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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

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 27 2008

SRC-00-245-51099

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:

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, Texas Service Center (director) initially approved the employment-based preference visa petition. In connection with information obtained while adjudicating the beneficiary's application to adjust status to lawful permanent residence, the Memphis, Tennessee district office returned the case to the director with a recommendation that the approval be revoked. The director served the petitioner with notice of intent to revoke the approval of the petition (NOIR) and in a Notice of Revocation (NOR) ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140), certifying her decision to the AAO.[1] The director's decision will be withdrawn; however, because the petition is not approvable, it is remanded for further action and consideration. The petition will be remanded to the director.

On certification, the beneficiary submits a statement. The beneficiary, however, is not an affected party. 8 C.F.R. § 103.3(a)(1)(iii). As the director's decision was certified to us, however, we must adjudicate the matter on its merits. For the reasons discussed below, the director's decision must be withdrawn because the issues raised by the director relate to the beneficiary's adjustment of status rather than whether the approval of the petition was subject to revocation. Nevertheless, as will be discussed below, the record reveals that the petition was approved in error. Finally, as the director certified its concerns regarding the application of section 204(j) of the Act to office, we will address those issues.

Section 205 of the Act, 8 U.S.C. § 1155, states, in pertinent part, that the Secretary of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the revocation of the approval of an immigrant petition. *Id.* The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application

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[1] *See* 8 C.F.R. § 103.4(5). The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *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 regional service center 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).

process. *Id.* at 589. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.*

The petitioner is a casino, and seeks to employ the beneficiary permanently in the United States as a human resource advisor (Human Resource Representative). As required by statute, the petition was filed with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The petition was approved on January 17, 2001. The beneficiary applied to adjust his status to a lawful permanent resident on November 16, 2001. During an interview at the Memphis, Tennessee local office, the beneficiary indicated that he no longer worked for the petitioner and submitted a letter that indicated he had his own tax consulting business, Key Tax Services, since August 7, 2003. The local office returned the file to the director on September 28, 2004 requesting revocation of the petition's approval as the beneficiary was no longer employed by the petitioner.

The petitioner seeks to classify the beneficiary as a professional worker. The regulation at 8 C.F.R. § 204.5(l)(2), provides that a third preference category professional is a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." 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.

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 the 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 CFR § 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).

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on September 28, 1999. The proffered wage as stated on the Form ETA 750 is $550 per week, which is equivalent to $28,600 per year based on a 40 hour work week. The Form ETA 750 was certified on April 27, 2000, and the petitioner filed the I-140 petition on the beneficiary's behalf on July 7, 2000.[2] The petitioner listed the following information on the I-140 Petition: date established: 1991; gross annual income: $271,656,192; net annual income: $149,907,966 and current number of employees: 3,142.

On November 29, 2004, the director issued a NOIR to the petitioner stating that since the petitioner no longer has an "apparent intent to employ the beneficiary, the petition's approval is no longer supportable." The director referenced the American Competitiveness in the 21st Century Act of 2000 (Public Law 106-313) (AC21) and stated that the petition's approval could remain valid if the beneficiary's job assignment within his tax consulting firm were in the same or similar occupational classification as that of a human resources representative. The director requested a detailed description of the beneficiary's current duties at the tax consulting enterprise. The director also requested evidence to demonstrate that the beneficiary's business was

[2] The petition was approved on January 17, 2001, and the approval was subsequently revoked on January 6, 2005.

an active business operation and that it had the ability to pay the proffered wage based on its federal tax returns, annual reports, or audited financial statements.[3]

In response, the beneficiary submitted correspondence stating that the petitioner's employment offer was terminated and he now operates his own tax consulting business. He listed that his duties included providing tax preparation assistance, education, and outreach to taxpayers with limited English language abilities. He stated that in the alternative, he was the recipient of an employment offer in a similar occupational classification as that of a human resources representative. The beneficiary submitted evidence from his tax business, including invoices, an unaudited income statement, and Schedule C to his Form 1040 individual income tax return. He also submitted statements from a business checking account, correspondence from the Internal Revenue Service ("IRS") assigning his business a federal tax identification number, and a letter from Shaheed's Insurance Services in Memphis, Tennessee, dated December 22, 2004, which offered the beneficiary the position of Associate Relations Assistant. The Shaheed offer letter included a description of position duties and offered a salary of $29,000.

