visa petition and associated adjustment application. 146 Cong. Rec. S9656 (2000). It does not appear, therefore, that the act was meant to be punitive as counsel infers. On the contrary, section 202 of the Immigration Services and Infrastructure Improvement Act of 2000 states that one of the main purposes of the act was to provide CIS with the mechanisms it needs to eliminate the current backlog in the processing of immigration benefit applications. Pub. L. No. 106-313, § 202(a)(1), 114 Stat. 1251, 1262 (Oct. 17, 2000). In other words, the legislation was meant to assist CIS with its backlog issues, which oftentimes have resulted due to legislative changes to the Act, i.e., the increase in filings due to the extended amnesty provisions of section 245(i) of the Act. Despite counsel's failure to submit probative evidence of congressional intent, the AAO recognizes that the Immigration Services and Infrastructure Improvement Act of 2000 provides an important Congressional policy objective, which is that immigration benefit applications should be processed within 180 days of the date they are filed. Pub. L. No. 106-313, § 202(b), 114 Stat. 1251, 1262 (Oct. 17, 2000).

However, there is no mention in AC21 of the new employer taking the place of the prior petitioner or any other language that would support counsel's novel but unsupported theory that the new employer should be granted rights as a "beneficial owner" or "successor employer." Section 106(c) states that the underlying I-140 petition "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." Pub. L. No. 106-313, § 106(c), 114 Stat. 1251, 1254 (Oct. 17, 2000); § 204(j) of the Act, 8 U.S.C. § 1154(j).

Moreover, counsel also argues that section 106(c) "has conferred a right in successor employers to circumvent lengthy and expensive procedures of the immigration process which have already been suffered by the beneficiary" Counsel cites *Arnett v. Kennedy*, 94 S. Ct. 1633, 1650 (1974), and states that such successor employer rights "cannot be denied without due process of law."

Again, counsel's assertions are unpersuasive. As discussed above, there is no evidence that Congress intended to confer anything more than a benefit to beneficiaries of long delayed adjustment applications. In other words, the plain language of the statute indicates that Congress intended to provide the alien, as a "long delayed applicant for adjustment," with the ability to change jobs if the individual's I-485 took 180 days or more to process. Section 106(c) of AC21 does not mention the rights of a subsequent employer and does not provide other employers with the ability to take over already adjudicated immigrant petitions. While counsel's argument of "successor employers" is creative, he fails to show that the statutory language confers any employment rights to subsequent employers and fails to explain how this legal construct was arrived at given that there is no mention of employment rights conferred to new employers under AC21 in either the statute or the legislative history, *supra*.

Counsel's citation of Justice Powell's concurring opinion regarding employment rights in *Arnett v. Kennedy* is also unpersuasive. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the *Arnett v. Kennedy* decision. Specifically, *Arnett v. Kennedy* dealt with the employment discharge dispute of a non-probationary federal employee protected by 5 U.S.C. § 7501(a) (repealed 1978). See *Arnett v. Kennedy*, 94 S. Ct. 1633, 1650 (1974). The concurring opinion in *Arnett v. Kennedy* relates specifically to whether an employee has a legitimate "property" or "liberty" interest within the meaning of the Fifth or Fourteenth Amendment; it makes no mention of any due process rights that would be granted to a "successor employer" under that statute. In the present case, counsel merely alludes to the right of a "successor employer" without demonstrating how such a right might arise from a statute that makes no mention of "successor employer" rights. It thus remains unclear how the beneficiary has been granted a legitimate claim of entitlement under AC21 and is thereby entitled to a constitutional guarantee of procedural due process similar to that granted under 5 U.S.C. § 7501(a) (repealed 1978).

In conclusion, counsel has failed to show that the passage of AC21 granted any rights, much less benefits, to subsequent employers of aliens eligible for the job portability provisions of section 106(c). Based on a review of the statute and legislative history, the AAO must reject counsel's unsupported legal construct of "successor employers," which would entitle these "beneficial owner[s]" to replace the original I-140 petitioner as an affected party in these proceedings.

The second issue in this proceeding is whether a petition that has been revoked is still valid for purposes of 8 U.S.C. § 204(j) as added by section 106(c) of AC21.

