U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

Date: JUN 2 1 2013 Office: WASHINGTON DISTRICT FILE: [redacted]

IN RE: [redacted]

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

ON BEHALF OF THE APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based application for adjustment of status was denied by the Director, Washington District Office. The director certified the decision to the Administrative Appeals Office (AAO) for review. The decision of the director will be affirmed.

The applicant seeks to adjust status as the beneficiary of an approved employment-based immigrant petition pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The applicant asserts that she qualifies for adjustment of status because she meets the requirements of portability under the American Competitiveness in the Twenty-first Century Act of 2000 (AC21)(Public Law 106-313); section 204(j) of the Act, 8 U.S.C. § 1154(j). The director determined that the applicant was ineligible for adjustment because the new employer was not going to pay the wage certified by the United States Department of Labor (DOL) on the Form ETA 750 Application for Alien Employment Certification. The director then issued a notice that was certified for review to the AAO pursuant to 8 C.F.R. § 103.4.

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security (DHS). *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

Certifications by district directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

The regulations at 8 C.F.R. §§ 103.4(a)(4) and (5) state as follows:

> *Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision.
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> *Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO].

Section 245(i)(2) of the Act, , 8 U.S.C. § 1255(i)(2), provides, in part, that:

> the Attorney General [now Secretary, Department of Homeland Security], may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if (A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (B) an immigrant visa is immediately available to the alien at the time the application is filed.

1. Facts and Procedural History

On March 1, 2003, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an Immigrant Petition for Alien Worker, Form I-140, from (the petitioner). The immigrant visa petition sought to employ (the beneficiary, also referred to as the applicant with respect to the adjustment of status application) permanently in the United States as a cleaning supervisor, pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3)(A)(i).[1] As required by statute, the petition is submitted along with an approved Form ETA 750.

The employment-based immigrant visa petition was approved by the VSC director on February 23, 2004. Shortly after the VSC director approved the Form I-140 petition, the beneficiary filed an Application to Register Permanent Resident or Adjust Status (Form I-485) along with the supporting documents.[2] The record shows that the application to adjust status was received by VSC on May 19, 2004.

On or about July 19, 2005, the petitioner through its counsel sent a letter to the VSC director requesting the withdrawal of approval of the petition.[3] In that same letter, counsel also informed the VSC director that it had earlier sent a letter to the U.S. Department of Labor (DOL) requesting that the approval of the Form ETA 750 for the beneficiary be withdrawn.

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[1] Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

[2] The supporting documents, among other things, included: a letter dated April 22, 2004 from President, stating that the beneficiary currently worked as a Cleaning Supervisor on a full time basis earning $7.92 per hour; a copy of the beneficiary's Form W-2 issued by the petitioner for the year 2001; copies of the beneficiary's Form W-2 issued by for 2002 and 2003; and copies of the beneficiary's individual tax returns (Forms 1040 and 1040EZ) for the years 2001 through 2003.

[3] No reason was given for the withdrawal. We note that prior to sending the withdrawal letter in July 2005, the President of was criminally prosecuted by a federal district court in Virginia and found guilty of several federal offenses relating to the conspiracy to commit immigration fraud (felony) through the fraudulent procurement of immigrant labor certifications and the filing of fraudulent immigrant worker visa petitions, making false statements to law enforcement agents (felony), and committing tax fraud (felony). *See U.S. v. Mederos*, No. 04-314-A (E.D. Va.). was sentenced to imprisonment for a term of thirty-three months to run concurrently for the three felony counts noted above. *Id.*

Subsequently, on October 28, 2005, the director of the VSC issued a notice confirming that it had automatically revoked the approval of the petition based on the withdrawal. 8 C.F.R. § 205.1(a)(3)(iii)(C).[4] On the same day (October 28, 2005), the VSC director issued a Notice of Intent to Deny (NOID) indicating that the beneficiary did not appear to be eligible to adjust her status to that of a lawful permanent resident, since there was no longer an immigrant visa immediately available to her. Nevertheless, the VSC director stated that the beneficiary might still be able to adjust her status under AC21 provided that her Form I-485 application had been pending for 180 days and that she could establish she had a *bona fide* offer of employment from a new employer in the same or similar occupation.