On January 6, 2005, the director revoked the petition's approval. The director noted that the beneficiary's adjustment of status application was pending for more than 180 days. However, the director stated that the beneficiary's sole proprietorship would not qualify as an "employer" for porting purposes under AC21 since a sole proprietor is not a separate legal entity from the business and therefore the beneficiary may not effectively offer himself a job.[4] The director also stated that both the descriptions of the beneficiary's employment at the sole proprietorship and the job offer from Shaheed's Insurance Services qualified as a new job offer in the same or similar occupational classification as the proffered position for the underlying labor certification to the instant petition. However, the director revoked the petition's approval since there was no evidence in the record of proceeding that demonstrated that Shaheed's Insurance Services has the continuing ability to pay the proffered wage beginning on the priority date.

In response to the notice of certification, the beneficiary submitted unaudited financial statements from Shaheed's Insurance Services.[5]

The issues on certification are: (1) whether or not the director properly revoked the petition; (2) whether or not the beneficiary properly ported to a position in the same or similar occupation as the proffered position; and (3) whether a beneficiary can port to self-employment. If the beneficiary properly ported to a same or similar position, under AC 21, he could then retain his ability to adjust status from the petition's initial approval. The director's certification additionally included specific issues to be addressed: whether a new employer under AC 21 must: (a) pay the certified wage stipulated in the job offer portion of the labor certification; and (b) whether a new employer must prove its ability to pay that wage. We will address each issue in turn.

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[3] We note that the director sent a copy to the beneficiary even though the beneficiary is not an affected party.

[4] 20 C.F.R. § 656.3 provides that employment means, "Permanent full-time work by an employee for an employer other than oneself."

[5] A beneficiary does not have standing to appeal a denied I-140, but does have standing to file a motion to reopen or reconsider an I-485 Adjustment of Status decision.

The director revoked the petition's approval on January 6, 2005 as the employer that the beneficiary ported to could not demonstrate its continuing ability to pay the proffered wage. The director was incorrect in revoking the petition's approval, and incorrectly incorporated portability issues into the revocation.

Regulatory interpretation has not yet been promulgated to provide guidance to Citizenship and Immigration Services (CIS) concerning the provisions of AC21. The provisions of AC21 do not separately or specifically state reasons why a director could revoke an approved petition.[6]

As portability is an issue to be addressed in the adjustment of status proceeding, we find that the director's decision fails to set forth good and sufficient cause for revocation of the petition's approval. Therefore, she has improperly revoked the petition's approval. Thus, the AAO is withdrawing the director's revocation determination. However, upon review of the petition, we find that the petition should not have been approved as the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification. Accordingly, we will remand the petition to the director in accordance with the following guidance for the director to issue a new NOIR addressing whether the beneficiary is qualified for the position.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003). 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)

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

> If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The above regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

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[6] In addition, the provisions of AC21 apply to adjustment proceedings, not to Form I-140 visa petition adjudications or revocation proceedings.

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

On the Form ETA 750A, the position description provided in part:

> Responsible for managing and coordinating immigrant Associates and immigration-related problems, thereby, evaluating this workforce for efficient use.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Education:	College: 4 years; College degree: Bachelor's degree;
Major Field Study:	Any
Experience:	1 year in job offered, Human Resource Representative.
Other special requirements:	Fluency in English, French, Spanish, which is necessary to conduct business (benefit issues, employment issues, payroll issues, disciplinary actions, health problems, education and training issues) with almost 300 people.

The petitioner did not list any other special requirements.