As discussed above, it is recognized that, as the I-140 was initially approved and as the I-485 was pending more than 180 days at the time AC21 was enacted on October 17, 2000, section 106(c) would normally apply in this case. However, section 106(c) does not specifically address the issue of a revoked petition and whether it would "remain valid" with respect to a new position with a different employer.

Citing an August 4, 2003 memorandum from William R. Yates, counsel argues on appeal that "so long as the original offer of employment is bona fide and the employer had the intent at the time the I-140 was approved to employ the beneficiary upon adjustment, it does not matter that the petition has been revoked." Counsel also asserts that, even when the original petitioner commits fraud, "so long as the initial offer of employment was bona fide and the initial employer had the intent at the time the I-140 was approved to employ the beneficiary upon adjustment, the job flexibility and portability provisions of AC21 apply."

Upon review, counsel's assertions are not persuasive. The operative language in section 106(c) is the following phrase: "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 or to situations in which an I-140 petition is revoked.⁷ See S. REP. 106-260; see

⁷ CIS has not as yet published any regulations governing the application of section 106(c) of AC21. The agency has offered guidance on this provision in the form of two policy memoranda and has amended the Adjudicator Field Manual (AFM) to account for the law. Neither the memoranda nor the AFM define the term "valid." See Memorandum from William R. Yates, Acting Assoc. Dir. for Operations, CIS, *Continuing*

also H.R. REP. 106-1048. Critical to section 106(c) of AC21, however, the petition again must be "valid" to begin with if it is to "*remain valid with respect to a new job.*" Section 204(j) of the Act, 8 U.S.C. § 1154(j) (emphasis added).

Although counsel points to CIS memoranda as well as to comments made by Senator Feinstein to assert that the AAO should construe section 106(c) in a light favorable to the beneficiary and his new employer, counsel does not discuss the actual language of the statute. As indicated above, statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552. We are expected to give the words used in the statute their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837. Furthermore, we are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. at 291 (again, holding that construction of language which takes into account the design of the statute as a whole is preferred); see also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561; *Matter of W-F-*, 21 I&N Dec. 503.

Contrary to the ordinary meaning of the word, counsel's position that section 106(c) applies in this matter would have CIS construe the term "valid" to include revoked and patently fraudulent petitions. See *Webster's New College Dictionary* 1218 (2001) (defining "valid" as "well-grounded," "producing the desired results," or "legally sound and effective.") As an approved petition is required for CIS to approve an application for adjustment of status, *supra*, it is extremely doubtful that Congress intended the term "valid" to include petitions that are fraudulent or ultimately revoked. § 245(a) of the Act, 8 U.S.C. § 1255(a)

Moreover, in passing AC21, Congress did not address the issue of I-140 revocations or amend section 205 of the Act, 8 U.S.C. § 1155, to restrict CIS authority in revoking previously approved petitions. Specifically, section 205 of the Act, 8 U.S.C. 1155, states: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title. Such revocation shall be effective as of the date of approval of such petition."⁸

Validity of Form I-140 Petition in accordance with Section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000, HQCIS 70/6.2.8-P (August 4, 2003); Memorandum from Michael A. Pearson, Executive Assoc. Comm., Office of Field Operations, INS (now CIS), *Initial Guidance for Processing H-1B Petitions as Affected by the American Competitiveness in the Twenty-First Century Act (Public Law 106-313) and Related Legislation*, HQCIS 70/6.2.8-P (June 19, 2001); see also § 20.2(c) of the AFM. However, with regard to revocations of I-140 petitions, the August 4, 2003 memorandum from William R. Yates states that, if an "approval of the Form I-140 is revoked, . . . the approved Form I-140 is no longer valid with respect to a new offer of employment and the Form I-485 may be denied." Memorandum from William R. Yates, Acting Assoc. Dir. for Operations, CIS, *Continuing Validity of Form I-140 Petition in accordance with Section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000*, HQCIS 70/6.2.8-P (August 4, 2003); § 20.2(c) of the AFM.

