



November 11, 2017

PM-602-0149

## Policy Memorandum

SUBJECT: *Matter of V-S-G- Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017)

### Purpose

This policy memorandum (PM) designates the attached decision of the Administrative Appeals Office (AAO) in *Matter of V-S-G- Inc.* as an Adopted Decision. Accordingly, this adopted decision establishes policy guidance that applies to and binds all U.S. Citizenship and Immigration Services (USCIS) employees. USCIS personnel are directed to follow the reasoning in this decision in similar cases.

*Matter of V-S-G- Inc.* clarifies that beneficiaries of valid employment-based immigrant visa petitions who are eligible to change jobs or employers (“port”) and who have properly requested to do so under section 204(j) of the Immigration and Nationality Act, 8 U.S.C. § 1154(j), are “affected parties” under DHS regulations for purposes of revocation proceedings of their visa petitions and must be afforded an opportunity to participate in those proceedings. Other kinds of visa petition beneficiaries, and the subsequent employers of beneficiaries who have ported or sought to port, are not affected parties under DHS regulations and may not participate in visa revocation proceedings.

### Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

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## ADOPTED DECISION

### MATTER OF V-S-G- INC.

ADMINISTRATIVE APPEALS OFFICE  
U.S. CITIZENSHIP AND IMMIGRATION SERVICES  
DEPARTMENT OF HOMELAND SECURITY

November 11, 2017<sup>[1]</sup>

- (1) Beneficiaries of valid employment-based immigrant visa petitions who are eligible to change jobs or employers (“port”) and who have properly requested to do so under section 204(j) of the Immigration and Nationality Act, 8 U.S.C. § 1154(j), are “affected parties” under DHS regulations for purposes of revocation proceedings of their visa petitions and must be afforded an opportunity to participate in those proceedings.
- (2) Other kinds of visa petition beneficiaries, and the subsequent employers of beneficiaries who have ported or sought to port, are not affected parties under DHS regulations and may not participate in visa revocation proceedings.

FOR THE PETITIONER: Leena Snellman, Esquire, Owings Mills, Maryland

This decision settles a tension between longstanding agency regulations and subsequent developments in the law regarding who is a cognizable party to a Form I-140, Immigrant Petition for Alien Worker. Most immigration benefit proceedings involve one recognized party, either an “applicant” seeking a benefit for himself or herself (and possibly for derivative family members as well) or a “petitioner” who seeks a benefit on behalf of someone else (who is known as a “beneficiary”). Traditionally, the applicant or petitioner is the only recognized party to the proceeding; that is, the beneficiary of a petition generally does not have the ability to participate in the immigration proceeding initiated by the petitioner. Today, we explore a scenario in which a Form I-140 beneficiary may become a recognized party in certain limited circumstances in light of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21) and one of its

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<sup>1</sup> On April 28, 2017, we issued this decision as a non-precedent decision. We have reopened this decision on our own motion under 8 C.F.R. § 103.5(a)(5)(i) for the purpose of making revisions in preparation for USCIS designating it as an Adopted Decision.

amendments to the immigration laws. In so doing, we will explain the current USCIS interpretation of applicable regulations to allow such a beneficiary, described below, to participate in relevant administrative proceedings.

## I. INTRODUCTION

First, we need to set the stage by introducing the case-specific facts and procedural history, as well as the evolving legal landscape that informs our analysis. The Petitioner in this case, Vision Systems Group Inc. (VSG), is (or was) an information technology services company that sought to employ the Beneficiary, an Indian national, in a permanent position as a software engineer.<sup>2</sup> More specifically, the Petitioner sought second preference (EB-2) immigrant classification of the Beneficiary as a member of the professions holding an advanced degree.<sup>3</sup> To this end, the Petitioner first secured a labor certification from the Department of Labor (DOL) in 2005, the first step in the process, and, in 2006, filed the certification with a Form I-140 immigrant petition with U.S. Citizenship and Immigration Services (USCIS). USCIS later approved the Form I-140 petition.

A beneficiary of an approved I-140 visa petition may file a Form I-485, Application to Register Permanent Residence or Adjust Status (the adjustment of status application), which, if approved, affords the beneficiary lawful permanent residence in the United States. Before such an application can be filed, however, a visa must be immediately available to the beneficiary. Visa availability is determined by a beneficiary's "priority date," which, in this context, is set on the date of filing the labor certification with DOL. This priority date is essential to each I-140 petition, and particularly for nationals of certain countries (such as India, at present) where the demand for certain visa categories greatly exceeds visa availability.<sup>4</sup> When demand exceeds supply for a particular visa category or foreign state and, therefore, the preference visa category or foreign state is oversubscribed, the Department of State must impose a cut-off date. When the Department of State imposes a cut-off date, only beneficiaries with a priority date earlier than the cut-off date may apply for adjustment. In 2007, the Beneficiary's 2005 priority date became current (meaning, a visa became immediately available), and he accordingly filed his adjustment of status application.