To determine whether a beneficiary is eligible for a preference immigrant visa, CIS must ascertain whether the alien is, in fact, qualified for the certified job. CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In looking at the beneficiary's qualifications, on Form ETA 750B, signed by the beneficiary, the beneficiary listed his prior education as: (1) University of Dakar, Dakar, Senegal; Field of Study: Sciences/Math; from October 1985 to July 1987, for which he received a Diploma of Scientific Studies; and (2) International Center for Banking, (location not listed); Field of Study: Banking; September 1992 to July 1993, for which he received a Professional Certificate; and (3) Technical Institute of Banking, Paris, France; Field of Study: Finance/Banking; from September 1993 to July 1995, for which he received a "Certificate of I.T.B."

The petitioner submitted an evaluation of the beneficiary's education in order to document that the beneficiary met the educational requirements of the labor certification:

Evaluation:

- Evaluator: Academic Credentials Evaluation Institute, Inc., Beverly Hills, CA.
- The evaluator concluded that based on the beneficiary's "six year of extensive experience in Auditing combined with his formal academic studies represent a level of learning and performance ability deemed comparable to the Bachelor of Science in Accounting with an emphasis in Auditing as offered by accredited institutions of higher education in the United States."

On remand, the director should consider whether the beneficiary's educational qualifications, based on a combination of education and experience, would meet the terms of the Form ETA 750 as drafted as the petitioner required a four-year bachelor's degree.

In addition, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). AACRAO, according to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, http://aacraoedge.aacrao.org/register/index/php, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

EDGE provides that a Diplome d'Etudes Scientifiques / DUES (Diploma of Scientific Studies) is equivalent to two years of university study in the United States. The other diplomas referenced in the evaluation, and in the translated educational documents are not listed in EDGE and we cannot ascertain their U.S. equivalency if any.

For approval as a professional, 8 C.F.R. § 204.5(l)(3)(ii)(c) requires that the beneficiary have a U.S. bachelor's degree or a foreign equivalent. The H-1B nonimmigrant standard, 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) that an equivalent degree may be acquired "through a combination of education, specialized training, and/or work experience in areas related to the specialty" applies to non-immigrant H-1B petitions, but not to immigrant petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5). The director shall consider whether, in light of the above information now incorporated into the record, the beneficiary has the necessary baccalaureate or foreign equivalent degree from a college or university, *see* 8 C.F.R. § 204.5(l)(3)(ii)(C), required for a professional.

However, the director may consider the petition under the skilled worker category, where 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. The director must take into account, however, that the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) provides that if the petition is for a skilled worker, "the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification . . . The minimum requirements for this classification are at least two years of training or experience." The minimum education requires that the individual have a four-year bachelor's degree. Form ETA 750 does not list that a candidate can meet this requirement through a combination of education, training, and/or experience.

Additionally, the director should consider whether the petitioner has demonstrated that the beneficiary had the required work experience for the position offered.

On the Form ETA 750B, signed by the beneficiary on September, 24, 1999, the beneficiary listed his prior experience as: (1) the petitioner, June 1998 to present (date of signature, September 24, 1999), position: Human Resources Representative; (2) the petitioner, from June 1997 to June 1998, position: Revenue Auditor; and (3) International Bank for Commerce, Dakar, Senegal, from April 1994 to April 1996, position: Internal Auditor. The beneficiary listed that while he was employed with the bank that, "from January 1995 to April 1996, I was also in charge of training and orienting the new hires at the Human Resources Department," and that he "was also responsible of the loans [sic] for the Employees (It was part of the Benefits provided by the employer), at the Human Resources Department."

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3), which provides:

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The beneficiary's experience listed on various forms in the record conflicts with the experience letters provided. The beneficiary provides on Form ETA 750B that he was employed with B.I.C.I.S. in Senegal from April 1994 to April 1996. Form G-325 submitted in support of an earlier Form I-485 Adjustment Application provides that he was employed with B.I.C.I.S. in Senegal from August 1989 to February 1996. The letters, however, provide that he was employed with B.I.C.I.S. in Senegal (or Gambia) from January 13, 1995 to April 15, 1996, and the educational attestation provides that the beneficiary completed studies in Paris, France during the academic years 1993-1994 and 1994-1995. If the beneficiary were employed in Senegal, then he could not have completed studies in Paris, France at the same time. The letters did not qualify that the beneficiary's experience was part-time, completed at another branch outside Senegal (except for the mission to Gambia), or that the beneficiary worked for the bank intermittently. Consequently, as the beneficiary's prior experience and educational claims conflict, which raises doubts on all the evidence submitted. 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.

