



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

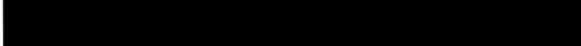


B6

File: 
EAC-05-158-50907

Office: VERMONT SERVICE CENTER

Date: **JUL 02 2008**

In re: Petitioner: 
Beneficiary: 

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:

SELF-REPRESENTED

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, Vermont Service Center (“director”), denied the immigrant visa petition. The petitioner appealed that decision and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner is a law office, and seeks to employ the beneficiary permanently in the United States as an accountant. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (“DOL”). As set forth in the director’s February 28, 2006 decision, the case was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered wage from the priority date until the beneficiary obtains permanent residence.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).¹

On appeal, the petitioner, an attorney, requests that his petition “be approved and ported to” a separate petition filed by [REDACTED] MD, PA, who is represented by the petitioner in this matter. Subsequently, the beneficiary secured a new attorney. The new attorney submits an “Authorization to Close Case and Release File” attempting to “direct” the petitioning attorney “to discontinue representation on his behalf in connection with” the appeal. This new attorney cites no legal provision, and we know of none, that would allow a beneficiary or his representative to withdraw or replace the petitioner’s representation. Significantly, the beneficiary is not an affected party to the matter on appeal. 8 C.F.R. §103.3(a)(i)(iii).

For the reasons discussed below, the petitioner has not overcome the director’s conclusion that the petition was not approvable when filed. Thus, the provisions of section 204(j) of the Act are not applicable. Moreover, the record contains serious discrepancies regarding the beneficiary’s past experience and proposed employment. Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id. at 591-592*.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 27, 2001. The proffered wage as stated on Form ETA 750 is \$20.00 per hour, based on a 35-hour work week, which would be equivalent to \$36,400 per year. The labor certification was approved on January 30, 2003, and the petitioner filed the Form I-140 petition on the beneficiary's behalf on May 6, 2005. On the Form I-140 petition, the petitioner listed the following information: date established: 1971; gross annual income: not listed; net annual income: not listed; current number of employees: two.

On June 28, 2005, the director issued a Request for Additional Evidence ("RFE"). The RFE requested that the petitioner provide evidence of its ability to pay the beneficiary the proffered wage from the time of the April 2001 priority date in the form of federal tax returns, annual reports, or audited financial statements, as well as to submit W-2 statements for the beneficiary if the petitioner employed the beneficiary. The RFE also requested that the petitioner provide evidence to show that the beneficiary had the two prior years of required experience as listed on Form ETA 750. Further, the RFE indicated that the petitioner submitted an incomplete Form I-140 and that the petitioner should provide its gross annual income, as well as its net annual income. The petitioner responded that it was unable to provide the requested evidence.

Following consideration of the petitioner's response, on February 28, 2006, the director denied the petition as the petitioner failed to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence.² The petitioner appealed that decision, and the matter is now before the AAO.

We will examine the petitioner's ability to pay based on information in the record and then consider the petitioner's additional arguments on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services ("CIS") will examine whether the petitioner

² The director's decision notes that the petitioner requested additional time to respond to the RFE. Although not officially granted more time, the petitioner failed to provide any further information in response to the RFE in the subsequent five-month time frame.

employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The beneficiary did not list on Form ETA 750B that he was employed with the petitioner. However, on Form G-325 filed with another application on the beneficiary's behalf, the beneficiary listed that he was employed with the petitioner from June 2001 to August 2002.

The petitioner did not provide any W-2 Forms or pay statements to evidence any payments to the beneficiary. Therefore, the petitioner cannot establish its ability to pay through any prior wage payments.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The petitioner failed to submit any federal tax returns, but instead indicated in his response to the RFE that, "I am not able to provide the requested financial information necessary to show that I am able to pay the required amount. My business suffered a down turn after application was made as a result of 9/11." Further, the petitioner provided that the beneficiary had been offered a similar job as stated in the "Memorandum of William R. Yates - May 12, 2005."³

As the petition did not contain the prescribed evidence under 8 C.F.R. § 204.5(g)(2) to exhibit the petitioner's ability to pay the proffered wage, the director denied the petition.

On appeal, the petitioner provides, "under the I-140 Portability Provisions of Section 106(C) of AC 21 [the American Competitiveness in the Twenty-First Century Act of 2000], the Finer Petition should be approved and ported to the Berlin Petition." The petitioner submitted a short statement, which reiterated the claim under Section 106(C) of AC 21 and further provided, "It appears from the Notice of Action . . . that the Service Center did not put the two petitions together for the purpose of portability."

The initial petition was denied because the petitioner failed to establish its ability to pay the beneficiary the proffered wage from the time of the priority date onward, and thus failed to establish the alien's eligibility for the requested classification. The petitioner provided no evidence on appeal to overcome the basis for the initial petition's denial. The record contains no evidence prescribed by regulation of the petitioner's ability to pay the proffered wage in any of the following years: 2001, 2002, 2003, 2004, or 2005. As the petitioner submitted no

³ The petitioner presumably refers to the memo from William R. Yates, Associate Director for Operations at Citizenship and Immigration Services (CIS), *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B 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).

evidence to overcome the basis for denial, we will affirm the director's determination that the petitioner has not established its ability to pay the proffered wage, and therefore, has not established the beneficiary's eligibility for the classification sought.

As the initial petition was denied and was not approvable when filed, the beneficiary would seek portability based on an unapproved and unapprovable I-140 petition. No related statute or regulation would render the beneficiary portable under these facts.

The pertinent section of AC 21, Section 106(c)(1), amended section 204 of the Act, codified at section 204(j) of the Act, 8 U.S.C. § 1154(j) provides:

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 adjudicated 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.

Statute and regulations allow 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).⁴

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). 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).

After enactment of the portability provisions of AC21, on July 31, 2002, CIS published an interim rule allowing for the concurrent filing of Form I-140 and Form I-485, 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 without the need to wait for an approved I-140. See 8 C.F.R. § 245.2(a)(2)(B)(2004); see also 67 Fed. Reg. 49561 (July 31, 2002). The beneficiary in the instant matter had filed his Form I-485 on July 13, 2006, concurrently with the petitioner's filing of Form I-140.

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).

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.

⁴ 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).

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).

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.

Statute and regulations allow 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). 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. 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 visa petitions and adjustment applications, thereby increasing CIS backlogs, in the hopes that the application might remain unadjudicated for 180 days.⁵

In the case at hand, the I-140 petition was denied. The petitioner failed to provide any evidence on appeal to overcome the basis for denial. The beneficiary would therefore not have a valid immigrant visa petition approved on their behalf to be 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).

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 denied, it cannot be deemed valid by improper invocation of section 204(j) of the Act.

Based on the foregoing, the petitioner has failed to document that it can pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence, and the petition was properly denied. 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.

⁵ 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.