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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUL 21 2008

EAC 04 193 53482

IN RE: Petitioner: [redacted]
Beneficiary:

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

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

CC: [redacted]

DISCUSSION: The employment-based immigrant visa petition was denied by the Acting Director (Director), Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner was a law firm. It sought to employ the beneficiary permanently in the United States as a paralegal. As required by statute, the petition was accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL).[1] The director determined that a bona fide job offer did not exist given that the president of the petitioner, [redacted] was convicted of immigration fraud and that the petitioner was convicted of conspiracy to commit immigration fraud. The director denied the petition on October 27, 2005 accordingly.

The instant appeal was filed on November 9, 2005 by [redacted] of the petitioner. During the adjudication of the appeal, evidence came to light that the petitioner's status as a business entity had been forfeited.[2] *See* the website at the Maryland Department of Assessments and Taxation at http://sdatcert3.resiusa.org/UCC-Charter/DisplayEntity_b.aspx?EntityID=W04371407&Ent....

The AAO notes that [redacted] the sole member of the petitioner as a Maryland limited liability company to practice law, was convicted in multiple counts of immigration fraud on April 14, 2005, after a jury trial in the United States District Court for the District of Maryland, Northern Division; that [redacted] was convicted of various counts regarding the falsifying of labor certification applications and conspiracy to submit false labor certifications; and that consequently, the District of Columbia Bar Association suspended [redacted]s membership; and on September 15, 2005, the U.S. Department of Justice Executive Office for Immigration Review granted a petition for immediate suspension and suspended [redacted] from the practice of law before the Board of Immigration Appeals, the Immigration Courts, and the Department of Homeland Security (DHS). *See* http://www.usdoj.gov/eoir/profcond/chart.htm.

On appeal, [redacted] submits an affidavit stating:

> That while I and my firm were convicted of immigration fraud in the Federal District Court in Greenbelt, Maryland, my case is currently on appeal with the Fourth Circuit Court of Appeals and the conviction involved only a small number of cases. The vast majority of cases filed by my firm were valid cases not involved in the criminal action and their processing has continued, with many being approved post-conviction.
>
> That there is absolutely no connection between the convictions and the job offered to [the beneficiary]. Just because there were convictions on a small number of cases does not

[1] It is noted that the current beneficiary is the second individual to be substituted on the approved labor certification. The petition for the first individual substituted on the approved labor certification (EAC 02 131 52193) was approved. However, that same petition was subsequently revoked and the labor certification invalidated on October 4, 2005. The original beneficiary of the labor certification was [redacted] It is also noted that the current beneficiary was previously petitioned for by [redacted] as a substitute on another labor certification for [redacted] That petition was denied and not appealed. Further, it is noted that the beneficiary had her own labor certification with a priority date of November 30, 2000 through Nice Minerals, Inc. as a market research analyst. The record of proceeding does not contain any information regarding the use of that labor certification.

[2] Since the business was forfeited, it is no longer an active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot.

> mean that my firm was not a valid business with the ability and need to hire employees to handle the remainder of cases.

However, the response on appeal does not contain any evidence to support [redacted]s assertions.[3] As such, this office finds, in keeping with the record from the Maryland Department of Assessments and Taxation, Taxpayer Services Division official website, that the petitioner's business status has been forfeited, and thus, the petitioner no longer qualifies to file the instant appeal as an affected party under 8 C.F.R. §§ 103.3(a)(2)(i) and 103.3(a)(1)(iii)(B). Therefore, further pursuit of the instant petition is moot.

However, as the beneficiary has a new attorney who has offered her a position as a paralegal in his firm based on AC-21and in the interest of fairness, this office will discuss this issue.

In general, an alien may acquire permanent resident status in the United States through two legal mechanisms: the alien may pick up their approved visa packet at an overseas consulate and be "admitted" to the United States for permanent residence; or, if the alien is already in the United States in a lawful nonimmigrant or parolee status, the alien may "adjust status" to that of an alien admitted for permanent residence. *Cf.* Section 211 of the Act, 8 U.S.C. § 1181 ("Admission of Immigrants into the United States"); Section 245 of the Act, 8 U.S.C. § 1255 ("Adjustment of Status of Nonimmigrant to that of Person Admitted for Permanent Residence").