We also note that the beneficiary's primary responsibilities were in auditing, and it is not clear how many hours could be attributed to his work in human resources, and on that basis whether he could show that he had the one year of prior experience in human resources. Additionally, the Form ETA 750A listed as a special requirement

that the position offered required the ability to speak English, French and Spanish. While French is spoken in Senegal,[7] the petitioner did not provide evidence to demonstrate that the beneficiary was able to speak Spanish.

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States, unless the petitioner is able to overcome the findings of the U.S. Consulate investigation. *See* INA Section 212(a)(6)(c), [8 U.S.C. 1182], regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

A material issue in this case is whether the beneficiary is qualified to perform the duties of the proffered position through meeting the experience requirements of the position offered. The job offered requires a Bachelor's degree based on four years of study, and one year of prior experience as a Human Resources Representative. If the beneficiary improperly represented his education and/or experience on Form ETA 750B, and signed that form under penalty of perjury, this would constitute an act of willful misrepresentation. The listing of false experience would misrepresent the beneficiary's actual qualifications in a willful effort to procure a benefit ultimately leading to permanent residence under the Act. *See Kungys v. U.S.,* 485 U.S. 759 (1988), ("materiality is a legal question of whether "misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect the official decision.")

Furthermore, a finding of misrepresentation may lead to invalidation of the Form ETA 750. *See* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

> Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

The director may pursue any additional investigation or requests for information or evidence she believes pertinent to determining whether or not there are legitimate grounds for revocation. The petitioner must be again accorded notice and opportunity to respond to any additional adverse information and it should be noted that the petitioner has standing in the proceedings pertaining to the adjudication and/or revocation of the Form I-140 visa petition, not the beneficiary.[8]

Lastly, we will address the issue of AC 21 since the director certified this issue to the AAO. If the petition's approval was improperly revoked and the director's decision is withdrawn, this would potentially allow the beneficiary the ability to port under AC 21. If, on remand the director revokes the Form I-140 petition again, the Form I-140 would no longer be valid for porting purposes.[9] Therefore, the next issue in this matter is

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[7] The Central Intelligence Agency World Factbook provides that French is the official language of Senegal, and that Wolof, Pulaar, Jola, and Mandinka are other languages spoken in Senegal. *See* https://www.cia.gov/library/publications/the-world-factbook/geos.sg.html accessed May 21, 2008.

[8] The beneficiary has standing only in the Form I-485 adjustment of status to lawful permanent resident adjudication proceedings.

[9] To find that a petition is valid for porting purposes when that petition was never approved, was revoked or, even if it was approved, if it was filed on behalf of an alien that was never entitled to the requested immigrant

whether or not the beneficiary may properly port under the provisions of AC21. The Form I-140 visa petition was approved on January 17, 2001. The Form I-485 was filed on November 16, 2001 and was pending for over 180 days at the time the director revoked the Form I-140 petition's approval. Upon review, whether or not the Form I-140 remains valid, we find that the position that the beneficiary's self-employment is not the "same or similar" to the petitioned for position, and, his offer with Shaheed's Insurance Services, would not be qualifying as Shaheed's cannot demonstrate its ability to pay the proffered wage. Therefore, the beneficiary may not avail himself of AC 21 and port to either position.

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 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.

Section 204(a)(1)(F) of the Act includes the immigrant classification for individuals holding baccalaureate degrees who are members of the professions and skilled workers under section 203(b)(3) of the Act, the classification sought in the underlying petition.

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classification would subvert the statutory scheme of the U.S. immigration laws. 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. 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.

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).

