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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

[redacted]

B4

DATE MAY 10 2012 Office: VERMONT SERVICE CENTER FILE [redacted]

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:

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.

Thank you.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, revoked the employment-based preference visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(*1*).

The petitioner was a law firm. It sought to employ the beneficiary permanently in the United States as a system administrator. As required by statute, a labor certification approved by the Department of Labor accompanied the petition. The petition was initially approved on December 26, 2001. Upon further investigation, the director issued a notice of intent to revoke the petition's approval. The director determined that the petitioner had not established that it has had the continuing financial ability to pay the proffered wage, that it has not established the required qualifying experience of the beneficiary, that it is no longer in business and cannot extend a *bona fide* job offer, and that in connection with these findings, it was appropriate to additionally make a finding of fraud. The director revoked the petition's approval on January 8, 2009.[1]

The record of proceeding contains a properly executed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, for the beneficiary's representative. Additionally, the Form I-290B, Notice of Appeal or Motion, was signed by the beneficiary's representative. United States Citizenship and Immigration Services' (USCIS) regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B).

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[1]The appeal was also untimely filed. The regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party or the attorney or representative of record must file the complete appeal within 15 days of service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 18 days. *See* 8 C.F.R. § 103.5a(b). The date of filing is not the date of mailing, but the date of actual receipt. *See* 8 C.F.R. § 103.2(a)(7)(i). Neither the Immigration and Nationality Act (the Act) nor the pertinent regulations grant the AAO authority to extend the 18-day time limit for filing an appeal.

The record indicates that the service center director issued the decision on January 8, 2009. It is noted that the service center director properly gave notice to the petitioner that it had 18 days to file the appeal. Neither the Act nor the pertinent regulations grant the AAO authority to extend this time limit.

Counsel dated the Form I-290B, February 4, 2009. It was not received by the service center until February 5, 2009, or 28 days after the decision was issued. Counsel for the beneficiary asserts that the decision was mailed later and submits an envelope in support. However, the AAO cannot confirm the later asserted mailing date from the information before us, only the January 8, 2009, date. Accordingly, the appeal was untimely filed.

It is noted that the appeal was filed by counsel who is also a principal of the law firm of [redacted] It is this employer to whom the beneficiary seeks to transfer his employment from the original petitioner[redacted] On appeal, counsel asserts that the beneficiary is entitled to "port" to [redacted] in a same or similar position as the job offered by the petitioner pursuant to the job flexibility provisions of section 204(j) of the Immigration and Nationality Act (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) since his adjustment of status application has been pending more than 180 days.

The Form G-28, Notice of Entry of Appearance as Attorney or Representative, that was submitted to the record in order to file the Form I-290B was not by an authorized representative of the original petitioner. As noted above, the beneficiary of a visa petition is not a recognized party on appeal. *See* 8 C.F.R. § 103.2(a)(3). As the beneficiary and a new employer, [redacted] would not be recognized parties in this matter, and the new employer, either as self-represented or through its counsel would not be authorized to file the appeal in this matter. 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)*.

However, given the unusual issue raised by the appeal, i.e., whether AC21 permits the new employer to have legal standing in this proceeding, the AAO will address this. To make this determination, the AAO must therefore discuss whether a new employer takes the place of an original petitioner in AC21 situations where the beneficiary's I-485 has been pending for 180 days or more.

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.* § 211 of the Act, 8 U.S.C. § 1181 ("Admission of Immigrants into the United States"); § 245 of the Act, 8 U.S.C. § 1255 ("Adjustment of Status of Nonimmigrant to that of Person Admitted for Permanent Residence").

[redacted] was disbarred September 16, 2005. *See* http://www.justice.gov/eoir/discipline.htm (accessed March 12, 2012). Maryland online records also indicate that [redacted] status was "forfeited" as of October 6, 1998. *See* http://sdatcert3.resiusa.org/UCC-Charter/DisplayEntity_b.aspx?EntityID=W04371407&En... (accessed March 13, 2012). Where there is no legally 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. Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case. Further, there is no evidence in the record to suggest that [redacted] is a successor-in-interest to [redacted]

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 [Secretary of Homeland Security], 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.

(Emphasis added.)

In this matter, as the beneficiary was present in the United States at the time the I-140 petition was approved, he was eligible to and chose to apply to adjust his status in the United States to that of a permanent resident instead of pursuing consular processing abroad. Furthermore, based on the record of proceeding, as the beneficiary's I-485 was pending for more than 180 days, it would appear, absent revocation, that the approved petition would remain valid with respect to a new position with a different employer.[3] Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000).

To determine whether a new employer may take the place of and become the petitioner of an I-140 petition in AC21 situations, 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:

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[3] It should be noted that at the time AC21 came into effect, legacy 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 was as follows: first, an alien obtains an approved employment-based immigrant visa petition; second, the alien files an application to adjust status; 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.

> 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.

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).

Further, words shall be given their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The language should be construed 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).

This proceeding seems to suggest that [redacted] would become the petitioner with respect to the approved I-140 petition by virtue of the portability provisions of AC21. That is, [redacted]ould become the petitioner of the I-140 petition which had been filed by [redacted] if and when the Form I-140 petition was approved, the I-485 application had been pending for 180 days, and the beneficiary began his new employment.

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).

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, which is not revoked, 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, which have been revoked.

The AAO does not determine 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 does not find that [redacted] has now become the petitioner, and an affected party, in these proceedings.

ORDER: The appeal is rejected as improperly filed.