The VSC director further requested that the beneficiary furnish the following evidence:

- A written request for adjudication of the Form I-485 under section 106(c) of the AC21;
- A letter from the beneficiary's new employer describing the job duties of the beneficiary;
- Copies of the beneficiary's earning statements for the last three months; and
- A copy of the beneficiary's federal income tax including her Form W-2 or 1099-MISC for 2004.

In response to the director's NOID, the beneficiary through her counsel provided the following evidence:

- A letter dated November 28, 2005 from Human Resource Manager, stating that the beneficiary had been employed with as a Cleaner from February 16, 2003 and that the beneficiary was earning $6 per hour, 35 hours per week;[5]
- Copies of the beneficiary's paystubs for the last three months (from August 10, 2005 to November 15, 2005);
- A copy of the beneficiary's Forms W-2 for the year 2004 issued by the petitioner, and and
- A copy of the beneficiary's U.S. Individual Income Tax Return (Form 1040) for the year 2004.

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[4] Under 8 C.F.R. § 205.1(a)(3)(iii), a petition is automatically revoked if: (A) the labor certification is invalidated pursuant to 20 C.F.R. § 656; (B) the petitioner or the beneficiary dies; (C) the petitioner withdraws the petition in writing; or (D) if the petitioner is no longer in business.

[5] An adjustment applicant (or his or her designated representative) whose adjustment application has remained pending 180 days or more may submit a request to change employers under 204(j). The AAO will consider the beneficiary's request to port to work at as of the date of the first letter from , November 28, 2005.

The record reflects that the beneficiary was interviewed on the Form I-485 application to adjust status at the Washington District Office on July 12, 2006, at which time the beneficiary provided USCIS with a second letter of employment from [redacted] Human Resource Manager, dated July 11, 2006 stating that the beneficiary had been employed as a Cleaner by [redacted] since February 16, 2003[6] and that the beneficiary was earning $6 per hour, 37.5 hours per week. In addition, to show that she had been employed and paid $6/hour by [redacted] the beneficiary submitted a copy of her paystub for the period ending June 30, 2006.

After the interview, the director determined that the beneficiary was not eligible for the benefit sought, since she was being paid less than the proffered wage of $7.92 per hour. On May 17, 2007 the director, pursuant to 8 C.F.R. § 103.4, certified the decision to the AAO for review.

In response to the director's notice of certification, to show that the beneficiary was now earning more than the proffered wage ($7.92 per hour), counsel for the beneficiary submitted a third letter from [redacted] dated May 31, 2007, who stated that the beneficiary was currently working at [redacted] as a Supervisor Assistant and that she was now making $8 per hour. A review of the copies of the beneficiary's paystubs for the period ending July 31, 2006 and from February 2007 to May 2007 shows that the beneficiary was paid $8 per hour beginning July 2006.[7]

The issues in this case are: (a) whether or not the employment-based immigrant visa petition in this case remained approved and available for the beneficiary to use to adjust status to lawful permanent residence despite her former employer's request to withdraw it; and (b) whether or not the new job opportunity is the same or similar to the certified position.

2. **Whether or not the employment-based immigrant visa petition remains valid after the petitioner withdrew the petition in writing**

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

> *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

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[6] The petitioner filed the Form I-140 on March 6, 2003, after the beneficiary began working for [redacted] The beneficiary claims on the Form G-325 Biographic Information Sheet filed in connection with her Form I-485 Application to Adjust Status that she worked for the petitioner from April 2001 – December 2001.

