



U.S. Citizenship
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Services

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[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **DEC 20 2007**
WAC 96 057 52090

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

[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.

Administrative Appeals Office

DISCUSSION: The director, California Service Center, initially approved the employment-based visa petition on April 3, 1996. Upon later review of the record, however, the director determined that the petitioner was not eligible for the benefit sought and therefore issued a Notice of Intent to Revoke (NOIR). The director ultimately revoked approval of the petition on November 26, 2003. The matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner, [REDACTED], is a company that incorporated October 18, 1994 in the State of California.¹ It claims to engage in the business of "import/export trading." 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.

The petition was filed on December 21, 1995 and the director approved the petition on April 3, 1996. The beneficiary filed an I-485, Application to Register Permanent Residence or Adjust Status on May 1, 1996. Citizenship and Immigration Services (CIS), formerly the Immigration and Naturalization Service (INS), interviewed the beneficiary regarding his I-485 application on May 13, 1997. On April 11, 2001, the Los Angeles district office returned the petition to the California Service Center for further review and action.

Upon review of the totality of the record, including a report resulting from a consular investigation conducted by the United States Consulate General in Shanghai, China, the California Service Center director issued an NOIR on August 6, 2003 noting both the overseas investigative report and its review of the underlying record. The NOIR indicates that the consular investigation revealed that the claimed parent company is no longer operating in Shanghai and that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity in the United States.

On September 4, 2003, counsel responded to the NOIR.² Counsel asserts (1) that the foreign parent company was in operation at the time the instant petition was filed and approved and only ceased operating in 1999; (2) that the

¹According to the corporate records of the State of California, the petitioner's corporate powers, rights, and privileges have been "suspended." Therefore, as California law does not permit the petitioner to do business in the State of California, this would call into question the petitioner's continued eligibility for the benefit sought if the appeal were not being dismissed for those reasons explained herein.

²It is noted that counsel attempted to respond to the August 6, 2003 NOIR twice. The first response, described by counsel as a "skeletal" response, was received on September 5, 2003. A second response was received by CIS on October 22, 2003. Counsel explained that, due to CIS sending the NOIR to an old address for the petitioner despite having received a letter dated June 8, 2001 noting a change of address, the petitioner is entitled to an extension of time to respond to the NOIR beginning from when the petitioner's current law firm received a copy. Counsel requested this extension of time in a letter dated August 27, 2003. Upon review, it is concluded that the petitioner's response to the NOIR was due within thirty days, plus three days for mailing, from the date of the NOIR. See 8 C.F.R. § 103.5a. As the NOIR was dated August 6, 2003, the petitioner's response was due on or before Monday, September 8, 2003.

beneficiary has been employed in a primarily executive capacity with the petitioner; and (3) that the beneficiary has been and will be employed in a similar executive capacity in his subsequent employment with Golden Mountain Investment Inc., and that this subsequent employment was authorized 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).

The director ultimately revoked the approval pursuant to section 205 of the Act, 8 U.S.C. § 1155. The director determined (1) that the petitioner failed to establish that the beneficiary has been or will be employed in a primarily managerial or executive position in the United States; and (2) that AC21 does not apply to the instant matter because (a) the parent organization in China ceased operating either before or immediately after the submission of the Form I-485 and, thus, the petitioner's eligibility for the benefit sought terminated at that time and the approval of the Form I-140 did not remain valid for subsequent employment; and (b) the beneficiary's new position with [REDACTED] is not an identical or similar position to the position described in the approved Form I-140.

On appeal, counsel asserts that the petitioner has established that the beneficiary will be employed in a primarily executive capacity. Counsel also asserts that, because the Form I-485 for the beneficiary has been filed and adjudicated for 180 days or more, the approved Form I-140 will remain valid even if the beneficiary changes jobs or employers because the new offer of employment from [REDACTED] is in the same or similar occupation.

The first issue in the present matter is whether the petition in this matter was properly revoked because the petitioner failed to establish that the beneficiary will be employed in a primarily executive capacity.