If the director ultimately properly revokes the petition, there is no basis for the beneficiary to seek benefits pursuant to AC 21.

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. 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."

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).[10]

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[10] 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).

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).

For the beneficiary to avail himself of AC 21, the original petition must remain approved [not revoked] and the position must be "in the same or a similar occupational classification as the job for which the certification was issued." *See* Section 212(a)(5)(A)(iv) of the Act. Therefore, we will examine each of the positions offered to the beneficiary.

Even if the director does not ultimately revoke the petition, the beneficiary's proposed employment does not qualify for AC 21 benefits.

The director stated that the beneficiary would be engaging in the same or similar occupation as the proffered position on the Form ETA 750A underlying labor certification to the instant petition either through self-employment or at Shaheed's Insurance Services. We withdraw that conclusion.

The Form ETA 750A Item 13 describes the proffered position as follows:

> Responsible for managing and coordinating immigrant Associates and immigration-related problems, thereby, evaluating this workforce for efficient use.
> Essential duties and responsibilities include the following:
> -Acts as a liaison between this segment of the workforce and management and co-workers.
> -Assists all management and Associates with any translation and mediation issues.
> -Assists all management and Associates with any immigration issues. . . .
> -Maintains tracking and reporting data on all immigrant associates. Identifies high potential immigrant associates and develops progress plan for career growth.
> -Responsible for maintaining a consistent and regular list of all immigrant associates.
> -Responsible for tracking working authorizations and immigrant-related problems.
> -Provides administrators with a quick and easy access to information regarding the [CIS] authorized associates.

> -Assists immigrant associates to a better understanding of the Company's expectations.
> -Ensure[s] that a maximum level of confidentiality is achieved and maintained in the area of the [CIS] authorized associates.
> -Coordinates recruiting of non-English speaking candidates.
> -Assists in orienting new associates which fall into this category.
> -Coordinates enrollment in English classes.
> -Ensures that all applicable laws, rules, regulations and controls of the Company, the State and [CIS] are enforced throughout the Human Resources Department.
> -Assists immigrant associates to a better understanding of the Benefits plan, payroll issues, employment issues, outrageous guests services, the Company's opportunities and the Company's policies.
> -Other duties as assigned.

On Form ETA 750A, DOL assigned the proffered position the Dictionary of Occupational Title (DOT) code 166.267-047, "Human Resource Advisor." The DOT provides the following duties and responsibilities for a Human Resources Advisor, 166.267-047:

> Provides establishment personnel assistance in identifying, evaluating, and resolving human relations and work performance problems within establishment to facilitate communication and improve employee human relations skills and work performance: Talks informally with establishment personnel and attends meetings of managers, supervisors, and work units to facilitate effective interpersonal communication among participants and to ascertain human relations and work related problems that adversely affect employee morale and establishment productivity. Evaluates human relations and work related problems and meets with supervisors and managers to determine effective remediation techniques, such as job skill training or personal intervention, to resolve human relations issues among personnel. Develops and conducts training to instruct establishment managers, supervisors, and workers in human relation skills, such as supervisory skills, conflict resolution skills, interpersonal communication skills, and effective group interaction skills. Schedules individuals for technical job-related skills training to improve individual work performance. May participate in resolving labor relations issues. May assist in screening applicants for establishment training programs. May write employee newsletter. May operate audio-visual equipment to review or to present audio-visual tapes for training program.

See http://www.occupationalinfo.org/16/166267046.html (accessed May 19, 2008).

The DOT description relates to communication, training, and services performed "within the establishment," or company, and among personnel.

The beneficiary's self-employment offer letter dated December 27, 2004 states the following duties and responsibilities for his role there:

- Providing assistance to taxpayers who speak English as a second language ("ESL taxpayers").
- Providing tax education and outreach to taxpayers who have limited English proficiency.
- Improve communication and identify tax problems faced by ESL taxpayers.