Governing adjustment of status, section 245(a) of the Act, 8 U.S.C. § 1255(a), requires the adjustment applicant to have an "approved" petition:

> 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 under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1) or [sic] 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:
>
> (i) the alien makes an application for such adjustment,
>
> (ii) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and
>
> (iii) an immigrant visa is immediately available to him at the time his application is filed.

In 2000, Congress passed the American Competitiveness in the Twenty-First Century Act (AC21), Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000). Section 106(c) of AC21 amended section 204 of the Act by adding the following provision, codified as 8 U.S.C. § 1154(j):

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[3] On June 4, 2008, the AAO issued a notice of derogatory information to [redacted] at [redacted] explaining that a print-out from the Maryland Department of Assessments and Taxation, Taxpayer Services Division shows that the business' status has been forfeited and allowing [redacted] thirty days to respond to the notice of derogatory information with proof of its active status. The notice of derogatory information was returned to the AAO as undeliverable on June 9, 2008.

> *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 212(a)(5)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(5)(A)(iv), states further:

> *Long Delayed Adjustment Applicants-* A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) shall remain valid with respect to a new job accepted by the individual after 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 certification was issued.

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 106(c) of AC21 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 similar occupational classification.

The available legislative history does not shed light on Congress' intent in specifically enacting section 106(c) of AC21. While the legislative history for AC21 discusses Congressional concerns regarding the nation's economic competitiveness, the shortage of skilled technology workers, U.S. job training, and the cap on the number of nonimmigrant H-1B workers, the legislative history does not specifically mention section 106(c) or any concerns regarding backlogs in adjustment of status applications. The legislative history briefly mentions "inordinate delays in labor certification and INS visa processing" in reference to provisions relating to the extension of an H-1B nonimmigrant alien's period of stay. *See* S. Rep. 106-260, 2000 WL 622763 at *10, *23 (April 11, 2000). In the 2001 Report On The Activities Of The Committee On The Judiciary, the House Judiciary Committee summarized the effects of AC21 on immigrant visa petitions: "[I]f an employer's immigrant visa petition for an alien worker has been filed and remains unadjudicated for at least 180 days, the petition shall remain valid with respect to a new job if the alien 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." H.R. Rep. 106-1048, 2001 WL 67919 (January 2, 2001). Notably, this report further confuses the question of Congressional intent since the report clearly refers to "immigrant visa petitions" and not the "application for adjustment of status" that appears in the final statute. Even if more specific references were available, the legislative history behind AC21 would not provide guidance in the current matter since, as previously noted, an approved employment-based immigrant visa was required to file for adjustment of status at the time Congress enacted AC21.

In the instant case, the beneficiary never had an approved petition.

On appeal, counsel states:

> The petitioner has filed an appeal of the said decision and which is currently pending adjudication. While it has long been established that in visa proceedings the petitioner bears the burden of proving eligibility for the benefits sought, Ref. *Matter of Brantigan,* 11 I&N Dec. 493 (BIA 1966), it may be noted that the decision of Service has adversely affected all the petitions filed by the petitioner without going into the merits of each filing. Justice dictates that the cases filed by the petitioner which led to his conviction be dismissed and the remaining cases be set aside for adjudication on merits. This will afford the necessary due process to those classes of cases which do not fall in the category which led to the conviction. Denying such as relief would be contrary to the spirit of Law under the Due Process clause of the Constitution.
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> * * *
>
> Justice will greatly be served if the Petitioner is allowed to prove a prima facie case on the remaining petitions which are out of the purview of the said conviction.
>
> Further the beneficiary under the aforesaid I-140 petition had filed an I-485 concurrently on June 14, 2004. Pursuant to the portability clause under AC-21 more than six months had elapsed when the beneficiary decided to change employers. At the time of such transfer the I-140 was still pending and would have been approved in the normal course like other petitions which were approved and filed by the same petitioner. The said transfer is in the same job title and salary as originally filed by the petitioner and hence the transfer is valid.