⁸ On December 17, 2004, the President signed the Intelligence Reform and Terrorism Prevention Act of 2004 (S. 2845). See Pub. L. No. 108-458, 118 Stat. 3638 (2004). Specifically relating to this matter, section 5304(c) of Public Law 108-458 amended section 205 of the Act by striking "Attorney General" and inserting

In addition, 8 C.F.R. § 204.5(n)(3) stated at the time and continues to read: "Validity of *approved* petitions. *Unless revoked* under section 203(e) or 205 of the Act, an employment-based petition is *valid* indefinitely." 8 C.F.R. § 204.5(n)(3) (2000); 8 C.F.R. § 204.5(n)(3) (2005) (*emphasis added*). It therefore follows that, if an approved petition is revoked, it is no longer considered valid. If Congress wanted to change this regulation and have revoked petitions be considered valid, it could have done so through AC21 or later in 2004 when it amended section 205 of the Act. As Congress chose not to define the term "valid" in passing AC21 or in revisiting revocation authority in the INA and as the congressional record fails to provide any guidance as to its meaning in revocation situations, it thereby follows that 8 C.F.R. § 204.5(n)(3) comports with Congressional intent. It is presumed that Congress is aware of CIS regulations at the time it passes a law. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).

Pursuant to the plain language of section 205 of the Act and 8 C.F.R. § 204.5(n)(3), when the approval of the petition in this matter was revoked, it was retroactively revoked to the date of its original approval. The petition was therefore never valid. Accordingly, the petition could not "remain valid" with regard to a new position with a different employer under section 106(c) of AC21. Considering the INA as a whole, it would thus severely undermine the immigration laws of the United States to find that a petition is "valid" when the approval of that petition was revoked. It would be irrational to believe that Congress intended to throw out the entire statutorily mandated scheme regulating immigrant visas whenever that scheme requires more than 180 days to effectuate.

Moreover, as discussed in greater detail below, the petition in the present matter was filed on behalf of an alien who was not "entitled" to the classification and the petition was ultimately revoked. Section 106(c) of AC21 does not repeal or modify sections 204(b) or 245 of the Act, which require applicants to have an approved petition prior to being granted immigrant status or adjustment of status, nor did it repeal or modify section 205 of the Act to grant any immunity from revocation, as proposed by counsel. Accordingly, this petition cannot be deemed to have been "valid" for purposes of section 106(c) of AC21.

In conclusion and as a final note on this issue, while section 106(c) did not create any right to immunity or protection from section 205 of the Act, it is recognized that, absent revocation, this section does provide adjustment of status applicants with a restricted benefit to change jobs assuming the underlying I-140 is bona fide and valid. Again, however, section 106(c) is based on the underlying assumptions that the I-140 petition had been approved and had not been revoked. Despite the time it may have taken CIS to revoke a petition, it is assumed that, whether the petition was processed within six months or six years, any problems and issues would be found before the I-485 adjustment application was adjudicated, as was the case in the instant petition. Contrary to the assertions of counsel, for the reasons discussed above, there is no evidence that Congress intended

"Secretary of Homeland Security" and by striking the final two sentences requiring that notice of revocation be sent to the petitioner and the Secretary of State. Furthermore, section 5304(d) of Public Law 108-458 provides that the amendment made by section 5304(c) took effect on the date of enactment and that the amended version of section 205 applies to revocations under section 205 of the Act made before, on, or after such date. Accordingly, in revisiting the revocation provisions of the INA following the enactment of AC21, instead of weakening CIS authority to revoke previously approved petitions, Congress has instead reaffirmed and strengthened this administrative power.

section 106(c) of AC21 to convey a right to an automatically approved I-140 petition or protection from section 205 revocation simply based on the passage of time.

The third issue in this proceeding is whether the petition in this matter was properly revoked. On appeal, counsel for the third party questions whether the revocation of Si Wei, Inc.'s I-140 petition was arbitrary and capricious and based upon unsupported and irrelevant conclusions.

