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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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FILE: [Redacted] OFFICE: NEBRASKA SERVICE CENTER Date: **MAR 25 2011**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, Texas Service Center on December 23, 2003. Upon further review of the record, the director determined that the petitioner was not eligible for the immigration benefit sought. The petitioner was properly served with a notice of intent to revoke the petition after which the final revocation notice was issued. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Texas corporation that seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director revoked approval of the petition based on two independent grounds of ineligibility: 1) the petitioner failed to establish that it had been doing business for one year prior to filing the Form I-140; and 2) the petitioner failed to establish that it was able to employ the beneficiary in a managerial or executive capacity at the time the petition was filed. On appeal, counsel submits a brief addressing the beneficiary's proposed U.S. employment. Counsel points out that the petition was approved and pending for longer than 180 days and that the approval is therefore no longer subject to revocation.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

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

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

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

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who

seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The first issue in this proceeding is whether the petitioner satisfied the initial filing requirement discussed at 8 C.F.R. § 204.5(j)(3)(i)(D), which states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) defines doing business as the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office. In the present matter, service records show that the petitioner filed its Form I-140 on October 22, 2002, thus indicating that the petitioner must establish that it had been doing business October 23, 2001.

In support of the Form I-140, the petitioner provided a letter dated September 30, 2002, which stated that the petitioner's gross revenue for the six-month period ending June 2002 was \$200,000. The petitioner claimed that it operated two retail stores and had a staff of three employees at each store at the time the Form I-140 was filed. The following documents were also provided in support of the petition: 1) the petitioner's articles of incorporation, showing that the petitioner was established on June 5, 2001; 2) the petitioner's bank account statements from January 2002 through July 2002; 3) an unaudited financial statement covering the period of January 2002 through June 2002; and 4) an unsigned 2001 corporate tax return showing the petitioner's total income in the amount of \$5,000. Although the petitioner provided various financial documents including Texas sales and use tax returns, bank statements, and general ledgers for [REDACTED] the record contains no documentation clarifying a relationship, if any, between the petitioner and the two named entities.

On April 6, 2009, the director issued a notice of his intent to revoke (NOIR) approval of the petitioner's Form I-140. The director instructed the petitioner to provide evidence to establish that it had been doing business through the date the Form I-140 was approved.

In response, counsel submitted a letter dated May 1, 2009 on behalf of the petitioner. Counsel stated that the petitioner did not file a tax return in 2001 because it did not produce any profit. Counsel also indicated that documentation was being provided to establish that [REDACTED] each of which is purportedly 50% owned by the petitioner, had been doing business from 2001 to 2003. The petitioner's submissions include general ledgers and 2002 tax returns for the petitioner, [REDACTED] as well as purchase invoices showing goods purchased by [REDACTED] from 2001-2003.

On July 22, 2009, the director determined that the petitioner failed to overcome the grounds for the intended revocation and revoked approval of the petition basing his decision, in part, on the determination that the record lacked sufficient evidence to establish that the petitioner had been doing business for the one-year period that preceded the filing of the Form I-140.

On appeal, while counsel generally disputes the adverse decision and addresses one of the grounds for denial, he does not dispute or address the director's finding that the petitioner failed to establish that it had been doing business for one year prior to filing the petition.

After conducting its own independent analysis of the record, the AAO finds that the director's conclusion with regard to 8 C.F.R. § 204.5(j)(3)(i)(D) was warranted and will not be withdrawn. The record does not include any documentation to establish that the petitioner itself was engaged in the provision of goods or services. While the record includes voluminous documentation pertaining to [REDACTED] each of which the petitioner claims to partly own, there is no evidence that the petitioner itself is doing business as either of these two entities. In fact, each entity has a "doing business as" name and neither does business as or carries the name of the petitioner as its legal business name. Moreover, even if the petitioner's ownership interest in these two retail stores were relevant in establishing that the petitioner itself is doing business, the petitioner has not provided any evidence to corroborate the petitioner's claimed 50% ownership in each of the two retail outlets. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Therefore, in light of the overall lack of evidence establishing that the petitioner was doing business during the requisite time period and due to the petitioner's failure to address this issue on appeal, the AAO concludes that the petitioner has failed to meet the initial filing requirement at 8 C.F.R. § 204.5(j)(3)(i)(D). Moreover, as previously noted, the petitioner failed to address this issue on appeal and therefore, in effect, waived any objection to dispute the director's finding. For that reason alone, the petition must be revoked.