Priority dates generally advance with time, but when more people apply for a visa in a particular category than there are visas available, a priority date that is current one month may not be current the next month. This is called visa retrogression. Retrogression, along with general limits on visa availability, can result in applicants from certain countries in certain preference categories waiting years to be eligible to receive a visa number after filing an application for adjustment. This is what

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<sup>2</sup> We are uncertain whether VSG exists, in its own right or through a successorship, such that it can pursue its interests in this petition. We notified VSG of this revocation proceeding by mail to the last known address of record, but we received no reply. According to New Jersey records, VSG incorporated in that state, but we could not verify that it currently is an actively registered company in New Jersey, the main location of the job offer in this matter.

<sup>3</sup> See Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

<sup>4</sup> See U.S. Dep't of State, Bureau of Consular Affairs, Visa Bulletin (August 2017). The Beneficiary's priority date recently again became current.

happened in this case, when the Beneficiary's priority date was no longer current, USCIS placed his adjustment application on hold until his priority date had again sufficiently advanced, both for the second preference immigration category and his country of origin.<sup>5</sup>

Prior to 2000, if the beneficiary changed jobs or employers while waiting for his priority date to become current, the new employer would have needed to file a new labor certification and Form I-140 petition. Otherwise, the beneficiary would be bound to the same job with his sponsoring employer until a priority date became current and he adjusted status to that of a lawful permanent resident.

In 2000, however, Congress enacted the American Competitiveness in the Twenty-first Century Act of 2000 (AC21).<sup>6</sup> As explored further below, AC21 included a "portability" provision – codified at section 204(j) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1154(j), that allows a beneficiary of a valid employment-based immigrant visa petition, whose adjustment of status application has been pending for 180 days or more, to change the intended job or employer if the new job is in the same or similar occupational classification, without relying upon the new employer to file a new labor certification or Form I-140 to support his or her adjustment of status.<sup>7</sup>

And that is what happened here. The Beneficiary first changed employers and took a new position with Z, Inc. in 2010 and then changed employers a second time to Marlabs, Inc. in 2011.<sup>8</sup> Meanwhile, the president of VSG (the original Petitioner) was convicted of mail fraud in connection with another USCIS petition. As a result, USCIS sought to revoke the approval of this immigrant visa petition filed by VSG on behalf of the Beneficiary (along with those of other VSG beneficiaries). Following the then applicable regulations and practice,<sup>9</sup> USCIS sent a notice of intent to revoke (NOIR) the approval of the petition to Petitioner's counsel (who also happened to represent the Beneficiary in this case). The NOIR stated that VSG's two principals had pled guilty

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<sup>5</sup> See sections 201(d) of the Act (annual employment-based visa limitation), 202 of the Act (per country limitation) and 203(b)(2)(A) of the Act (second preference visas limitation), 8 U.S.C. §§ 1151(d), 1152, 1153(b)(2)(A).

<sup>6</sup> Pub. L. No. 106-313, 114 Stat. 1251.

<sup>7</sup> Today, we are concerned with Form I-140 beneficiaries and their porting scheme under section 204(j) of the Act, as enacted by AC21, and for purposes of convenience, will refer to section 204(j) colloquially as "AC21." We note, however, that AC21 section 105(a) also sets forth a procedure permitting certain persons in nonimmigrant H-1B status to accept new employment (i.e., change employers) upon the filing of a new nonimmigrant petition by the prospective employer. Section 214(n)(1)-(2) of the Act, 8 U.S.C. § 1184(n)(1)-(2). In this decision, we expressly exclude *nonimmigrant* H-1B beneficiaries under those provisions, as opposed to the immigrant beneficiaries who fall under section 204(j), as affected parties. We note in this regard that, unlike portability for immigrant beneficiaries, which puts the decision to file a port request in the hands of the beneficiary when that person meets the requirements of the statute, nonimmigrant beneficiaries of H-1B petitions expressly require "the filing by the prospective employer of a new [H-1B visa] petition on behalf of [the current H-1B visa holder]" before changing employers is permitted.

<sup>8</sup> The Beneficiary in this case was working in the United States in H-1B nonimmigrant status while employed at VSG. In August 2010, the Beneficiary properly notified USCIS that he intended to port the approved I-140 immigrant petition to employment with Z, Inc. In February 2011, he then properly notified USCIS that he intended to port that same petition to employment with Marlabs, Inc. instead.

<sup>9</sup> See 8 C.F.R. § 205.2 (establishing processes for visa petition revocation on notice).

to charges related to fraud, and that this fact cast doubt on the validity of this (and other) VSG petitions. Counsel responded on behalf of the Beneficiary, contesting the NOIR; Petitioner VSG did not respond to the NOIR through counsel or in its own right. USCIS revoked the petition's approval due to the Petitioner's failure to respond. The Beneficiary appealed the revocation to this office, and we dismissed the appeal. The matter is currently before us on a motion to reopen and reconsider.