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

CIS regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed. See 8 C.F.R. § 245.1(a). If the beneficiary of an approved visa petition was ineligible or is no longer eligible for the classification sought, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for "good and sufficient cause."⁹ Notwithstanding the CIS burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

As previously indicated, the petitioner in this matter endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. Specifically, section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

⁹ On appeal, counsel infers that a petition may only be revoked when a finding of fraud or misrepresentation has been entered. Section 205 of the Act, however, clearly indicates that a finding of fraud or misrepresentation is not required; a revocation only requires "good and sufficient cause," which includes but does not require fraud or misrepresentation. 8 U.S.C. § 1155. By itself, a director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

- (C) **Certain Multinational Executives and Managers.** -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary. A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

To assess the petitioner's eligibility to classify the beneficiary as a multinational manager or executive, the AAO must first address whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. *See* section 203(b)(1)(C) of the Act.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

* * *

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half

of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In an October 25, 1996 letter appended to the petition, the petitioner initially stated: [REDACTED] is one of the branch companies of [REDACTED] of P.R. China since January 1995.” The petitioner submitted its Articles of Incorporation showing that it was incorporated in October 1994 and was authorized to issue 1,000,000 shares of stock. The petitioner also submitted its stock certificate number 1 showing 100,000 shares issued to [REDACTED] on January 11, 1995. The record also contains an October 25, 1996 letter on the [REDACTED] letterhead and bearing the chop of the [REDACTED]. The letter from the foreign entity indicates that the foreign entity holds 100,000 of the petitioner’s shares representing 100 percent of the petitioner’s total shares issued.

On this limited information regarding the qualifying relationship between the beneficiary’s foreign employer and the petitioner, the director approved the petition.

Based on an October 28, 1998 interview with the beneficiary in conjunction with the beneficiary’s I-485 application and subsequent review of the beneficiary’s alien file, the district director observed that: the beneficiary had entered the United States on September 30, 1996 with an L-1A nonimmigrant intracompany transferee classification pursuant to a petition filed by [REDACTED] on August 14, 1996 [REDACTED] petitioned for an extension of the L-1A classification for the beneficiary; and, the beneficiary claimed employment with a foreign entity, [REDACTED] from 1993 until his 1996 transfer to [REDACTED] as president.¹⁰ The district director requested an overseas investigation to substantiate the existence of the foreign entity and any United States subsidiaries of the foreign entity. The district director in his request to the overseas office indicated that fraud was suspected.

The overseas investigator interviewed the beneficiary on July 6, 2000 on the premises of the [REDACTED] in China. The beneficiary claimed his United States subsidiary was established in 1994 and named [REDACTED]. The investigator noted that the beneficiary amended his statement to indicate that his United States company was [REDACTED], and that [REDACTED] was his business partner.

As a result of the investigation and an in-depth review of the files relating to this proceeding, the director determined that the record did not contain sufficient evidence that [REDACTED] was the petitioner’s parent company.¹¹ In the March 12, 2004 NOIR, the director detailed the documents

¹⁰ It is noted for the record that the petitioner failed to provide evidence of the beneficiary’s employment authorization with the petitioner or to explain his apparent employment with [REDACTED] during this same period of time.

¹¹ The California Service Center director thoroughly details the numerous inconsistencies contained in this record, details the investigator’s report by repeating it verbatim, and details the several letters and documents in support of the petition by repeating them verbatim. The AAO only highlights the inconsistencies that

submitted in support of a qualifying relationship, the complete results of the overseas investigation, and the numerous inconsistencies in the record regarding the petitioner's claimed organizational structure, its purported associated enterprises, its claims of doing business under various names, and the very nature of its business. The director requested in the NOIR, among other things, evidence that the claimed foreign parent company paid for the stock issued and that the petitioner, as presented in the I-140, continued to operate as a viable, ongoing business concern, as opposed to a front or paper entity or agent in the United States.

The petitioner, [REDACTED], did not respond to the NOIR. As previously noted, a director's decision to revoke the approval of a petition will be affirmed on appeal when a petitioner fails to offer a timely explanation or rebuttal to a properly issued notice of intent to revoke. *Matter of Arias*, 19 I&N Dec. at 569.

