



U.S. Citizenship
and Immigration
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FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 04 2008
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IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a provider of tax, legal, information technology and other services. According to Part 6 of the petition, it seeks to employ the beneficiary permanently in the United States as a “Vice President, Global Database Management Services Manager” pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750,¹ Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the position being offered did not match the position certified by DOL.

On appeal, counsel asserts that the beneficiary will be performing the same duties listed on the alien employment certification in addition to his expanded duties. For the reasons discussed below, we uphold the director’s decision.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: “A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master’s degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.” *Id.*

As noted above, the ETA 750 in this matter is certified by DOL. DOL’s role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

These are the only inquiries assigned to DOL. See *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The regulation at 20 C.F.R. § 656.30(c)(2), as in effect when the ETA 750 was filed, provides that a “labor certification involving a specific job offer is valid only for the particular job opportunity.”

The issue in this proceeding in the context of the alien employment certification is whether the particular job opportunity remains as certified. If it does not, then the validity of the certification is considered to have expired. 20 C.F.R. § 656.30(c)(2); *Matter of United Investment Group*, 19 I&N Dec. at 248, 249 (Commr. 1984). To remain as certified, the facts of employment or intended employment must remain as stated and intended must continue both in present fact and

¹ After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

prospectively. *Id.* A review of this fact centers on the circumstances of the petitioner and on its intent. *Id.*

In evaluating the position certified by DOL, Citizenship and Immigration Services (CIS) may not ignore a term of the alien employment certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the job in an alien employment certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). CIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. CIS cannot and should not reasonably be expected to look beyond the plain language of the alien employment certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The job title listed on the alien employment certification is "Officer & Technical Specialist, Database Administration & Support." The job duties are described as follows:

Primary responsibility for providing support for database and related services to corporate data warehouse projects, including providing physical data modeling, database design, and SQL programming support, providing support for ETL and OLAP tools used by development teams, addressing technical questions and troubleshooting problems. Also responsible for administration of data warehouse environments, creations of databases, backup and recovery, archiving databases, migration of data, security, etc. [A]lso responsible for Capacity Monitoring & Planning and Quality Assurance.

Significantly, the occupational title of the person who will be alien's immediate supervisor is listed as "Vice President." Finally, the proffered wage is listed as \$94,000. Based on the above information, DOL assigned the occupational title "computer support specialist" to this position.

On the Form I-140 petition, Part 6, the petitioner listed the beneficiary's job title as "Vice President, Global Database Management Services Manager." On October 30, 2006, the director requested evidence that the job listed on the Form I-140 was the same position certified by DOL. In response, the petitioner submitted a letter from [REDACTED] a global mobility specialist with the petitioning company. [REDACTED] asserts that the beneficiary's duties with the petitioner have encompassed those listed on the alien employment certification. She continues:

While maintaining overall responsibility for support for database and related services for corporate data warehouse projects, [the beneficiary's] duties have expanded in scope and managerial and discretionary authority in the span of six year years that he has worked in this occupation. He is now managing database services on a larger scale with responsibility for global applications and has additional managerial responsibility including establishing goals, conducting reviews and recruitment of

new team members. [The beneficiary] is called upon to use his expertise to develop cost-saving initiatives, provide database design and architecture recommendations and global capacity planning for the development and management of budgets.

Thus, [the beneficiary] remains employed in the same essential capacity of Technical Specialist, Database Administration & support which he has held since joining [the petitioner] in November 2001. Based upon his strong performance in this position, he has advanced along the natural career progression of the company, assuming added scope and responsibility at progressive levels while continuing to carry out the primary database support and related services inherent in the position.

The petitioner submitted pay stubs reflecting that the beneficiary was earning \$5,375 biweekly, which annualizes to \$139,750. The director concluded that the petitioner was offering the beneficiary a different position than the one certified by DOL and denied the petition accordingly.

On appeal, counsel relies on Michael Aytes, Acting Associate Director, Domestic Operations, CIS, *AFM Update: Chapter 22: Employment-based Petitioners (AD03-01)*, HQPRD70/23/12 (September 12, 2006). This memorandum from Mr. Aytes notes that adjudicators must assess immigrant petitions based on alien employment certifications to ensure “that the position offered is the same or similar position that was certified by the DOL.” Counsel asserts that the memorandum does not define “same or similar position,” and, thus, looks to another authority for a definition of this phrase. Specifically, counsel notes that section 204(j) of the Act, 8 U.S.C. § 1154(j), provides that a 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.”

Counsel further notes that the following memorandum, William R. Yates, Associate Director for Operations, CIS, *Interim Guidance for Processing Form I-140 Employment-based Immigrant Petitions and Form I-485 and H1-B Petitions Affected by the American Competitiveness in the Twenty First Century Act of 2000 (AC21) (Public Law 106-313)*, HQPRD 70/6.2.8-P (May 12, 2005), provides guidance on the issue of “same or similar.” The memorandum by Mr. Yates provides the following:

When making a determination if the new employment is the “same or similar” occupational classification in comparison to the employment in the initial I-140, adjudicators should consider the following factors:

- A. Description of the job duties contained in the ETA 750A or the initial I-140 and the job duties of the new employment to determine if they are the “same or similar” occupational classification.
- B. The DOT code and/or SOC code assigned to the initial I-140 employment for petitions that have a certified ETA 750A or consider what DOT and/or SOC code is appropriate for the position for an initial I-140 that did not require a certified ETA 750A. Then consider the DOT code and/or SOC code, whichever is

appropriate for the new position to make a determination of “same or similar” occupational classification.