This situation points to a tension between a benefit an I-140 beneficiary may request under AC21 and pre-existing USCIS regulations establishing who may be recognized or be an affected party in proceedings relating to I-140 petitions. As noted above, AC21 allows certain I-140 petition beneficiaries to move a valid, permanent offer of employment to a different employer than the one who filed the original petition if his or her adjustment application has been pending for 180 days or more. Even if the beneficiary seeks to "port" to another employer, however, the initial visa petition may be subject to revocation in certain circumstances which, if revoked, could harm the beneficiary by making him or her ineligible for adjustment of status. But the applicable revocation regulation, which was originally promulgated 10 years before the enactment of AC21, provides that "[r]evocation of the approval of a petition . . . will be made only on notice to the *petitioner*" who is given an opportunity to reply in opposition. 8 C.F.R. § 205.2(b) (emphasis added).<sup>10</sup> That section also states that notice of any revocation and its underlying reasons, as well as the right to appeal any decision to revoke, will also be provided to the petitioner without reference to the beneficiary. 8 C.F.R. § 205.2(c), (d). Moreover, the agency's broadly applicable appeal and motion regulations explicitly deny beneficiaries the right to file motions or appeals in these case types. See 8 C.F.R. § 103.3(a)(1)(iii)(B) ("For purposes of [appeals, motions, and decisions certified for review], *affected party* . . . means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition.") (emphasis in original).

While AC21 lets a beneficiary port a permanent job offer to a new employer, the pre-existing regulations contemplate the original petitioning employer as the only recognized party to an immigration proceeding that may continue to affect the beneficiary's immigration future. As discussed below, these regulations do not take into account the fact that, under AC21, and as in this case, while the original petitioner-employer and beneficiary may no longer intend to enter into an employment relationship, they can remain connected for immigration law purposes.

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<sup>10</sup> 8 C.F.R. § 205.2(b) was last amended in 1996. 61 Fed. Reg. 13,078 (Mar. 26, 1996).

## II. DISCUSSION

### A. Legal Background

#### 1. Traditional Petitioner-Beneficiary Relationship

Immigration law has long recognized that petitioners control the visa petitions that they file; a beneficiary cannot compel a petitioner to pursue a visa petition on the beneficiary's behalf.<sup>11</sup> Were this not the case, awkward and undesirable circumstances would arise, in which employers could be compelled to pursue immigration benefits for foreign workers whose services they no longer need.<sup>12</sup>

As introduced in the previous section, the long-standing general rule – that beneficiaries do not receive notice relating to the adjudication or revocation of a petition's approval and are not accorded standing to administratively challenge any unfavorable result – is codified in the regulations. *See* 8 C.F.R. §§ 103.2(a)(3) (“A beneficiary of a petition is not a recognized party in [a benefit request] proceeding.”), 103.3(a)(1)(iii)(B) (for administrative appeals, certifications, and motions, a beneficiary is not an “affected party” with legal standing in a proceeding). Generally, unless a beneficiary is permitted by law to self-petition, USCIS only communicates with petitioners, not the beneficiaries of petitions that those petitioners have filed.<sup>13</sup>

In like manner, USCIS currently serves NOIRs only to the petitioners, not the petitions' beneficiaries. 8 C.F.R. § 205.2(b) (“Revocation of the approval of a petition [or] self-petition . . . will be made only on notice to the petitioner or self-petitioner.”). The same applies to notifications of the revocations themselves and of the resultant right to appeal. 8 C.F.R. § 205.2(c)-(d). And, as noted above, beneficiaries are explicitly prohibited from filing a motion on or an appeal from a denied or revoked immigration benefit. 8 C.F.R. § 103.3(a)(1)(iii)(B).

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<sup>11</sup> *See, e.g., Matter of Kurys*, 11 I&N Dec. 315 (BIA 1965) (appeal from denial of a visa petition may only be filed by the petitioner); *Matter of C-*, 9 I&N Dec. 547 (BIA 1962) (attorney who once represented petitioner but now represents only the beneficiary of an immigrant visa petition has no standing to file an appeal of its revocation).

<sup>12</sup> This distinction between a petitioner and a beneficiary is by far the majority rule, but the law includes certain exceptions to allow discrete classes of individuals to self-petition for immigration benefits. *See, e.g.,* section 203(b)(2)(B) of the Act (Secretary of Homeland Security may deem it in the national interest to waive the requirement of a job offer by a U.S. employer and allow the foreign national to petition directly); 204(a)(1)(E) of the Act (alien with extraordinary ability in the sciences, arts, education, business, or athletics may self-petition for a visa); section 204(a)(1)(A)(ii) of the Act (alien spouse of a U.S. citizen may self-petition for a visa within two years of the citizen's death); and section 204(a)(1)(A)(iii) of the Act (alien spouse may self-petition for an immigrant visa if he or she has been battered or subjected to extreme cruelty by the U.S. citizen spouse); 8 U.S.C. §§ 1153(b)(2)(B), 1154(a)(1)(E), 1154(a)(1)(A)(ii), and 1154(a)(1)(A)(iii). These individuals are termed “self-petitioners,” and the very grounds for benefit eligibility indicate why a separate, traditional petitioner is not required.

<sup>13</sup> Petitioners and self-petitioners are accorded standing to appeal explicitly by regulation in several instances. *See, e.g.,* 8 C.F.R. §§ 204.2(a)(3) (petitioner for alien spouse will be notified of denial of petition and right to appeal), 204.2(c)(3)(ii) (self-petitioning spouse of abuser will be notified of denial and right to appeal), 204.2(d)(3) (petitioner for son or daughter will be notified of the denial of the petition and the right to appeal), 204.2(e)(3)(ii) (self-petitioning child of abuser will be notified of denial and right to appeal).