Instead, the beneficiary indicated in a March 31, 2004 statement that he was one of the major shareholders of [REDACTED], a company established in 1992. The beneficiary indicated further that [REDACTED] established [REDACTED] in 1994. The beneficiary claims that also in 1994 [REDACTED] invested \$10,000 to form [REDACTED], the petitioner in this matter, and owned 100 percent of [REDACTED]. The beneficiary does not provide independent evidence of his claimed ownership of the [REDACTED] or of [REDACTED] investment in the petitioner.¹²

The director revoked the approval after determining that: (1) the petitioner had not responded to the NOIR; (2) even if the beneficiary's statement was considered, as one of the petitioner's purported officials, the statement acknowledged the circumstances surrounding the inconsistencies and misrepresentations of the petition; and, (3) the beneficiary's belated attempt to make a deficient petition comply with CIS requirements was unacceptable under *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

On appeal, counsel for the beneficiary questions whether the revocation of [REDACTED] I-140 petition was arbitrary and capricious and based upon unsupported and irrelevant conclusions. As the director noted, the beneficiary's counsel¹³ does not represent the petitioner, the affected party in these proceedings. See 8 C.F.R. § 103.3(a)(1)(iii)(B). The AAO is compelled to note, however, that the director thoroughly discusses the inconsistencies in the documentation submitted in support of the petition and the law applicable to the issue of qualifying relationship and the revocation of the approval of this petition. Moreover, the AAO observes that the petitioner did not present evidence that the foreign entity actually invested funds in the petitioner, even though the

required the issuance of the Notice of Intent to Revoke and will not repeat the numerous problems recognized and detailed by the director.

¹² A brochure submitted as part of the record indicates that the beneficiary was the general manager of the [REDACTED] but this document does not provide any information regarding the ownership of this corporation or its relationship with either the petitioner or the [REDACTED]

¹³ As indicated previously, while counsel may represent the beneficiary with regard to the I-485 adjustment application, there is no evidence that counsel represents the beneficiary, or more importantly, Si Wei, Inc. with regard to the I-140 revocation proceeding.

director requested this evidence and such evidence should have been available to the beneficiary as the individual associated with the foreign entity's investment. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The AAO concludes that the director's NOIR and decision were properly issued for "good and sufficient cause" and were based on the facts and law applicable to those facts. The petitioner has submitted no evidence to overcome the director's decision on this issue.

Second, to further assess the petitioner's eligibility to classify the beneficiary as a multinational manager or executive, the AAO must also address whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity for the United States entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily

1. directs the management of the organization or a major component or function of the organization;

- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In an October 25, 1996 letter appended to the petition, the petitioner indicated that the beneficiary's major job functions for the petitioner would include:

1. To direct and manage overall operations of our USA branch company;
 2. To develop and implement company management system;
 3. To develop and expand the markets in USA and North America;
 4. To coordinate between USA branch company and China main company;
 5. To negotiate and sign up major buying/selling and joint venture contracts;
 6. To conduct personnel authority as to hire/fire and assign proper jobs of the US entity[.]
- [The beneficiary] shall report directly to China main company periodically.

The petitioner also listed the names of four of its employees and brief descriptions of their job duties. The list did not include the beneficiary.

The petitioner also included an October 25, 1996 letter from [REDACTED] The foreign entity stated:

We hereby confirm the permanent employment offer to [the beneficiary] with our USA branch. [The beneficiary] has been working for [REDACTED] which is one of our USA branch companies under his L-1A working visa status since August 1996. As President of our USA branch, he has successfully established the management system of this US operation and lead [sic] our USA operation on to a very potential direction. We believe that [the beneficiary] shall be a valuable asset to our organization.

In a February 16, 1997 response to a request for additional evidence, the petitioner again listed several employees and their job titles. The list of employees and positions does not correspond to the initial list of employees and job duties. The director's initial approval of the petition was based on the vague and nonspecific description of the beneficiary's job duties and questionable evidence relating to the petitioner's employees.

In the director's March 12, 2004 NOIR, the director detailed the evidence supplied in support of the petition, noting inconsistencies regarding the petitioner's organizational structure contained in documentation submitted in support of the beneficiary's I-485 application. The director determined that the petitioner's description of the beneficiary's duties lacked specificity regarding the type of duties the beneficiary

performed and the managers he supervised. The director determined that the record did not contain sufficient evidence to establish that the beneficiary had been and would be working in an executive or managerial capacity.

