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U.S. Department of Homeland Security  
Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
425 I Street, N.W.  
Washington, DC 20536

[REDACTED]

File: [REDACTED] Office: TEXAS SERVICE CENTER

Date: DEC 01 2003

IN RE: Applicant: [REDACTED]

PETITION: Application to Register Permanent Residence or Adjust Status Pursuant to Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255

ON BEHALF OF PETITIONER:

[REDACTED]

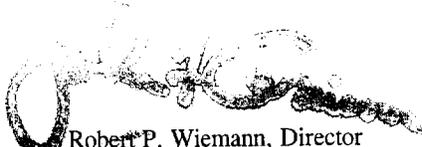
**INSTRUCTIONS:**

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the application for adjustment of status and certified her decision for review by the Administrative Appeals Office (AAO).<sup>1</sup> The director's decision will be affirmed.

Counsel for the applicant contends that the adjustment of status application in this matter should be approved based upon the "portability provision" of section 204(j) of the Immigration and Nationality Act (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). Section 204(j) of the Act provides that an applicant 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, and the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Due to the complicated history of this matter, the procedural history will be discussed at length.

The applicant's original employer, Ericsson, Inc., filed an employment-based visa petition (Form I-140) on June 17, 2002. The petitioner, Ericsson, Inc., sought to employ the applicant as a "Technical Solutions Manager II" and requested that the applicant be classified as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). On October 8, 2002, the applicant filed an application to adjust to permanent resident status (Form I-485) based on the previously filed Form I-140.

On December 5, 2002, Ericsson, Inc. notified CIS that it no longer intended to employ the beneficiary and withdrew the I-140 petition. The regulation at 8 C.F.R. § 103.2(b)(6) states that a petitioner may withdraw a petition at any time until a decision is issued or, in the case of an approved petition, until the person is admitted or granted adjustment or change of status, based on the petition.

On April 15, 2003 the director approved the withdrawn petition in error. Realizing the error, the director revoked the approval on April 29, 2003 pursuant to 8 C.F.R. § 205.1(a)(iii)(C). The regulation at 8 C.F.R. § 205.1(a)(iii)(C) provides that upon written notice of withdrawal filed by the petitioner, the

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<sup>1</sup> 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). As the director certified her decision pursuant to 8 C.F.R. § 103.4, the director's decision will be reviewed.

approval of the petition shall be automatically revoked. The director noted that the December 5, 2002 letter withdrawing the petition had been received by CIS prior to the approval of the petition but had not been matched with the file prior to the adjudication.

At the time of the revocation, the director also denied the Form I-485 application to adjust status, because the underlying immigrant visa petition had been revoked. The director noted that service center records did not show the existence of another approved immigrant visa petition.

Counsel for the applicant timely filed a motion to reopen and reconsider the denial of the I-485 application. Counsel asserted that the provisions of section 204(j) of the Act applied to the adjudication and that the applicant had complied with the requirements of that section of law. Counsel attached a letter from the applicant, dated April 15, 2003, notifying CIS of his change of employer. The applicant stated that he intended "to change employer and take up the position of Senior Corporate Applications Engineer with Synopsys, Inc." The applicant claimed that "the new position with Synopsys, Inc. is in the same or similar occupational classification as the job for which my alien labor certification and I-140 immigrant petition were approved."

Counsel also attached a letter from Synopsys, Inc., the applicant's new employer. The letter indicated that the applicant would be employed "in the same or similar occupational classification as the job certified by the Department of Labor in the alien labor certification filed on [the I-485 applicant's behalf]." Upon review, it is not clear whether Synopsys, Inc. was referring to the petition that was filed by Ericsson, Inc., since that petition was not accompanied by a labor certification from the Department of Labor. The letter from Synopsys, Inc. does not ascribe any managerial duties to the applicant's new position.

Counsel requested that the director reopen the Form I-485 application and reconsider the matter under section 204(j) of the Act and in light of the newly provided evidence.

The director found that section 204(j) of the Act does not apply to an applicant whose underlying immigrant petition is ultimately denied or revoked or an applicant whose I-485 application is denied. The director also determined that the applicant's new position was not in the same or a similar occupational classification as the position described in the I-140 petition. The director further stated that the criteria for the classification of an individual as an employment-based manager or executive immigrant must be overlaid on the criteria of the portability provision of section 204(j) of the Act. The director concluded that the I-485 applicant had failed to establish that

he met the criteria of AC21. The director certified her decision to the AAO for review.

Section 204(j) of Act states:

A petition under subsection (a)(1)(D) [since re-designated section 203(a)(1)(F) of the Act] 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.

The Executive Associate Commissioner, Office of Field Operations, issued guidance in the form of a memorandum on June 19, 2001. The guidance provided that the labor certification or approval of a Form I-140 employment-based (EB) immigrant petition shall remain valid when an alien changes jobs, if:

(a) A Form I-485, Application to Adjust Status, on the basis of the EB immigrant petition has been filed and remained unadjudicated for 180 days or more; and

(b) The new job is in the same or similar occupational classification as the job for which the certification or approval was initially made.

Memorandum from Michael A. Pearson, Executive Associate Commissioner for Field Operations, INS, *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 (Public Law 106-311 and Public Law 106-396)*, HQPGM 70/6.2.8 (June 19, 2001).

On July 31, 2002, the Immigration and Naturalization Service published an interim rule allowing, in certain circumstances, the concurrent filing of Form I-140 and Form I-485. See 8 C.F.R. § 245.2(a)(2)(B). The previous regulations required an alien worker to first obtain approval of the underlying Form I-140 before applying for permanent resident status on the Form I-485.

In light of the concurrent filing process, the Acting Associate Director of Operations, CIS, issued further guidance on processing Forms I-485 in accordance with section 106(c) of AC21 relating to the issues of withdrawal of the I-140 petition and revocation of approval of the I-140 petition. Issued on August 4, 2003, the guidance states, "[i]f approval of the Form I-140 is revoked or the Form I-140 is withdrawn before the alien's Form I-485 has been pending 180 days, 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 [REDACTED] Acting Associate Director 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).

In this matter, the applicant filed the Form I-485 on October 8, 2002. At the time the Form I-140 was withdrawn on December 5, 2002, the I-485 had been pending for 58 days. The applicant's Form I-485 had not been pending 180 days when the Form I-140 petition was withdrawn. The withdrawal of the Form I-140 on December 5, 2002 eliminates the necessity of consideration of the I-485 application pursuant to the portability provision of section 201(j) of the Act.

The director's error in approving the petition on April 15, 2003 is not a basis for the continuing validity of the I-140 petition. In this matter, the petition was withdrawn prior to the date of the erroneous decision. The withdrawal of the petition was effective when filed and not dependent on the director's acknowledgement. The director erred in adjudicating a withdrawn petition. *Matter of Cintron*, 16 I&N Dec. 9 (BIA 1976). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

Moreover, the applicant has not established that the new job is in the same or a similar occupational classification as the job for which the initial petition was filed. The applicant's original employer sought to employ the applicant in a managerial position titled "Technical Solutions Manager II." The I-140 petition in this matter requires the beneficiary's assignment be in a primarily managerial or executive position as defined in sections 101(a)(44)(A) or (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B). The applicant's new employer indicates that the applicant will be employed as a "Senior Corporate Applications Engineer," a position that will consist primarily of engineering duties. Counsel's assertion that one of the applicant's duties would be to manage key customer accounts does not establish that the I-485 applicant's primary assignment with the new employer would be a managerial assignment. The letter from Synopsys, Inc. does not support this assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In adjustment of status 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 director's decision is affirmed. The application is denied.