- Inform ESL taxpayers about their federal rights and responsibilities, for a better understanding of the federal tax system.
- Provide assistance to a non-filer in the preparation of prior year tax return (s).
- Preparation of an amended return, if such assistance is necessary to resolve a controversy with the Internal Revenue Service (IRS).
- Incidental assistance to ESL taxpayers in the preparation of federal tax returns or other required tax forms.

Neither the duties of the proffered position nor the description of duties and responsibilities of the Human Resource Advisor, 166.267-047, mention anything about assistance with tax preparation to non-English speakers. The Human Resource Advisor position as delineated on Item 13 of the Form ETA 750A reflects a position that involves helping immigrants with work authorization and liaison between the petitioner's management and its immigrant staff members. Even one of its final "catch-all" bullet-points in its job description discusses helping immigrants understand benefits, payroll, and employment issues, but never discusses taxes, tax issues, or assistance with taxes.

For comparison, the DOT code for a tax preparer, 219.362-070, provides:

> Prepares income tax return forms for individuals and small businesses: Reviews financial records, such as prior tax return forms, income statements, and documentation of expenditures to determine forms needed to prepare return. Interviews client to obtain additional information on taxable income and deductible expenses and allowances. Computes taxes owed, using adding machine, and completes entries on forms, following tax form instructions and tax tables. Consults tax law handbooks or bulletins to determine procedure for preparation of atypical returns. Occasionally verifies totals on forms prepared by others to detect errors of arithmetic or procedure. Calculates form preparation fee according to complexity of return and amount of time required to prepare forms.

See http://www.occupationalinfo.org/21/219362070.html (accessed May 19, 2008).

The beneficiary's services would be more in line with the occupation of tax preparer. Interviewing clients would encompass the beneficiary's role in "outreach" and assisting ESL clients in understanding the tax filing process.

The director determined that despite the failure to include tax work in the proffered position's description, overall the beneficiary would be performing identical services since it would provide liaison services between aliens and the IRS. **The AAO does not concur. Both the proffered position description and DOL's** description of Human Resource Advisor do not involve liaison between federal agencies and non-English speaking immigrants but rather liaison between management of a business and its employees. The beneficiary did not indicate that it was employing any other employees in his sole proprietorship. Accordingly, he would have no employees to assist with human resources matters. The beneficiary would not be eligible to port to his sole proprietorship position through the provisions of AC21 because it is not the same or similar to the proffered position based on an examination of the relevant DOT codes.

The AAO withdraws that portion of the director's decision where the director determined that the beneficiary's sole proprietorship employment was the same or similar to the proffered position. The job descriptions for the beneficiary's sole proprietorship position, and the proffered position, are not the same or

similar based on a review of the relevant DOT codes. Additionally, the AAO agrees with the director that the beneficiary would not be able to port to self-employment.

Under 20 C.F.R. § 656.3 employer means:

> (1) A person, association, firm or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN). For purposes of this definition, an "authorized representative" means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters. A labor certification can not be granted for an Application for Permanent Employment Certification filed on behalf of an independent contractor.
>
> (2) Persons who are temporarily in the United States, including but not limited to, foreign diplomats, intra-company transferees, students, and exchange visitors, visitors for business or pleasure, and representatives of foreign information media can not be employers for the purpose of obtaining a labor certification for permanent employment.

20 C.F.R. § 656.3 provides that employment means, "Permanent full-time work by an employee for an employer other than oneself."

Allowing the beneficiary to port to self-employment would be in conflict with 20 C.F.R. § 656.3. Additionally, self-employment would present issues regarding the legitimacy of the employment, whether the employment would provide regular full-time employment, whether a beneficiary would perform the duties listed on the respective Form ETA 750, or work in a hybrid position with part job duties and part management duties unspecified on Form ETA 750, which would eviscerate the "same or similar" nature of the job duties between the certified position and the self-employed position.