The purported notice of change of address dated June 8, 2001 concerns *the beneficiary* and his Form I-485, Application to Register Permanent Residence or Adjust Status, and does not concern the petitioner, a California corporation. This is apparent by both the letter's terms and by the letter's failure to change the petitioner's address listed in the Form I-140, i.e., 20475 Yellowbrick Road, Suite 3-F, Diamond Bar, California. The record in this matter did not contain a notice of change of address, or a Form G-28 appointing new counsel, at the time the NOIR was issued. Therefore, the NOIR was properly mailed to the petitioner's address listed in the Form I-140 with a copy sent to its original counsel of record in this particular matter, Hienrich F. Davis. As personal service was not required, the California Service Center was obligated to mail the NOIR to the petitioner's "last known address." 8 C.F.R. § 103.5a(a)(1). The California Service Center's decision to send a copy of the NOIR to the beneficiary's counsel on or about August 20, 2003, was clearly an accommodation, was not compelled by the regulations, and did not extend the time for the petitioner to respond to the NOIR. Furthermore, counsel's submission of a response to the NOIR on September 5, 2003 waived any right, real or imagined, which the petitioner may have had to file a later response to the NOIR. All evidence submitted in response to a CIS request must be submitted at one time. 8 C.F.R. 103.2(b)(11). Consequently, the director was correct to consider only the response to the NOIR submitted on September 5, 2003, and, likewise, the AAO will consider only this response in considering the instant appeal.

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 unrebutted, 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."³ 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):

* * *

- (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

³On 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. at 590.

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 address whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity for the United States entity. In this matter, as counsel has clearly limited the beneficiary to the executive classification, the AAO will only consider this classification on appeal.

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.

Former counsel to the petitioner described the beneficiary's proposed duties in the United States in a letter dated December 14, 1995 as follows:

The transferring company has transferred [the beneficiary] to the petitioning company since October 1994 to serve as President where he performs all duties involving formulating and executing of corporate policies, analyzing monthly operating reports, managing and organizing all aspects of the company to handle necessary business transactions to coordinate efforts with government agencies and prospective business partners. Periodically report to the board of

directors of the parent company of the business development, and coordinate and settle business disputes. As compensation for his service, the petitioner would continue to pay him \$30,000 per annum plus bonus and traveling expenses.

The petitioner also submitted an organizational chart showing the beneficiary supervising a "manager" a bookkeeper and a secretary/receptionist).

On January 12, 1996, the director requested additional evidence. The director requested, *inter alia*, additional evidence addressing who performs the day-to-day tasks associated with the petitioner's import/export trading company.

In response, the petitioner submitted a letter dated March 19, 1996 in which it explains the following:

The US petitioning company presently have [sic] 4 employees, and [the beneficiary] is the president directing the day-to-day business operation [sic], please refer to the enclosed organizational chart for their names and titles[.]

The petitioner also submitted a California wage report indicating that the petitioner employed the four people listed on the organizational chart during the month in which the instant petition was filed.

On August 6, 2003, the director issued a NOIR in which he indicates, *inter alia*, that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity in the United States.

In response to the NOIR, counsel to the petitioner repeats the job description provided with the initial petition in 1995 and further describes the beneficiary's current duties as president of Golden Mountain Investment Inc.

On November 26, 2003, the director revoked the approval of the Form I-140. The director concluded that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. The director also concluded that AC21 does not apply to the instant matter because (a) the parent organization in China ceased operating either before or immediately after the submission of the Form I-485 and, thus, the petitioner's eligibility for the benefit sought terminated at that time and the approval of the Form I-140 did not remain valid for subsequent employment; and (b) the beneficiary's new position with Golden Mountain Investment Inc. is not an identical or similar position to the position described in the approved Form I-140.

On appeal, counsel asserts that the petitioner established that the beneficiary will be employed in a primarily executive capacity.

Upon review, counsel's assertions are not persuasive and the appeal will be dismissed.