[7] [redacted] gave no indication in the July 11, 2006 letter submitted by the beneficiary at the adjustment interview that the hourly wage was expected to increase from $6.00 to $7.92 per hour, or that [redacted] intended to promote the beneficiary to a cleaning supervisor.

employers[8] if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Section 204(j) of the Act generally provides relief to the alien beneficiary who changes jobs after his/her visa petition has been approved. More specifically, this section allows an approved employment-based immigrant visa petition to remain valid when (1) the beneficiary's application for adjustment of status has remained unadjudicated for at least 180 days, and (2) the beneficiary's new job is in the same or similar occupational classification as the job for which the visa petition was approved. *See Perez-Vargas v. Gonzales*, 478 F.3d 191, 193 (4th Cir. 2007); *also see Sung v. Keisler*, 505 F.3d 372, 374 (5th Cir. 2007).

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.

In *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010), the AAO held that the petition must have been valid to begin with if it is to remain valid with respect to a new job. *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010). To be considered valid in harmony with related provisions and with the statute as a whole, the petition must have been filed for an alien who is entitled to the requested classification and that petition must have been approved by a USCIS officer pursuant to his or her authority under the Act. An unadjudicated immigrant visa petition is not made "valid" merely through the act of filing the petition with USCIS or through the passage of 180 days. *Id.*

Section 205 of the Act provides that approval of any petition may be revoked for "good and sufficient cause" and that the revocation dates back to the date of approval. Thus, there is an inherent conflict between sections 205 and 204(j) of the Act. Because the agency has to give effect to both provisions, and again noting the lack of regulatory guidance, USCIS generally allows 204(j) portability in situations where the prior employer withdraws the approved petition and the beneficiary's I-485 application has been pending for 180 days or more.[9] However, in cases where the underlying I-140 approval was not valid to begin with, such as in cases of fraud or willful misrepresentation, or where the I-140 was approved in error by USCIS because either the petitioner or the beneficiary did not qualify for the preference classification sought, a revocation under section 205 will negate any claim to section 204(j) portability.

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[8] This is often called "porting."

[9] Note that this may result in a mitosis conflict if the initial employer intends to use the original labor certification application for another alien. Only one alien may use the labor certification application.

In a case pertaining to the revocation of an approved I-140 petition, the Ninth Circuit Court of Appeals determined that the government's authority to revoke the approval of a Form I-140 petition under section 205 of the Act survived portability under section 204(j) of the Act. *Herrera v. USCIS*, 2009 WL 1911596 (9th Cir. July 6, 2009). Citing a 2005 AAO decision, the Ninth Circuit reasoned that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start. The Ninth Circuit stated that if the plaintiff's argument prevailed, an alien who exercised portability would be shielded from revocation, but an alien who remained with the petitioning employer would not share the same immunity. The Ninth Circuit noted that it was not the intent of Congress to grant extra benefits to those who changed jobs. Under the plaintiff's interpretation, an applicant would have a very large incentive to change jobs in order to guarantee that the approval of an I-140 petition could not be revoked. *Id.* [10]

In the instant case, the record shows that the Form I-140 petition had already been approved and that the Form I-485 application had been pending for over 180 days when the petitioner withdrew the Form I-140 petition. Consistent with section 106(c) of AC21, section 204(j) of the Act, 8 U.S.C. § 1154(j), the employment-based petition was, therefore, valid when the applicant was eligible to port, and it will remain valid so long as the applicant's new job with the new employer is in the same or a similar occupational classification as the job for which the petition was filed.

3. **Whether the New Job Opportunity is the Same as or Similar to the Certified Position**

The petitioner , as noted above, sought to permanently hire the beneficiary as a "Cleaning Supervisor." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote:

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[10] 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.

> Supervise and coordinate activities of workers cleaning and maintaining commercial building. Assign and inspect completed work. Requisition and issue supplies and equipment. Train and evaluate new workers.

The DOL determined that the title appropriate for the position described above is "Supervisor, Janitorial Services (any industry)," consistent with DOT Job Code 381.137-010 or O*Net-SOC code 37-1011.[11] The rate of pay or the proffered wage stated on that form is $7.92 per hour.