DOL would not certify a position for self-employment. Where the petitioner is owned by the person applying for the position, it is not a bona fide offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). Accordingly, to continue to utilize the underlying original labor certification, the beneficiary who "ported" should not be accorded more favorable or different treatment than if he were the original applicant on the labor certification. *See also Hall v. McLaughlin*, 864 F.2d 868 (D.C. Cir. 1989), where the court affirmed the district court's dismissal of the alien's appeal from the Secretary of Labor's denial of his labor certification application. The court found that where the alien was the founder and corporate president of the petitioning corporation, absent a genuine employment relationship, the alien's ownership in the corporation was the functional equivalent of self-employment.

Next, we will examine the beneficiary's "alternate" job offer. The letter from Shaheed's Insurance Services, dated December 22, 2004, described its job offer to the beneficiary as follows:

> As posted, the description of the work to be performed includes, but is not limited to being responsible for the managing and coordinating of Immigrant Associates and immigrant-related issues relative to their needs as addressed by our industry. The immigrant population in Memphis and Shelby County is growing tremendously and the skills and the qualifications

that you possess will translate into essential organizational currency in reaching and servicing the needs of this population.

A separate page lists the following duties and responsibilities:

- Acts as a liaison between this segment of the workforce [Immigrant Associates], the management and the clients.
- Assists all Management and Associates with any translation and/or mediation issues.
- Assists all Management and Associates with any Immigration issues such as I-9 Compliance.
- Maintains tracking and reporting data on all Immigrant Associates. Identifies high potential Immigrant Associates and develops progress plan for career growth.
- Provides Administrators with a quick and easy access to information regarding [CIS] authorized workers.
- Assists Immigrant Associates and Clients to a better understanding of the Company's expectations.
- Coordinates insurance Enrollment for non-speaking English [sic].
- Assists in orienting new Associates, which fall into this category.
- Ensures that all applicable laws, rules, regulations and controls of the Company, the State and [CIS] are enforced.
- Assists Immigrant Associates to a better understanding of the Insurance Services.
- Other duties as assigned.

The AAO concurs with the director's determinations that Shaheed's Insurance Services's job description reflects the same or similar job duties of the proffered position.[11] However, Shaheed's Insurance Services cannot demonstrate its ability to pay the proffered wage. We additionally question whether Shaheed's Insurance Services is a bona fide employer able to extend a valid job offer to the beneficiary.

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.

To validly continue to utilize the underlying petition and Form ETA 750, the new offer of employment must similarly be accompanied by evidence that the new employer has the ability to pay the proffered wage. In certifying the labor certification, DOL has certified the wage for the applicable position to ensure that foreign workers are paid the prevailing wage for the position level and occupation. Simultaneously, this ensures that foreign workers will not provide employers a more attractive and less expensive labor force, and protects the U.S. workforce in that similarly placed foreign workers cannot be paid less and reduce U.S. wages. *See* 20

[11] Shaheed's Insurance Service letter lists its address in Memphis, Tennessee and references Memphis and Shelby counties. The proffered position's location was Robinsonville, Mississippi.

C.F.R. § 656.2(c)(1)(ii) "the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed."

Portability provides a situation not unlike the case of a petitioner demonstrating that it is a successor-in-interest to a prior entity. To show that the new entity qualifies as a successor-in-interest to the original petitioner requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company, and has the ability to pay from the date of the acquisition. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Moreover, the petitioner must establish that the predecessor enterprise had the financial ability to pay the certified wage at the priority date. *See Id.* at 481.

Similarly, in the case of portability, a new employer seeking to hire the beneficiary based on the underlying labor certification and approved I-140 would need to show its ability to pay the proffered wage from the date that the beneficiary ported, and the initial petitioner would need to establish its ability to pay until the date that the beneficiary ported. *See e.g.* 8 C.F.R. § 204.5(g)(2); *Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481.

While Section 106(c)(1) was intended to resolve the issue of lengthy adjudications, it was not intended as an avenue to circumvent protections established for U.S. workers in allowing foreign nationals to port to positions where they may be paid less than the prevailing wage, and therefore become a more attractive workforce than a similarly situated U.S. worker. *See* 20 C.F.R. § 656.2(c)(1)(ii).