In examining the claimed executive capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

As a threshold issue, it must be noted that the beneficiary's claimed duties and accomplishments relating to his employment occurring after the filing of the underlying petition are not relevant to determining whether the petition was erroneously approved on April 3, 1996 for failure to establish that he will be employed in a primarily executive capacity. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, the AAO will only consider the job duties ascribed to the beneficiary, and the petitioner's description of its organizational structure, as these relate to the position offered to the beneficiary in 1995.

In view of the above, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis. For example, the petitioner claims that the beneficiary will formulate and execute "corporate policies," analyze "monthly operating reports," and manage and organize "all aspects of the company to handle necessary business transactions to coordinate efforts with government agencies and prospective business partners." However, the petitioner does not specifically define these corporate policies, business transactions, or coordinated efforts, or explain what, exactly, he will do in "analyzing" operating reports. The fact that the petitioner has given the beneficiary an executive title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary will actually perform managerial or executive duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, *aff'd*, 905 F.2d 41. 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).

Likewise, it has not been established that the petitioner will employ a subordinate staff capable of relieving the beneficiary of the need to perform the non-qualifying administrative or operational tasks inherent to his ascribed duties and to the administration of the petitioner's business affairs in general. The petitioner claims that the beneficiary "direct[s] the day-to-day business operation" or the "import/export trading" business and that the petitioner employs a bookkeeper, a "manager," and a secretary/receptionist. However, even though the director specifically requested in the Request for Evidence an explanation addressing "who has been doing the actual day-to-day business of the company," the petitioner failed to respond to this request by not specifically describing the duties of the claimed subordinate staff members. 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). Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Absent detailed job descriptions for the beneficiary and his subordinate staff, it cannot be concluded that he will be "primarily" employed as an executive. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in an executive capacity. See sections 101(a)(44)(B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Furthermore, it is noted that, in the absence of job descriptions for the subordinate employees, the record also does not establish that these employees are supervisory, managerial, or professional employees. Therefore, it appears that the beneficiary will be, at most, a first-line supervisory of non-professional, non-supervisory employees. While counsel correctly observes that an executive need not supervise or manage other supervisory, managerial, or professional employees to be eligible for the executive classification, the beneficiary's performance of first-line supervisory tasks would nevertheless be a non-qualifying, non-executive duty. An executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor. See *Matter of Church Scientology International*, 19 I&N Dec. at 604. As the record does not establish how much time the beneficiary will devote to his first-line supervisory tasks, the petitioner has failed to establish that the beneficiary will be "primarily" employed as an executive for this reason as well.

In this matter, it appears more likely than not that the beneficiary will perform primarily non-qualifying administrative or operational tasks and will not be primarily employed as an executive. While the petitioner has given the beneficiary an executive title and ascribed inflated, executive-sounding duties, the record is not persuasive in establishing that the beneficiary's duties are truly executive in nature or that the petitioner employs a subordinate staff capable of relieving the beneficiary of the need to primarily perform the tasks necessary to provide a service. In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager or executive. See *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003). Furthermore, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of

the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Accordingly, the petitioner has failed to establish that the beneficiary will be employed in an executive capacity, and 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.").

Beyond the decision of the director, the petition shall also be revoked because the petitioner failed to establish that it has 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 this matter, the petitioner asserts that it is 100% owned by the foreign employer, a business entity formed under the laws of China. In support, the petitioner submitted a stock certificate purportedly representing the issuance of 100,000 shares of stock to the foreign employer. However, the petitioner also submitted a copy of its 1994 Form 1120, U.S. Corporation Income Tax Return, Schedule E, which indicates that the beneficiary owns 100% of the petitioner's stock.

On January 12, 1996, the director requested that the petitioner clarify its ownership and control given the discrepancy between the stock certificate and the petitioner's averments in its Form 1120.

In response, the petitioner submitted a letter dated January 18, 1996 from a certified public accountant indicating that the beneficiary does not own any of the petitioner's stock and that the averment in the Form 1120 was a "clerical error."

