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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: FEB 07 2011

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (TSC), revoked the approval of the third preference visa petition on July 8, 2009. On July 27, 2009, the beneficiary of the visa petition filed a Form I-290B, Notice of Appeal or Motion, with the Administrative Appeals Office (AAO), appealing the director's decision to revoke the approval of the visa petition. On October 18, 2010, the TSC director rejected the appeal. The decision of the director revoking the approval of the petition is now before the AAO on appeal. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

Upon *de novo* review, the director's decision dated October 18, 2010 rejecting the appeal is procedurally erroneous and will be withdrawn. The AAO, not the director, pursuant to 8 C.F.R. § 103.3(a)(2)(iv) shall have the jurisdiction over a properly filed appeal in this case.[2] The appeal will be rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1). *See infra.*

The petitioner is a [redacted] It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director of the Vermont Service Center (VSC) initially approved the petition on May 3, 2003. Thereafter, however, the TSC director in response to the discovery of potentially fraudulent information in the petition approval process, issued a notice of intent to revoke (NOIR) on March 30, 2009 and subsequently found fraud and revoked the petition, accordingly. Specifically, the director determined that the petitioner had not complied with the DOL's advertising and recruitment requirements, and that the application for labor certification involved willful misrepresentation.

On appeal, counsel for the beneficiary contends that since the beneficiary has ported to another similar job after the petition was approved and because the beneficiary's application to adjust status (Form I-485) had been pending and remained unadjudicated for more than 180 days, the beneficiary, and not the original petitioner, shall have standing to file the appeal with the AAO. This is allowed by the job flexibility provisions of section 204(j) of the Act, 8 U.S.C. § 1154(j), as added by section 106(c) of the American Competitiveness in the Twenty First Century Act of 2000 (AC21), according to counsel. Counsel specifically indicates:

> A beneficiary's interest in an approved employment-based visa petition is strongest in cases where the beneficiary has changed jobs in reliance on the

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[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).

[2] The regulation at 8 C.F.R. § 103.3(2)(iv) specifically states, "If the reviewing official will not be taking favorable action or decides favorable is not warranted, that official shall promptly forward the appeal and the relating record of proceeding to the AAO in Washington, DC."

> approved petition, insofar as it allows him to seek adjustment of status without the support of his original petitioner, and where he has indeed cut ties with the original petitioner, or where the original petitioner no longer exists. The nature of employment-based petitions is such that the very identity of the petitioner is constantly evolving – managers come and go, businesses change ownership – and the relationship between petitioner and beneficiary is not a static one, in the same manner as in family-based petitions. For this reasons, 8 U.S.C. § 1154(j) explicitly allows a beneficiary to end his reliance on the original petitioner after his adjustment application has been pending for a reasonable period of time. To then deny a beneficiary the right to challenge the arbitrary revocation of such a petition, despite his statutory right to change jobs once the petition is approved, not only undermines Congressional intent, but also violates the beneficiary's Constitutional guarantee of due process.

Counsel in essence states that the beneficiary in this case is the affected party as defined by the regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B), and therefore, has standing to appeal the revocation of the petition.

Counsel's assertions run contrary to the regulations, however. The regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B) specifically states that "an affected party is the person or entity with legal standing in a proceeding, and it does not include the beneficiary of a visa petition." The explicit language of the regulation noted above suggests that the beneficiary and/or his counsel would not be authorized to file the appeal in this matter, and the appeal, since it was authorized by the beneficiary and filed by the beneficiary's counsel in this case, is improperly filed. 8 C.F.R. § 205.2(d); 8 C.F.R. § 103.3(a)(1)(iii)(B); 8 C.F.R. § 103.3(a)(2)(v)(A)(1).

Even so, this does not answer the more specific question of whether the beneficiary may take the place of and become the petitioner of an I-140 petition in AC21 situations. Given the novel issue raised by the appeal, i.e., whether AC21 permits the beneficiary to have legal standing in this proceeding, the AAO will address this issue.[3]

To address this issue, it is important to analyze section 106(c) of AC21 and determine the interpretation of the statute as intended by Congress. Specifically, section 106(c) of AC21 added the following to section 204(j) to the Act:

> 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.

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[3] The beneficiary's counsel will be provided a courtesy copy of this decision.

American Competitiveness in the Twenty-First Century Act of 2000 (AC21), Pub. L. No. 106-313, § 106(c), 114 Stat. 1251, 1254 (Oct. 17, 2000); § 204(j) of the Act, 8 U.S.C. § 1154(j).

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.

Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int'l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975 (2d Cir.), *cert. denied*, 112 S. Ct. 416 (1991).

In addition, we are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). 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).

Counsel for the beneficiary seems to suggest that the beneficiary has become the petitioner with respect to the approved I-140 petition by virtue of the portability provisions of AC21. That is, counsel suggests that the beneficiary became the petitioner of the I-140 petition once the I-140 petition was approved, the I-485 application had been pending for 180 days, and the beneficiary ported to a new employer and began his new employment in a similar position as the job offered by the petitioner.

It is true that, absent revocation, the beneficiary would have been eligible for adjustment of status with a new employer provided, as counsel points out, that "the new job is in the same or similar occupation as that for which the petition was filed." However, 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).[4]

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[4] Furthermore, 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

The statutory language provides no benefit or right for a new employer to "substitute" itself for the previous petitioner. Section 106(c) states that the underlying I-140 petition "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." Pub. L. No. 106-313, § 106(c), 114 Stat. 1251, 1254 (Oct. 17, 2000); § 204(j) of the Act, 8 U.S.C. § 1154(j). Thus, the statute simply permits the beneficiary to change jobs and remain eligible to adjust based on a prior approved petition if the processing times reach or exceed 180 days.

There is no evidence that Congress intended to confer anything more than a benefit to beneficiaries of long delayed adjustment applications. In other words, the plain language of the statute indicates that Congress intended to provide the alien, as a "long delayed applicant for adjustment," with the ability to change jobs if the individual's I-485 took 180 days or more to process. Section 106(c) of AC21 does not mention the rights of a subsequent employer and does not provide other employers with the ability to take over already adjudicated immigrant petitions.

Counsel has failed to show that the passage of AC21 granted any rights, much less benefits, to subsequent employers of aliens eligible for the job portability provisions of section 106(c). Based on a review of the statute and legislative history, the AAO must reject counsel's assertions that the beneficiary has now become the petitioner, and an affected party, in these proceedings.

As no evidence of record suggests that the petitioner consented to the filing of the appeal, the appeal was improperly filed pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1) and must be rejected.

All other issues that counsel raises, such as the beneficiary's qualification for the proffered job and whether the petitioner complied with the U.S. Department of Labor's recruiting requirements, are moot and will not be discussed further.

ORDER: The appeal is rejected as improperly filed.

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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 USCIS backlogs, in the hopes that the application might remain unadjudicated for 180 days. In a case pertaining to the revocation of an I-140 petition, the Ninth Circuit Court of Appeals determined that the government's authority to revoke a Form I-140 petition under section 205 of the Act survived portability under section 204(j) of the Act. *Herrera v. USCIS*, 571 F.3d 881 (9th Cir. 2009). Citing a 2005 AAO decision, the Ninth Circuit reasoned that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start. The Ninth Circuit stated that if the plaintiff's argument prevailed, an alien who exercised portability would be shielded from revocation, but an alien who remained with the petitioning employer would not share the same immunity. The Ninth Circuit noted that it was not the intent of Congress to grant extra benefits to those who changed jobs.