In support of Shaheed's Insurance Services ability to pay the proffered wage, it submitted a "pro forma income statement (annual report)" dated for the time periods ending December 31, 2004 and 2005. The 2004 statement provided lists "total revenue" in the amount of $94,545, and net income in the amount of $55,531. The 2005 statement provided lists "total revenue" in the amount of $94,545,[12] and net income in the amount of $26,772, which is less than the proffered wage of $28,600.

Additionally, the income statement submitted is unaudited. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements submitted with the petition are not persuasive evidence. The statements are in a compilation format rather than audited. Statements produced pursuant to a compilation are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Based on the documentation submitted, Shaheed's Insurance Services cannot establish its ability to pay the proffered wage from the date that the beneficiary ported. The company failed to provide valid evidence in accordance with 8 C.F.R. § 204.5(g)(2), and further, the evidence submitted did not demonstrate that the entity had the continuing ability to pay the beneficiary the proffered wage.

Further, we are not convinced that Shaheed's Insurance Services is a valid business. A general search of the Internet on "Shaheed's Insurance Services" in Memphis, Tennesse provides no results either in business or phone listings. A more specific search of Shaheed's Insurance Services in the Tennessee Department of State

[12] The two statements provide that the business generated the exact same amount of revenue in both years, which we find to be unusual.

database similarly provides no results. Therefore, we are not convinced that Shaheed's Insurance Services is a valid business, that it has any employees, or would have a need to employ an Associate Relations Assistant.

As Shaheed's Insurance Services cannot establish its ability to pay the proffered wage, the beneficiary cannot validly port to this position.

Similar provisions that let employers continue processing under the initial labor certification require that the new entity pay the certified wage as listed. As noted above, in the case of a successor-in-interest, the new entity must establish that it has the ability to pay from the date of the acquisition. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481. Similarly, in a case where a petitioner was previously allowed to substitute a new beneficiary into an existing certified labor certification, the petitioner was required to pay the wage listed on Form ETA 750.[13]

Further, if based on Section 204(j) of the Act, the beneficiary is porting to a "same or similar" position, it would be reasonable to expect that the new position pay an amount similar to the wage certified. While the employer subsequent to the initial petitioner may not pay the exact amount that the beneficiary was earning with the petitioner, a new employer's offer should not be less than the proffered wage.

Additionally, if we allowed a beneficiary to port to new employment prior to attaining permanent residence without the new employer establishing its ability to pay the proffered wage, this would remove the inherent safeguards established to protect U.S. workers in that it would make a foreign worker more attractive if the employer could pay the foreign worker less, or would not have to demonstrate its ability to pay the proffered wage.

Based on the foregoing, we withdraw the director's basis of revocation, but remand the petition to the director to determine whether the beneficiary meets the qualifications of the certified labor certification, or whether this application, or any prior application by the beneficiary contains any fraud or material misrepresentations that would warrant invalidation of the labor certification. Further, we concur with the director that the beneficiary may not port or avail himself of AC 21 with respect to the job offers submitted.

The director may pursue any additional investigation or requests for information or evidence she believes pertinent to determining whether or not there are legitimate grounds for revocation. The petitioner must be

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[13] DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The Kooritzky decision effectively led 20 CFR 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to Citizenship and Immigration Services ("CIS") based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule becomes effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications.

again accorded notice and opportunity to respond to any additional adverse information and it should be noted that the petitioner has standing in the proceedings pertaining to the adjudication and/or revocation of the Form I-140 visa petition, not the beneficiary.[14] Further, the AC 21 issues raised related to the beneficiary's portability should be addressed in relation to the beneficiary's Form I-485 Adjustment of Status.

In view of the foregoing, the case is remanded to the director for consideration of the potential revocation issues stated above. If the director requests any additional evidence considered pertinent, the petitioner may be provided a reasonable period of time to be determined by the director to submit a response. In that event, upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision to revoke the approval of the petition is withdrawn. The matter is remanded to the director for further action in accordance with the foregoing.

[14] The beneficiary has standing in the Form I-485 adjustment of status to lawful permanent resident adjudication proceedings.