Upon review, this explanation is not credible, and the petition will also be revoked because the petitioner failed to establish that it has a qualifying relationship with the foreign employer. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In this matter, the letter from the accountant is not sufficient to resolve the inconsistency in the record. The accountant offers no explanation for how or why this "error" was made in the Form 1120. Claiming the averment was a clerical error is simply not credible given that (1) the averment was made in Schedule E; (2) averments consistent with those made in Schedule E were also made in Schedule K; and (3) the petitioner also averred that the petitioner owns more than 50% of the petitioner's voting stock in its 1994 California Form 100. The petitioner's choice to take the position that the beneficiary owned and controlled 100% of the petitioner's stock was clearly a conscious decision made by the accountant, an agent and/or employee of the petitioner, or both. Absent an explanation addressing how or why this decision was made, the petitioner has failed to successfully resolve the inconsistency. 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). Moreover, no apparent effort was made to correct the claimed error, i.e., filing an amended tax return with the Internal Revenue Service.

Accordingly, the petitioner has failed to establish that it has a qualifying relationship with the foreign employer, and the petition shall be revoked for this additional reason.

The second issue in this matter is whether the beneficiary's subsequent employment with [REDACTED] is properly authorized pursuant to the provisions of section 204(j) of the Act, 8 U.S.C. § 1154(j), as added by section 106(c) of AC21. More specifically, in view of the director's proper revocation of his approval of the underlying Form I-140, the AAO must determine whether a petition that has been revoked is still "valid" for purposes of 8 U.S.C. § 204(j).⁴

Section 106(c) of AC21 added the following to section 204(j) to the Act:

⁴Although 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 issue related to the petition includes its continued "validity" and the revocation of the petition itself, discussed *supra*.

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).

Counsel indicates in her appellate brief that, because the beneficiary's Form I-485 has been unadjudicated for 180 days or more, the approved Form I-140 will remain valid as to the beneficiary's new job with Golden Mountain Investment Inc. provided that the new offer of employment is in the same or similar occupation. As simple paraphrasing and application of the statute, the AAO agrees with counsel. 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).

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.⁵ See S. REP. 106-260; see 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). However, 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."⁶

⁵CIS 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 policy memoranda and has amended the Adjudicator Field Manual (AFM) to account for the law. Neither the memoranda nor the AFM directly define the term "valid." See 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); 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.

⁶On 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 "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.

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 *supra*, 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. For the reasons discussed above, there is no evidence that Congress intended 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.

Accordingly, as the instant petition was properly revoked, the petition cannot be deemed to have been "valid" for purposes of section 106(c) of AC21 and the beneficiary's subsequent employment with Golden Mountain Investment Inc. would not be authorized for this reason.⁷

Finally, although the I-140 petition is referenced and/or reviewed for the purpose of assessing and comparing a beneficiary's new job with Golden Mountain Investment Inc. 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. Therefore, the AAO will withdraw the director's determination that the beneficiary's new job with [REDACTED] is not the same or similar to the sponsored position as it pertains to the revocation of the underlying approval of the Form I-140 for the sole reason that this determination is not relevant to this particular matter. The director should instead address this issue in the context of adjudicating the beneficiary's Form I-485. The AAO, however, notes that director's determination on this issue appears sound. It is further noted that 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).

In conclusion and for the reasons stated above, the AAO finds that (1) the I-140 was properly revoked; and (2) the revoked petition in this matter cannot be deemed to have been "valid" for purposes of section 106(c) of AC21. As such, the appeal will be dismissed.

The petition will 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 decision of the director is affirmed and the petition is revoked.

⁷It is noted that, while the director ultimately, and correctly, concluded that the instant petition did not remain "valid" for AC21 purposes, the director's determination that the petition ceased to be valid because the foreign employer ceased doing business at some point after the approval of the instant petition in 1996 will be withdrawn. The record establishes that it is more likely than not that, as of the filing of the beneficiary's application for adjustment of status, the foreign employer was engaged in business abroad. It appears that the foreign employer ceased doing business in 1999, approximately three years after the approval of the instant Form I-140 and the filing of the beneficiary's Form I-485. Therefore, in this matter, while the foreign employer's cessation of business in 1999 had no immediate effect on the validity of the approval of the underlying petition, the petition nevertheless became invalid for AC21 purposes upon its appropriate revocation by the director.