As previously noted, the petitioner did not respond to the director's NOIR. *See Matter of Arias*, 19 I&N Dec. at 569. The beneficiary did not address the issue of managerial or executive capacity in his statement. The director determined that: (1) the petitioner had not responded to the NOIR; (2) even if the beneficiary's statement was considered, as one of the petitioner's purported officials, the statement acknowledged the circumstances surrounding the inconsistencies and misrepresentations of the petition; and, (3) the beneficiary's belated attempt to make a deficient petition comply with CIS requirements was unacceptable under *Matter of Izummi*, 22 I&N Dec. at 176.

On appeal, counsel for the beneficiary questions whether the revocation of [REDACTED]'s I-140 petition was arbitrary and capricious and based upon unsupported and irrelevant conclusions. Again, as the director noted, the beneficiary's counsel does not represent the petitioner, the affected party in these proceedings. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B). Moreover, other than the vague descriptions provided by the petitioner, the record lacks any evidence that the beneficiary's duties for the petitioner were or would be primarily managerial or executive. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The initial description of the beneficiary's duties for the petitioner simply paraphrased the statutory requirements of both managerial and executive capacity. *See* section 101(a)(44)(A)(iii) and 101(a)(44)(B)(i)(ii) of the Act. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Regardless, for the reasons detailed above, the director's revocation was proper and his decision will be affirmed. Generally, the director's decision to revoke the approval of a petition will be affirmed, notwithstanding the submission of evidence on appeal, where a petitioner fails to offer a timely explanation or rebuttal to a properly issued notice of intention to revoke. *See Matter of Arias*, 19 I&N Dec. 568, 569 (BIA 1988). Because the petitioner failed to respond to the NOIR, the director's decision to revoke approval was proper. Accordingly, the approval is revoked, retroactive to the date of the original approval. *See* § 205 of the Act ("Such revocation shall be effective as of the date of approval of any such petition.").

As a final note, although the I-140 petition is referenced and/or reviewed for the purpose of assessing and comparing a beneficiary's new job under the portability considerations of AC21 to that of the sponsored position, the AAO finds that the eligibility of this new position is a separate issue that is part of the adjudication of the beneficiary's I-485 application, not the I-140 revocation decision.¹⁴ As previously noted, no appeal lies from the denial of an application for adjustment of status under section 245 of the Act, 8 C.F.R. § 245.2(a)(5)(ii).

¹⁴ The AAO observes for the record, however, that [REDACTED], the beneficiary's purported new employer, does not provide a description of the beneficiary's existing or proposed duties. Thus, even if the eligibility of the new position were subject to review as part of the appeal of the I-140 revocation, the

In conclusion and for the reasons stated above, the AAO finds that (1) AC21 did not grant any rights or benefits to [REDACTED] in this matter such that it could be considered a "successor employer" or "beneficial owner" of the instant I-140 petition; (2) the revoked petition in this matter cannot be deemed to have been "valid" for purposes of section 106(c) of AC21; and (3) the I-140 petition was properly revoked. Consequently, the beneficiary has no recognized claim under section 106(c) of AC21 and, as [REDACTED] is not the petitioner and is thereby not a recognized party in this matter, neither it nor its counsel is authorized to file the instant appeal. 8 C.F.R. § 205.2(d); 8 C.F.R. § 103.3(a)(1)(iii)(B); 8 C.F.R. § 103.3(a)(2)(v)(A)(1). The appeal must therefore be rejected.

Finally, regarding counsel's request for oral argument, the regulations provide that the "affected party" must explain in writing why oral argument is necessary. 8 C.F.R. § 103.3(b)(1). Furthermore, CIS has the sole authority to grant or deny a request for oral argument and will grant oral argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel simply stated that novel issues are present in this proceeding and asserted that jurisdiction is with the AAO. Even if counsel persuaded this office why he could not adequately address the issues in this matter in writing, as explained and for the reasons stated herein, counsel is not and does not represent an affected party in this proceeding. Therefore, the request for an oral argument from counsel for an unaffected party is not properly received and must be denied.

Even if the appeal had been properly filed, the petition would be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 rejected. The decision of the director is affirmed.

information in the record is not adequate to establish that the beneficiary's assignment for the new employer is in the same or similar occupational classification as the job for which the petition was filed.