Thus, in this immigrant visa petition scenario, two distinct parties exist: the petitioner, who is the individual or entity with the legal authority to request and pursue an immigration benefit, and the beneficiary of such a request, who is dependent on the petitioner for that benefit. The regulations mentioned above contemplate this context, and accordingly were drafted to limit USCIS' interactions to the petitioner as the sole party to the immigration proceeding.

## 2. Individuals Described in Section 204(j) of the Act

The traditional distinction of petitioner, beneficiary, and affected party breaks down, however, when the law allows the beneficiary to leave the employ of the original petitioner and take a job elsewhere without disrupting the validity of the underlying immigrant visa petition on which the pending adjustment application depends. As noted above, under AC21, when the beneficiary of a valid I-140 employment-based immigrant visa petition files an adjustment application, and that application remains pending for 180 days or more, the beneficiary may then request to “port” the valid immigrant petition to a new job if that job is the same or similar to the original one. *See* 8 C.F.R. § 245.25(a).<sup>14</sup> When such a request is submitted, the intent of the original petitioner to employ the beneficiary and of the beneficiary to work for that employer in a permanent position may cease to exist, although the original petition would remain valid for purposes of the beneficiary's adjustment of status if the request is approved.<sup>15</sup>

But if USCIS later discovers fraud, material misrepresentation, or an overlooked material deficiency in the underlying petition, and in turn takes steps to revoke its approval, the original petitioner and the beneficiary may again become intertwined. Following the regulations, USCIS currently provides the NOIR solely to the petitioner. Because the petitioner may no longer intend to employ the beneficiary in a permanent position and thus may have no real interest in the petition's ongoing validity, the petitioner may elect not to reply to the NOIR, nor notify the beneficiary of its possible revocation. If that happens, USCIS would then revoke the approval of the petition for the reason(s) set forth in the NOIR. Consequently, USCIS would also deny the beneficiary's pending adjustment application for lack of an approved visa petition. Without prior notice of the NOIR or the petition revocation, the beneficiary would typically learn that his ability to become a lawful permanent resident is in jeopardy only at the time his or her adjustment application is denied. At that point, there is no mechanism for the beneficiary to directly challenge the final agency decision revoking the approval of the underlying visa petition.

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<sup>14</sup> This section was recently codified in the final rule, “Retention of EB–1, EB–2, and EB–3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers; Final Rule.” 81 Fed Reg. 82,398, 82,490 (Nov. 18, 2016). The rule, which took effect on January 17, 2017, clarified and codified longstanding policies and procedures previously articulated in memoranda and precedent decisions implementing sections of AC21. The final rule did not address notices and standing of INA 204(j) beneficiaries in Form I-140 revocation proceedings.

<sup>15</sup> The intent to enter into an employment relationship should remain if the beneficiary moves to a new same or similar position with the same petitioning employer, but we are discussing the effect of a change in employers in this case.

### 3. *Mantena v. Johnson*

In a case very similar to this one, involving the same Petitioner, VSG, the beneficiary's approved I-140 was revoked for the same reasons as in this case. *Mantena v. Johnson*, 809 F.3d 721 (2d Cir. 2015). In that case, the Second Circuit observed that the Department of Homeland Security (DHS) regulations dictating that the petitioner, and not the beneficiary, must be afforded notice of revocation and an opportunity to respond to the notice or challenge the revocation, were originally promulgated a decade before the 2000 enactment of the AC21 statute, which, for the first time, gave beneficiaries the ability to port to new prospective employment from an approved I-140 petition. The court went on to conclude that, in enacting AC21, Congress had altered the traditional relationship between a petitioner and beneficiary such that beneficiaries who are porting under its provisions now had standing to challenge the revocation of the petition's approval in federal court. *Id.* at 730-732.

The court in *Mantena* also rejected the argument that the regulations regarding beneficiary standing in administrative proceedings at 8 C.F.R. §§ 103.2(a)(3) and 103.3(a)(1)(iii)(B) deprived the beneficiary in that case of standing in federal court. The court stated: "the fact that *Mantena* may not have satisfied USCIS's definition of 'legal standing' before the agency does not mean she does not have standing to bring this lawsuit in *federal court*." *Id.* at 732 (citing *Kurapati v. USCIS*, 732 F.3d 1255, 1260 (11th Cir. 2014)) (emphasis in original).

Having thus established the beneficiary's standing to challenge the sufficiency of the notice of the visa petition's revocation, the court turned to the issue of the sufficiency of the notice itself and found it to be inadequate, reasoning: "Because the [AC21] portability provisions altered the parties who have an interest in opposing the revocation of a ported I-140 petition, we believe that the regulations must be read to require notice to the real parties in interest." *Mantena*, 809 F.3d at 734. The court recognized the possibility that, even if the beneficiary had been given notice, the result may have been the same. *Id.* at 730. Nevertheless, the court held:

USCIS acted inconsistently with the statutory portability provisions of AC21 by providing notice of an intent to revoke neither i) to an alien beneficiary who has availed herself of the portability provisions to move to a successor employer nor ii) to the successor employer, who is not the original I-140 petitioner, but who, as contemplated by AC21, has in effect adopted the original I-140 petition.<sup>16</sup>

*Id.* at 736. It accordingly remanded the case to the district court with instructions to examine what notice to which party, the beneficiary or the new employer, is required under AC21.<sup>17</sup>

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<sup>16</sup> The court suggested in dicta that the beneficiary's new employer had effectively "adopted" VSG's Form I-140 petition and that it makes sense to consider that subsequent employer the *de facto* petitioner and thus entitled to notice of the visa petition revocation. But it explicitly declined to hold that notice to the new employer is required. *Id.* at 735-36.