C. A substantial discrepancy between the previous and the new wage.

The memorandum further elaborates that while a difference in the wage offered on the approved labor certification, initial Form I-140 and the new employment cannot be used as a basis of a denial, “a substantial discrepancy between the previous and the new wage may be taken into consideration as a factor in determining if the new employment is ‘same or similar.’”

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987)(administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff’d* 273 F.3d 874 (9th Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even CIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(An agency’s internal guidelines “neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.”)

As quoted above, the regulation at 20 C.F.R. § 656.30(c)(2) provides that an alien employment certification is valid only for the particular job opportunity. The initial job duties certified by DOL do not include any managerial responsibilities. The Vice President job now offered to the beneficiary, however, is inherently managerial. Most significantly, the job certified by DOL reported to the Vice President while the current position *is* the Vice President. Finally, the proffered wage on the alien employment certification, \$94,000, is substantially different from the \$139,750 the beneficiary is earning in the Vice President position. We are not persuaded that DOL’s certification that there are insufficient workers who are able, willing, qualified and available to perform the Officer and Technical Specialist, Database Administration and Support position is indicative of the number of workers who are able, willing, qualified and available to perform the Vice President position. Thus, the alien employment certification in this matter is not valid for the Vice President position.

Finally, we note that counsel raises section 204(j) of the Act, which is implicated in this matter. Therefore, the following discussion is warranted.

I. The Portability Provision of Section 204(j) of the Act is Invoked Only in Adjustment of Status Proceedings where the Underlying Visa Petition was Approved.

The pertinent portability provision at section 204(j) of the Act applies only to adjustment of status proceedings where the underlying immigrant visa petition has been approved. The portability provision does not require CIS to approve a visa petition where eligibility has not been established merely because the petition was concurrently filed with an application to adjust status that has been pending for at least 180 days.

A. The Relevant Statutory and Regulatory Provisions

Section 106(c)(1) of AC21 amended section 204 of the Act by adding the following provision, codified at section 204(j) of the Act, 8 U.S.C. § 1154(j):²

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.

Section 204(a)(1)(F) of the Act includes immigrant classification of alien beneficiaries as outstanding professors or researchers under section 203(b)(1)(B) of the Act, the classification sought in this case.

Governing adjustment of status, section 245(a) of the Act, 8 U.S.C. § 1255(a), states:

Status as Person Admitted for Permanent Residence on Application and Eligibility for Immigrant Status

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 as a VAWA self-petitioner may be adjusted by the Attorney General [now the CIS], in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is *eligible* to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) *an immigrant visa is immediately available* to him at the time his application is filed.

(Emphasis added.)

An immigrant visa is immediately available to an alien seeking employment-based preference classification under section 203(b) of the Act (such as the beneficiary in this case) when the alien's visa petition has been approved and his or her priority date is current. 8 C.F.R. § 245.1(g)(1), (2).

² AC21 included a related portability provision regarding the continuing validity of alien labor certifications which was codified at section 212(a)(5)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(5)(A)(iv). Because the classification requested here does not require a labor certification, we will not address that provision in this decision.

Hence, adjustment of status may only be granted “by virtue of a valid visa petition approved in [the alien’s] behalf.” 8 C.F.R. § 245.1(g)(2).

B. Filing Procedures Prescribed by Regulation Do Not Support Counsel’s Contention

At the time AC21 went into effect, legacy Immigration and Naturalization Service (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 204(j) of the Act at the time of enactment was as follows: first, an alien obtains an approved employment-based immigrant visa petition; second, the alien files an application to adjust status; and 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 a similar occupational classification.

After enactment of the portability provisions of AC21, CIS implemented the “concurrent filing” process whereby an employer may file an employment-based immigrant visa petition and an application for adjustment of status for the alien beneficiary at the same time. *See* 8 C.F.R. § 245.2(a)(2)(B)(2004); *see also* 67 Fed. Reg. 49561 (July 31, 2002). CIS implemented concurrent filing as a convenience for aliens and their U.S. employers. Because section 204(j) of the Act applies only in adjustment proceedings, CIS never suggested that concurrent filing would make the portability provision relevant to the adjudication of the underlying visa petition. Rather, the statute and regulations prescribe that aliens seeking employment-based preference classification must have an immigrant visa petition approved on their behalf before they are even eligible for adjustment of status. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).

C. The Statutory Framework and Recent Judicial Determinations Show That the Underlying Visa Petition Must Be Approved Before Any Portability Determination is Made

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

Statutory interpretation begins with the language of the statute itself. *Hughey v. U.S.*, 495 U.S. 411, 415 (1990). We are expected to give the words used in the statute their ordinary meaning. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (citing *I.N.S. v. Phinpathya*, 464 U.S. 183, 189 (1984)). We must also 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). See also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561, 573 (1989); *Matter of W-F-*, 21 I&N Dec. 503, 506 (BIA 1996).