As indicated by the director in the Notice of Certification dated May 17, 2007, the director denied the beneficiary's application to adjust status because the beneficiary was not being paid equal to or in excess of the prevailing wage by the new employer. The director based her decision on the DOL regulation, which stated:

> Job offers filed on behalf of aliens on the Application for Alien Employment Certification form must clearly show that the wage offered equals or exceeds the prevailing wage determined pursuant to § 656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work.

See 20 C.F.R. § 656.20(c)(2) (2004).[12]

Responding to the director's Notice of Certification, counsel submitted Interoffice Memorandum dated August 14, 2006 from [redacted], District Adjudication Officer, to Administrative Appeals Office Director, [redacted], entitled "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 (AC21) and Congress' intent in enacting AC21" (2006 Memo). Counsel pointed to page 2 of the 2006 Memo which states:

> **Should service centers or district officers use a difference in the wage offered on the approved labor certification and initial I-140, and the new employment as basis for denial in adjustment portability cases? Answer:** No. As noted above the relevant inquiry is if the new position is the same or similar occupational classification to the alien's I-140 employment. A difference in the wage offered on the approved labor certification, initial I-140 and the new employment cannot be used as a basis of a denial. However, a substantial discrepancy between the previous and the new wage may be taken into

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[11] The O*NET website contains a crosswalk that translates DOT codes into SOC codes. *See* http://online.onetcenter.org/crosswalk/DOT. Using the O*NET crosswalk, DOT job code 381.137-010 is translated into SOC code 37-1011 (first-line supervisors of housekeeping and janitorial workers).

[12] The current DOL regulation on the proffered wage can be found at 20 C.F.R. § 656.10(c).

consideration as a factor in determining if the new employment is "same or similar."

In this case, the director adjudicating the Form I-485 considered the difference between $6 per hour and $7.92 per hour substantial in determining same or similar occupational classification for purposes of I-140 portability. The AAO agrees.

Additionally, the AAO observes that Human Resource Manager of stated in her letter dated November 28, 2005 that the beneficiary worked as a "Cleaner" earning $6 per hour. Similarly, upon her adjustment interview with a field officer on July 12, 2006, the beneficiary submitted a letter from dated July 11, 2006, in which once again, stated that the beneficiary works as a "Cleaner" earning $6 per hour.

Based on the evidence submitted and the stated facts above, the AAO finds that when the beneficiary ported to work for she was not hired as a cleaning supervisor, but as a regular cleaning staff member. This is reflected by the amount she earned per hour ($6 per hour) and by the letters dated November 28, 2005 and July 11, 2006 from who stated in both letters that the beneficiary had been employed as a cleaner since February 16, 2003. The evidence suggests that the beneficiary was only promoted to the position of supervisor assistant, earning $8/hour, starting from July 2006, when USCIS required such documentation at the adjustment interview.

A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). "To do otherwise would make a farce of the preference [s]ystem and priorities set up by statute and regulation." *Id.*

The position tested and certified by the DOL, as noted above, was for cleaning supervisor. At the time the beneficiary ported to work for the position was for a cleaner, not for a cleaning supervisor, as stated by in her letters dated November 28, 2005 and July 11, 2006 and as reflected in the beneficiary's then salary of $6 per hour. Further, the record contains no evidence showing the job duties or description of the beneficiary with her new employer. Simply stating that the beneficiary was employed as a cleaner or supervisor assistant neither establishes the reliability of the assertions nor demonstrates that the beneficiary's job at is in the same or similar job classification for which the original petition was filed. 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 (Reg. Comm. 1972)). The AAO finds that the new employer did not intend to employ the beneficiary as a cleaning supervisor as required by the terms of the labor certification.

Since the applicant was not employed as a cleaning supervisor at the time she requested to port to she did not port to the same or similar job classification as the DOL-certified job opportunity.

Thus, the Application to Register Permanent Resident or Adjust status shall be denied. The AAO affirms the director's decision to deny the applicant's Form I-485.

ORDER: The beneficiary's Form I-485 is denied. The director's decision to deny the beneficiary's application to adjust status is affirmed.