<sup>17</sup> The court also suggested that the district court might wish to further remand the case to this office to consider the question first, in light of our particular expertise in the matter. *Id.*

## B. *Amicus Curiae* Briefing

Prior to the Second Circuit decision, but in light of this developing jurisprudence,<sup>18</sup> we solicited *amicus curiae* briefing on the question of whether beneficiaries of certain employment-based immigrant visa petitions, especially beneficiaries who are subject to the portability provisions of AC21, have standing to participate in the administrative adjudication process, including standing to appeal to this office.<sup>19</sup>

Most of the briefs advocated generally for AC21 beneficiary standing. For example, one noted that AC21 significantly changed the law by permitting beneficiaries who met its criteria to complete the adjustment of status process independent of the original petitioner, and thus recommended that DHS interpret the regulations to permit these beneficiaries – whether or not their adjustment of status applications had been pending for more than 180 days – to receive notice and an opportunity to respond to any adverse actions relating to their visas. This *amicus* also recommended that DHS amend its regulations to afford *all* beneficiaries notice and an opportunity to respond in *all* visa petitions.

Another *amicus* advocated for beneficiary standing in cases where the beneficiary of an employment-based visa petition has an application for adjustment of status pending for at least 180 days, whether the visa petition has been approved or is still pending. This *amicus* noted that AC21 exists to protect the interests of sponsored workers and that, pursuant to recent developments in the case law, a beneficiary who falls under AC21's provisions must be given standing to defend the employment-based visa petition in all contexts in which the petition's validity is placed in question.

A third *amicus* stated that AC21 beneficiaries should have standing to prevent bad-faith employers from taking advantage of beneficiaries' dependence on employers for their immigration benefits. Finally, one *amicus* noted that the employment-based immigration framework is designed to protect U.S. workers, in that it permits U.S. employers to hire foreign nationals only if U.S. workers are not available and there will be no adverse effect on U.S. wages or working conditions. Although arguing for a general rule of a lack of judicial or administrative standing for employment-based immigrant visa beneficiaries, this *amicus* apparently conceded an exception for AC21 beneficiaries.

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<sup>18</sup> See, e.g., *Bernardo ex rel. M&K Eng'g, Inc. v. Johnson*, 814 F.3d 481 (1st Cir. 2016); *Rajasekaran v. Hazuda*, 815 F.3d 1095 (8th Cir. 2016); *Kurapati*, 732 F.3d 1255; *Patel v. USCIS*, 732 F.3d 633 (6th Cir. 2013); *Mehanna v. USCIS*, 677 F.3d 312 (6th Cir. 2012); *Green v. Napolitano*, 627 F.3d 1341 (10th Cir. 2010); *Abdelwahab v. Frazier*, 578 F.3d 817 (8th Cir. 2009); *Sands v. DHS*, 308 F. App'x 418 (11th Cir. 2009) (per curiam); *Ghanem v. Upchurch*, 481 F.3d 222 (5th Cir. 2007); *Jilin Pharm. USA, Inc. v. Chertoff*, 447 F.3d 196 (3d Cir. 2006); *El-Khader v. Monica*, 366 F.3d 562 (7th Cir. 2004); *ANA Int'l Inc. v. Way*, 393 F.3d 886 (9th Cir. 2004); *Mohammad v. Napolitano*, 680 F. Supp. 2d 1 (D.D.C. 2009). But see *Musunuru v. Lynch*, 831 F.3d 880 (7th Cir. 2016).

<sup>19</sup> We appreciate the several thoughtful briefs we received in response to our solicitation.

## C. Analysis

### 1. Standing in Federal Courts and Administrative Proceedings

First, we will explain the distinction between “standing” as it relates to federal litigation and the ability to pursue matters before USCIS under its regulations. “Article III,” or “case-and-controversy” standing, is a constitutional limitation on the power of U.S. courts to entertain suits brought before them. *See Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1368 (2014) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). This kind of standing is not at play in this case.

Federal courts also apply a related filter called “prudential standing,” which is often described as comprising at least three principles: “the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.” *Id.* (citation and internal quotation marks omitted). In *Lexmark*, the Supreme Court clarified that prudential standing, whatever its boundaries, does not include a “zone-of-interests” test. Rather, the zone-of-interests test is a determination, under traditional approaches to statutory construction, “whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.” *Id.* at 1387. Or, put another way, the proper inquiry is whether a plaintiff is a member of a class of persons Congress has authorized to sue under a particular statute. *Id.*; *see also Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 401 (1987) (“[T]he [“zone of interest”] test denies a right of review if the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.”).