Upon review, counsel's assertions are not persuasive. The operative language in section 106(c) is the following phrase: "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; *see also* H.R. Rep. 106-1048. Critical to section 106(c) of AC21, the petition must be "valid" to begin with if it is to "*remain* valid with respect to a new job." Section 204(j) of the Act, 8 U.S.C. § 1154(j) (emphasis added).

Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). We are expected to give the words used in the statute their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Furthermore, we are to 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) (holding that construction of language which takes into account the design of the statute as a whole is preferred); see also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (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)(3) . . . 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).[4]

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 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

[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).

applications, thereby increasing CIS backlogs, in the hopes that the application might remain unadjudicated for 180 days.[5]

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.

Furthermore, the beneficiary does not have an approved labor certification as required in the filing of a Form I-140. The labor certification under which the beneficiary was substituted was invalidated on October 4, 2005.

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
>
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The regulation at 20 C.F.R. § 656.30(c)(2) provides:

> A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the Application for Alien Employment Certification form.

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[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.

The Act does not provide for the substitution of aliens in the permanent labor certification process. Similarly, both the CIS and the Department of Labor's regulations are silent regarding substitution of aliens. The substitution of alien workers is a procedural accommodation that permits U.S. employers to replace an alien named on a pending or approved labor certification with another prospective alien employee. Historically, this substitution practice was permitted because of the length of time it took to obtain a labor certification or receive approval of the Form I-140 petition. *See generally*, Department of Labor Proposed Rule, "Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity," 71 Fed. Reg. 7656 (February 13, 2006).

CIS may not approve a visa petition when the approved labor certification has already been used by another alien. *See Matter of Harry Bailen Builders, Inc.*, 19 I&N Dec. 412 (Comm. 1986). Moreover, CIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). 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). Thus, while CIS policy permits substitutions of beneficiaries, once the labor certification has been used for the original beneficiary, even in error, that labor certification is no longer available. In addition, once a labor certification has been invalidated, it is no longer available for use by the beneficiary.

At the time of filing of the instant petition, CIS policy permitted substitutions of beneficiaries. However, once the labor certification has been invalidated, even in error, that labor certification is no longer available.[6] The labor certification on which this petition is based already served as the basis of admissibility of the original beneficiary. Section 212(a)(5)(A) of the Act. Counsel provides no legal authority, and we know of none, that would allow CIS to rely on an invalidated labor certification to allow a beneficiary to adjust to lawful permanent residence.

Although counsel argues that the petitioner's due process rights were violated, the petitioner has not demonstrated any error by the director in conducting its review of the petition. Nor has the petitioner demonstrated any resultant prejudice such as would constitute a due process violation. *See Vides-Vides v. INS*, 783 F.2d 1463, 1469-70 (9th Cir. 1986); *Nicholas v. INS*, 590 F.2d 802, 809-10 (9th Cir. 1979); *Martin-Mendoza v. INS*, 499 F.2d 918, 922 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975). The petitioner has provided no evidence in support of its claims on appeal. 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). Accordingly, the petitioner's claim is without merit. In addition, the court in *De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) held that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge. The respondents have fallen far short of meeting this standard. A review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case. The petitioner's primary complaint is that the director denied the petition. The evidence is clear in the conviction and forfeiture of the petitioner. The petitioner has not met its burden of proof and the denial was the proper result under the regulation. Accordingly, counsel's claim is without merit.

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[6] It should be noted that the original I-140 could not have been approved without a valid labor certification from DOL. Thus, the adjustment of status of a beneficiary based on an I-140 must still contain a valid labor certification.

ORDER: The appeal is dismissed as moot based on the finding that the petitioner's status as a business entity has been forfeited.