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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 0 3 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

cc:

DISCUSSION: The Director, Texas Service Center, revoked the approval of the employment-based immigrant visa petition. In connection with the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485), the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The petitioner filed a subsequent motion to reopen and to reconsider the director's revocation decision which was dismissed by the director. The matter was appealed to the Administrative Appeals Office (AAO). The appeal will be rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1). The director's decision to deny the petition will not be disturbed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department 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." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner describes itself as a convenience store. It seeks to permanently employ the beneficiary in the United States as a manager. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). 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 determined that the petitioner had failed to establish that the beneficiary was eligible to be classified as a skilled worker. Accordingly, the director revoked the prior approval of the petition.

On appeal to the AAO, the beneficiary's new employer, through its counsel, contends that the director improperly denied the petition.[1] As a threshold issue, we must determine whether the beneficiary's new employer has legal standing to appeal in this proceeding.

The regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B) unequivocally states:

> For purposes of this section and §§ 103.4 and 103.5 of this part, affected party (in addition to the Service) means the person or entity with legal standing in a proceeding. **It does not include the beneficiary of a visa petition.** (Emphasis added).

Further, the regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(1) states, "An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed."

The language of the cited regulations explicitly states that only the affected party has legal standing and is authorized to file the appeal in this matter. Neither the beneficiary nor his

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[1] Counsel for the beneficiary's new employer will be provided a courtesy copy of this decision.

counsel has legal standing in this visa petition proceeding. The beneficiary's new employer is also not the affected party and therefore, has no legal standing to file the appeal.

In this case, however, the appeal was filed and authorized by the beneficiary's new employer. The record contains no evidence showing that the original petitioner consented to the filing of the appeal. For this reason, we find that is not entitled to file the appeal in this case. Further, because the beneficiary's new employer is not entitled to appeal in this proceeding, the appeal was not properly filed, and the appeal must, therefore, be rejected.

On appeal, counsel for the beneficiary's new employer infers that , has legal standing to appeal the matter and continue the proceeding since the beneficiary has ported from the petitioner pursuant to section 204(j) of the Act, and that the beneficiary's new employer may take the place of and become the petitioner of an I-140 petition in situations involving the application of section 106(c) of the American Competitiveness in the Twenty First Century Act of 2000 (AC21).[2] We disagree.

To address this issue, we must first 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) of 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.

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

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[2] On October 17, 2000 Congress passed section 106(c) of AC21, which amended section 204(j) of the Act; 8 U.S.C. § 1154(j).

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 infers that the beneficiary and his new employer were given the authority by the petitioner of the Form I-140 petition once the petition was approved, the I-485 application had been pending for 180 days, and the beneficiary ported to a new employer and began her 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 beneficiary's 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).[3]
The statutory language provides no benefit or right for a new employer to "substitute" itself for the previous petitioner. Section 106(c) of AC21 states that the underlying Form I-140 petition "shall remain valid with respect to a new job if the individual changes jobs or employers if the new

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[3] 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 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 a Form 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.

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 Form 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 for the beneficiary's new employer has failed to show that the passage of AC21 granted any rights or 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 inferences that the beneficiary and/or his new employer have now become the petitioner, and an affected party, in these proceedings.

As no evidence of record suggests that the original petitioner authorized 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. Further, since the appeal is rejected, we will not elaborate on the question of whether the beneficiary qualifies for the position offered and whether the petitioner has established its ability to pay the proffered wage.

As the appeal was not properly filed, and it is unclear whether or not the petitioner consented to having an appeal filed on its behalf, it will be rejected. 8 C.F.R. § 103.3(a)(2)(v)(A)(*1*).

It is noted that the director issued the decision dismissing the motion to reopen the director's revocation decision on May 23, 2011. The director properly gave notice to the petitioner that it had 33 days to file the appeal. The Form I-290B, Notice of Appeal or Motion, was filed on April 10, 2012, or 39 days after the decision was issued. An untimely appeal must be rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(*1*). Accordingly, the appeal is untimely.

ORDER: The appeal is rejected as improperly filed. The director's decision to revoke the approval of the petition remains undisturbed.