Several courts have noted that these limitations on the ability to sue in federal court are distinct from the ability to pursue immigration benefits in administrative proceedings before USCIS. *See, e.g., Mantena*, 809 F.3d at 732 (citing *Kurapati*, 775 F.3d at 1260). Nonetheless, after finding that AC21 beneficiaries have standing to sue in federal court, the *Mantena* court stated that the regulations barring beneficiary standing as a general matter must be read in light of the AC21 portability provisions to require notice and an opportunity to respond to “the real parties in interest.” *Id.* at 734. The court remanded the case for consideration of “how to read the regulation so that it best comports with the notice requirements implicit in, but nonetheless mandated by, AC21.” *Id.* Although there is a distinction between a zone-of-interests analysis for purposes of the ability to sue in federal court and the opportunity to participate in administrative revocation proceedings, the same or similar factors and concerns apply in both circumstances, and the court so concluded in remanding the case for further inquiry.

In sum, Congress in enacting AC21 gave a specifically delineated class of beneficiaries the ability to choose another employer or job. The regulations regarding administrative standing for these individuals, however, have never been amended or their application altered in light of this significant change in the traditional stance of the parties. Consonant with the *Mantena* court’s invitation to do so, and as set forth more fully below, we now interpret those regulations to recognize two affected

parties in the context of AC21 portability: (1) a beneficiary who is eligible to port and has properly requested to port an immigrant petition under AC21; and (2) the original petitioner-employer. However, we decline to revisit our interpretation of 8 C.F.R. §§ 103.3(a)(1)(iii)(B), 205.2(b), (c)-(d) to include any other immigrant or nonimmigrant beneficiaries, or any subsequent employers of ported or porting beneficiaries as entitled to any notice in this context.

## 2. The AC21 Beneficiary

First, we agree with the Second Circuit, amici, and the Beneficiary on this general proposition: AC21 places certain beneficiaries of Form I-140 petitions within the zone of interests of its statutory provisions that authorize porting to eligible new employment. As discussed above, a beneficiary might not, by virtue of porting, become entirely independent of his or her petitioning employer. Even so, or especially so, AC21 gives some beneficiaries a statutory interest in job flexibility that we will recognize in our administrative immigration proceedings. But further analysis is necessary to determine precisely which beneficiaries fall within the statute's zone of interests.

Although the zone-of-interests analysis applies to standing in federal court, we conclude by analogy that it is also appropriate for USCIS to interpret its agency regulations regarding standing in administrative proceedings in a manner equally mindful of the benefit AC21 makes available to certain beneficiaries. We will accordingly allow beneficiaries who are eligible to port and have properly requested to port under AC21 to participate in proceedings to revoke underlying I-140 petitions filed on their behalf, including any appeals or motions in those proceedings.

We emphasize that, to fall within the statute's zone of interests, a beneficiary must be eligible to and have properly requested to port under AC21, which requires, among other things, that the new employment be in the same or similar position. Therefore, USCIS must assess the characteristics of the new position to ascertain if this is the case, and will only be able to do so if made aware of the new job and its details.<sup>20</sup> If USCIS determines that a beneficiary is eligible to and has properly requested to port under AC21 to a qualifying new job, USCIS will now afford that person notice of any intent to revoke the underlying I-140 visa petition filed on his or her behalf, and an opportunity to reply before it is revoked. In *Mantena*, the Court noted the relevance of the fact that the plaintiff had, in fact, requested to port. 809 F.3d at 733 (“[T]he INA, as amended by AC-21, requires some form of such notice for post-porting beneficiaries, *at least as to those aliens who have notified USCIS of their change in employment, ...*”) (emphasis added).

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<sup>20</sup> Affirmative notification to USCIS of an intent to port is required before USCIS may adjudicate the application for adjustment of status. A form is used for this purpose, the Form I-485 Supplement J, “Confirmation of Bona Fide Job Offer or Request for Job Portability Under INA Section 204(j).” However, the form instructions indicate that the filing of a Supplement J to request portability under INA 204(j) may be made as soon as the I-140 beneficiary's Form I-485 application has been pending for 180 days or more.

### 3. Other Beneficiaries

We are not, however, persuaded by assertions of some *amici* that a broader universe of beneficiaries in various or even all immigration categories should receive similar consideration as affected parties under the immigration regulations. Neither the statutory language in AC21 nor its legislative history suggests that Congress was concerned with other beneficiaries beyond the specific scenario redressed by AC21.<sup>21</sup> Other classes of beneficiaries have been subject to long delays in their immigration benefits due, for example, to statutory caps, but Congress has taken no similar actions to allow those beneficiaries any measure of independence from their original petitioners.

