U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAY 10 2006

SRC-04-088-50830

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be summarily dismissed.

The petitioner is a stucco and plastering firm. It seeks to employ the beneficiary permanently in the United States as a stucco mason. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, and denied the petition accordingly.

Counsel submitted a Form I-290B Notice of appeal on January 7, 2005 and checked the block indicating that he would be sending a brief and/or additional evidence to the AAO within 30 days. Counsel also submitted an attachment with the Form I-290B asserting that "[the beneficiary] requests that [CIS permits] him to substitute CB Homes, Inc. as his new employer/Petitioner under his I 140 Petition. Attached is the G 28 authorizing [counsel] to represent CB Homes, Inc." In addition, counsel states that "[the petitioner's] successor company can prove sufficient resources to consummate the job offer made in 2000 to [the beneficiary] . . . as soon as [its 2003 and 2004 tax] returns are available."

On November 1, 2005, counsel submitted a Supplemental Memorandum dated October 20, 2005 reiterating that the beneficiary has a substitute petitioner. Counsel also submitted an unadjudicated copy of the I-140 petition filed by the new petitioner, and the petition was signed by the new petitioner and counsel on September 23, 2005.

Counsel's request that the original petitioner be substituted by another petitioner is not an assignment of error. In fact, the statements submitted on appeal contain no specific assignment of error. The regulation at 8 C.F.R. § 103.3(a)(1)(v) states, in pertinent part: "An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal." No such erroneous conclusion of law or statement of fact has been asserted as a basis for the appeal and the appeal must be summarily dismissed. Moreover, this appeal stems from an I-140 petition listing [redacted] as the petitioner, and the regulations concerning employment-based immigrant petitions do not allow for a substitute petitioner at this point. In addition, the substitute petitioner appears to have already filed its I-140 petition.

In the Supplemental Memorandum dated October 20, 2005, counsel, on the beneficiary's behalf, states that the beneficiary is eligible to adjust status based on the fact that the instant petition was "approvable at the date it was filed" and that a new employer is now offering a position "under the same terms and conditions." Thus, counsel seems to be advocating on the beneficiary's behalf that his I-485 application can be approved under the terms of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21) section 106(c). The AAO does not agree that the terms of AC21 make it so that the instant *immigrant petition* can be approved; rather, it allows an *application for adjustment of status* to be approved despite the fact that the initial job offer is no longer valid. The language of AC21 states that the I-140 petition "shall remain valid" with respect to a new job offer for purposes of the beneficiary's I-485 petition despite the fact that he or she no longer intends to work for the petitioning entity provided that (1) the I-485 petition based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer from the new employer must be for a "same or similar" job. A plain reading of the phrase "will remain valid" suggest that the I-140 petition must be valid *prior* to any consideration of whether or not the I-485 application was pending for more than 180 days and/or the new position is same or similar. In other words, it is not possible for an I-140 petition to remain valid if it is not valid currently.

The AAO would not consider an I-140 petition wherein the initial petitioner has not demonstrated its eligibility to be a valid I-140 petition for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, CIS regulations required that the underlying I-140 petition be approved prior to the beneficiary filing for adjustment of status. Thus, when AC21 was enacted, the only time that an I-485 application could have been pending for 180 days was when it was filed based on an approved I-140 petition. Therefore, the only possible meaning for the term "remains valid" was that the underlying I-140 petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer.

The AAO notes that the director is the official with jurisdiction over the beneficiary's I-485 petition and therefore the record is being returned to her. The director may, in her discretion, review the beneficiary's I-485 petition and consider this new offer of employment and the entire record with respect to the beneficiary's eligibility under section 106(c) of AC21.

ORDER: The appeal is summarily dismissed.