Contrary to the ordinary meaning of the word, counsel's ultimate position would require the AAO to construe the term "valid" to include petitions that have not been approved. See Webster's New College Dictionary 1218 (2001) (defining "valid" as "well-grounded," "producing the desired results," or "legally sound and effective.") Since an approved petition was required to file an application for adjustment of status at the time the portability provision was enacted, it is extremely doubtful that Congress intended the term "valid" to include petitions that simply remain pending after the close of the 180-day period.³

A different interpretation of the portability provision would conflict with the statutory framework for granting immigrant status and violates a fundamental tenet of statutory construction. With regard to the overall design of the nation's immigration laws, section 204 of the Act provides the basic statutory framework for the granting of immigrant status. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), provides that "[a]ny employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(1)(B) . . . of this title may file a petition with the Attorney General [now Secretary of Homeland Security] for such classification." (Emphasis added.)

Section 204(b) of the Act, 8 U.S.C. § 1154(b), governs CIS's authority to approve an immigrant visa petition before immigrant status is granted:

After an investigation of the facts in each case . . . the Attorney General [now Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is . . . eligible for preference under subsection (a) or (b) of section 203, approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.

As noted above, if the alien seeks adjustment of status in the United States, the statute and regulations allow such adjustment only where the alien has an approved petition for immigrant classification. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).

Pursuant to the statutory framework for the granting of immigrant status, any United States employer desiring and intending to employ an alien "entitled" to immigrant classification under the Act "may file" a petition for classification. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F).

³ We note that the Act contains at least one provision that does apply to pending petitions; in that instance, Congress specifically used the word "pending." See section 101(a)(15)(V) of the Act, 8 U.S.C. § 1101(a)(15)(V) (establishing a nonimmigrant visa for aliens with family-based petitions that have been pending three years or more).

However, section 204(b) of the Act mandates that CIS approve that petition only after investigating the facts in each case, determining that the facts stated in the petition are true and that the alien is eligible for the requested classification. Section 204(b) of the Act, 8 U.S.C. § 1154(b). Hence, Congress specifically granted CIS the sole authority to approve an immigrant visa petition; an alien may not adjust status or be granted immigrant status by the Department of State until CIS approves the petition.

Therefore, to be considered “valid” in harmony with the portability provision of section 204(j) of the Act and with the statute as a whole, an immigrant visa petition must have been filed for an alien that is entitled to the requested classification and that petition must have been approved by CIS pursuant to the agency’s authority under the Act. *See generally* section 204 of the Act, 8 U.S.C. § 1154. A petition is not validated merely through the act of filing the petition with CIS or through the passage of 180 days.

Section 204(j) of the Act cannot be interpreted as allowing the adjustment of status of an alien based on an unapproved visa petition when section 245(a) of the Act explicitly requires an approved petition (or eligibility for an immediately available immigrant visa) in order to grant adjustment of status. To construe section 204(j) of the Act in that manner would violate the “elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.” *Dept. of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 340 (1994).

Accordingly, it would subvert the statutory scheme of the U.S. immigration laws to find that a petition is valid when that petition was never approved or, even if it was approved, if it was filed on behalf of an alien that was never entitled to the requested immigrant classification. 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. We will not construe section 204(j) of the Act in a manner that would allow ineligible aliens to gain immigrant status simply by filing frivolous visa petitions and adjustment applications, thereby increasing CIS backlogs, in the hopes that the application might remain adjudicated for 180 days.

Moreover, every federal circuit court of appeals that has discussed the portability provision of section 204(j) of the Act has done so only in the context of deciding an immigration judge’s jurisdiction to determine the continuing validity of an approved visa petition when adjudicating an alien’s application for adjustment of status in removal proceedings. *Sung v. Keisler*, 2007 WL 3052778 (5th Cir. Oct. 22, 2007); *Matovski v. Gonzales*, 492 F.3d 722 (6th Cir. Jun. 15, 2007); *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007). In *Sung*, the court quoted section 204(j) of the Act and explained that the provision only addresses when “an *approved* immigration petition will remain valid for the purpose of an application of adjustment of status.” *Sung*, 2007 WL 3052778 at *1 (emphasis added). *Accord Matovski*, 492 F.3d at 735 (discussing portability as applied to an alien who had a “previously approved I-140 Petition for Alien Worker”); *Perez-Vargas*, 478 F.3d at 193 (stating that “[s]ection 204(j) . . . provides relief to the alien who changes jobs after his visa petition has been approved”). Hence, the requisite approval of the underlying visa petition is explicit in each of these decisions.

In this case, the petition was filed on behalf of an alien to work in a different position than the position certified by DOL. As discussed above, the director correctly denied the petition. The enactment of the portability provision at section 204(j) of the Act did not repeal or modify sections 204(b) and 245(a) of the Act, which require CIS to approve an immigrant visa petition prior to granting adjustment of status. Accordingly, as this petition was never approved, it cannot be deemed valid by improper invocation of section 204(j) of the Act.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.