We do not agree with those courts that have suggested that a broader class of employment-based beneficiaries have standing to challenge their denied or revoked I-140 visa petitions in federal court. *See e.g., Patel*, 732 F.3d at 636 (stating that, for purposes of Article III and prudential standing, the immigration laws make the visa available to the immigrant, not the employer, suggesting that the immigrant had a stake in whether he was granted the visa).<sup>22</sup> We do not see in the relevant statutes that Congress intended for beneficiaries to be within the statute's zone of interests – in fact, the opposite is the case. The immigration laws quite clearly place the power to pursue immigration benefits with petitioners and self-petitioners, and the AC21 framework is a unique exception for the reasons explained above. Upon careful review of the evolution of the statutory scheme and the associated legislative history, we conclude that Congress did not intend all beneficiaries to be within

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<sup>21</sup> The court in *Mantena* cites to comments in the legislative history for the proposition that Congress intended, by enacting AC21, to aid *employers*. 809 F.3d at 734. This is not the case. While it is clear Congress created job porting to address perceived bureaucratic delays in adjudicating beneficiaries' adjustment applications, no evidence exists in the legislative history that Congress intended to benefit anyone else. In fact, the material that the court cited does not relate to portability. The court stated: "Under the statute, as Congress recognized, such employers would be able to attract skilled workers with aspirations of permanent residency by relying on a prior employer's filings. *See* S. Rep. No. 106-260, 2 (2000) ('In the Information Age, when skilled workers are at a premium, America faces a serious dilemma when employers find that they cannot grow, innovate, and compete in global markets without increased access to skilled personnel.')" *Id.* This language, however, does not refer to employee portability but instead to limitations on the number of H-1B visas available prior to AC21. The next sentence of the cited Senate report reads: "That access, however, was being curbed by a cap on H-1B visas put in place almost a decade earlier, in 1990, when no one understood the scope of the information revolution that was about to hit." S. Rep. No. 106-260 at 2. In AC21, Congress temporarily increased – by a significant amount – the number of H-1B visas available annually, and it was this change that Congress made to assist employers, not portability.

<sup>22</sup> The *Patel* decision did not involve a foreign national beneficiary of an approved I-140 petition who had sought to port, nor one who had ever been the beneficiary of an approved I-140 in the first instance. In that case, the beneficiary's first employer (a hotel) obtained a labor certification and filed an I-140 petition, which was denied on the merits. The first employer did not pursue the matter further. A second employer (another hotel in another state) filed a second I-140 petition, using the labor certification from the first employer rather than filing its own. USCIS denied this second petition solely on the ground that the first certification was pertinent only to the first position and could not substantiate the second, unrelated petition. As the dissent in *Patel* points out, the Form I-140 was not in USCIS' power to grant; the second employer had to first secure from DOL a new labor certification before USCIS could consider the beneficiary's eligibility for the immigration benefit sought. 732 F.3d at 642. Under these circumstances, the question of the beneficiary's interest in an approved Form I-140 may not have been properly before the court, because any fault lay with the second employer's failure to file a new labor certification. *Patel* is not persuasive as he could not have pursued lawful permanent residence status independent from its original petitioning employer without an approved I-140.

the Act's zone of interest.<sup>23</sup> We therefore decline to extend our construction of DHS regulations to afford standing in revocation proceedings beyond the specific class of AC21, employment-based beneficiaries outlined above.

#### 4. The Petitioner

We also find that the original petitioner-employer remains an affected party under the regulations, even if a beneficiary has properly requested to port to a new employer. We recognize some petitioners may not be interested in the immigration outcome of beneficiaries who seek to port to a new employer under AC21, but this will not always be so. As an initial matter, the regulations still require that the petitioner be given notice and an opportunity to respond to a NOIR. In addition to regulatory-prescribed standing, even if a beneficiary has properly requested to port to a new employer under AC21, a petitioner remains interested because it may wish to protect itself against USCIS questions (in a NOIR) of fraud or noncompliance that could impact its other and future petitions. The petitioner may also remain interested because the departed beneficiary's immigration outcome may impact the petitioner's efforts to recruit and retain other employees. Alternatively, the petitioner may seek to support the beneficiary to encourage him or her to return to the petitioner's employ in the future (albeit to assume a permanent position rather than a temporary one). Finally, and more simply, the petitioner is the party who filed the petition, paid the filing fee, and attested to the accuracy of the filing. For all of these reasons, we will presume the original petitioner's potential interest in the participation in future proceedings and continue to permit them to participate in the administrative proceedings.

#### 5. Subsequent Employer(s)

Lastly, we conclude that a subsequent employer to whom an AC21 beneficiary is porting is *not* an affected party who may participate in proceedings related to the underlying visa petition. We acknowledge that the U.S. Court of Appeals for the Seventh Circuit has recently held to the contrary in a case involving facts very similar to this one.<sup>24</sup> In *Musunuru v. Lynch*, 831 F.3d 880 (7th Cir.

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<sup>23</sup> Some courts reach this conclusion as well. For example, in *Vemuri v. Napolitano*, 845 F. Supp. 2d 125 (D.D.C. 2012), the court held that the beneficiary of an I-140 petition that had never been approved and was not within the zone of interests protected by the applicable sections of the INA and lacked prudential standing to challenge the petition's denial in federal court. The court stated that "it is clear that Plaintiff's interests are inconsistent with the purpose of the relevant portions of the INA" 845 F. Supp. 2d at 131(citing *Pai v. USCIS*, 810 F. Supp. 2d 102 (D.D.C. 2011)). In *Pai*, the plaintiff, a prospective employee, rather than the employer, challenged USCIS's denial of an employer filed I-140 petition, in which the plaintiff was the named beneficiary. *Pai v. U.S. Citizenship & Immigration Servs.*, 810 F. Supp. 2d 102, 105 (D.D.C. 2011) The court in *Pai* concluded that: "[L]ooking at the specific facts of this case and the zone of interests that Congress intended to protect in this particular statutory scheme, this Court finds that it is the employer, not Pai, that has standing in this case to challenge the USCIS' decision." *Id.* at 111, *Cf. Khalid v. DHS*, 1 F. Supp. 3d 560 (S.D. Tex. 2014) ("The relevant INA provisions make clear that a religious employee's interest [under section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C),] in coming to or remaining in the United States is, at best, marginally related to Congress' purpose in passing the statute.").

<sup>24</sup> In *Mantena*, the Second Circuit alluded to the possibility of a similar result, but left open the precise way to read the notice regulations in light of AC21. 809 F.3d at 735-736.

2016), the same petitioner as here (VSG) filed a Form I-140 immigrant visa petition on behalf of a beneficiary who later sought to port to a different employer. USCIS revoked the approval of that petition on similar grounds as in this case, i.e., the fraud VSG committed in another case. The court did not find, however, that the beneficiary was entitled to notice and an opportunity to respond, but rather the beneficiary's current employer was.<sup>25</sup>

We respectfully disagree with this conclusion. The new employer did not pay for the filing, is not responsible for maintaining the petition, is not liable for the original petitioner's compliance or malfeasance associated with it, and cannot withdraw the petition if it no longer requires the beneficiary's services. Nor can the new employer prevent the beneficiary from porting to yet another employer (as happened here).

In this case, for example, the beneficiary has already moved on to a third employer. Although AC21 does contemplate new employers in the porting scheme it creates, it does so only as a result of giving the beneficiary the independence to choose a new employer. Indeed, the title of INA section 204(j) is "Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence." That title implies that the focus of the provision was job flexibility for adjustment of status applicants, and not the availability of foreign workers to subsequent employers. Furthermore, as noted above, the legislative history that discusses AC21 porting provisions only evidences Congressional concern with beneficiaries who were enduring lengthy processing delays, no one else.

Also as a practical matter, in the case of a proposed revocation, any issues related to deficiencies in the underlying immigrant visa petition would relate to either the original petitioner or to the beneficiary. The new employer is presumably in no position to answer questions related to the evidence the petitioner submitted in support of the petition, or to produce such evidence.<sup>26</sup> And beneficiaries do not need the participation of a subsequent employer to answer questions about their education or experience. Furthermore, because a beneficiary must be eligible for a requested benefit at the time of filing and throughout the adjudication period, a subsequent employer cannot cure any deficiencies that relate to the initial petition. *See* 8 C.F.R. § 103.2(b)(1).

Consistent with the finding in *Clarke v. Sec. Indus. Ass'n*, that that there is no right of review if the interests are only marginally related to or inconsistent with the purposes implicit in the statute, we conclude that new employers' interests are so marginally related to and inconsistent with the purposes implicit in the AC21 statute that we do not believe Congress intended to permit their participation in other employers' administrative proceedings. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987). Therefore, we are not revising our interpretation of 8 C.F.R. §§ 103.3(a)(1)(iii)(B), 205.2(b), (c)-(d) to include the beneficiary's subsequent employers, Z, Inc. or Marlabs, Inc., as

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<sup>25</sup> In *Musunuru*, the employers that Musunuru ported to were not parties to the litigation and never sought a copy of the notices of intent to revoke or revocation.

<sup>26</sup> In fact, the subsequent employer may be in a related industry to and a competitor of the original employer. USCIS may not be in a position to share with a subsequent employer all the details of the potential deficiencies in the original employer's visa petition for privacy, operational, or other concerns.

eligible to receive notice in this context or to participate in this administrative proceeding relating to a petition that they did not file and to a beneficiary whom they may or may not still employ or intend to employ.<sup>27</sup>

### III. CONCLUSION

Because we find that beneficiaries who are eligible to port and properly request to port under AC21 are within the statute's zone of interests, USCIS interprets that statute as requiring a change in the agency's historical interpretation of the applicable DHS regulations. Our new interpretation is to treat these beneficiaries as affected parties who may participate in revocation proceedings related to their underlying immigrant visa petitions. Because the Beneficiary in this case, who is eligible to port and properly requested to port in compliance with the requirements under AC21, did not have an opportunity to so participate, we will reopen these proceedings and reinstate the Form I-140 immigrant visa petition relating to the Beneficiary and remand these proceedings to the Director, who must afford the Beneficiary an opportunity to respond to any future NOIR related to this I-140 petition. Should the Director thereafter revoke the immigrant petition's approval, the Beneficiary may appeal or file a motion to reopen or reconsider from the revocation or he may participate in proceedings arising from an appeal or motion filed by the Petitioner relating to this petition.

**ORDER:** The record is remanded to the Director of the Nebraska Service Center.

Cite as *Matter of V-S-G- Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017)

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<sup>27</sup> See *Matter of Cerna*, 20 I&N Dec. 399, 401 (BIA 1991) (observing that “[a]uthority from one circuit is not binding in another” and declining to follow particular Second Circuit precedent decision “outside the jurisdiction of the Second Circuit”); *Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989) (stating that “[w]here we disagree with a court’s position on a given issue, we decline to follow it outside the court’s circuit”).