The other issue in this proceeding is whether the petitioner established that it was ready to employ the beneficiary in the United States in a qualifying managerial or executive capacity at the time the Form I-140 was filed.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee

is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the September 30, 2002 letter submitted in support of the Form I-140, the petitioner described the beneficiary's proposed position as follows:

In the capacity of President and Executive Director, [the beneficiary] is responsible for the overall direction and operation of the company. He is involved in all facets of the business, including new hires of the management staff strategy. He establishes our financial relations and is responsible for all tax and other required reports. He reports directly to our parent company. He reviews business opportunities and is in charge of the company's expansion plans.

In the April 6, 2009 NOIR the director instructed the petitioner to provide a definitive statement listing the beneficiary's job duties and the percentage of time spent daily performing each duty. The director also asked the petitioner to provide the job titles, job duties, and educational levels of the beneficiary's subordinates as well as the IRS Form W-2s issued to the company's employees in 2001 and 2002.

In response, counsel's May 1, 2009 letter included the following list of activities attributed to the beneficiary's proposed position:

- Direct and develop strategic business plan[s] for [the] corporation. Work with [the] brokers/realtor to evaluate locations. (20%)

- Coordinate and negotiate financing of operations including establishment of budgets and banking relations and credit with bankers. (20%)
- Hire, train and oversee managers to run the day[-]to[-]day operations and supervise clerical staff. (10%)
- Provide leadership to staff in establishing company policies in resolving matters with attorneys and business advisers. (10%)
- Oversee the negotiation and approve contracts and agreements with suppliers, distributors, and customers. Approving major expenditures. (20%)
- Review and approve accounting reports prepared by [an] accountant. (10%)
- Plan and direct sales promotions with store managers and suppliers. (10%)

Counsel stated that the four employees who report to the beneficiary include two store managers and two clerks/cashiers. Although the petitioner provided 2002 Form W-2 statements for five individuals, the only Form W-2 that identified the petitioner as the employer was the one that was issued to the beneficiary. The four remaining Form W-2s were issued to employees of the [REDACTED] which is the "doing business as" name for an entity that was incorporated as [REDACTED]

In the July 22, 2009 decision revoking the approval of the Form I-140, the director noted that the individuals who would report to the beneficiary would not be deemed professional and further determined that the petitioner lacks the organizational complexity to employ the beneficiary in a qualifying managerial or executive capacity.

On appeal, counsel asserts that the beneficiary would be employed in an executive and managerial capacity and provides a supplemental job description in an attempt to establish that the beneficiary's position meets the four elements listed under the definition of executive capacity.

With regard to the first criterion—directing the management of the organization—counsel states that the beneficiary spends 15% of his time directing and coordinating financial and budgetary activities to fund the operation, 10% overseeing budgets for funding new purchases, and 20% managing the company by overseeing paperwork and supervising department managers. This portion of the description is problematic for a number of reasons. First, counsel fails to distinguish between what it means to direct and coordinate financial and budgetary activities to fund the operation and what it means to oversee the budget for funding new purchases. The generality of these statements precludes a meaningful understanding of what specific tasks the petitioner intended the beneficiary to perform at the time of filing, particularly given the lack of organizational complexity in the petitioner's personnel hierarchy at the time of filing. The lack of sufficient support personnel is particularly problematic when counsel indicates that the beneficiary would oversee the company's paperwork and supervise department managers. Counsel's statements are dubious at best in light of the lack of information as to the type of paperwork counsel is referring to and an overall lack of evidence establishing who would be doing the paperwork. Additionally, with regard to the beneficiary's purported supervision of department managers, the record does not indicate that the petitioner has sufficient personnel to head any departments or to warrant the entity to be subdivided into departments.

With regard to the second criterion—establishing goals and policies of the organization—counsel states that the beneficiary allocates 10% of his time to directing, planning, and implementing policies and objectives to maximize returns on investments; 10% to directing and coordinating activities of each store's production, pricing, sales, and product distribution; and 10% to reviewing reports provided by staff members in an effort to make necessary changes and to supervise accounting, banking, merchandising, and inventory control. This set of broad responsibilities is equally problematic in that counsel primarily paraphrases the statutory definition but fails to reveal the beneficiary's specific tasks in the context of the petitioner's business operation and organizational hierarchy. Generally stating that the beneficiary directs, plans, and implements policy provides no meaningful insight as to the nature of the beneficiary's specific position, as these general responsibilities can be attributed to any manager or executive in any given industry regardless of whether that individual primarily performs operational tasks or qualifying executive tasks. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Again, the AAO must question any of counsel's statements that suggest an element of personnel supervision on the beneficiary's part, as this information cannot be considered without also considering the petitioner's staffing at the time of filing. In the present matter, the petitioner's limited organizational hierarchy at the time of filing gives the AAO cause to question the validity of counsel's claims.

With regard to the third criterion—exercising wide latitude in discretionary decision-making—counsel states that the beneficiary would allocate 15% of his time to analyzing operations to evaluate company and staff performance in meeting objectives and another 10% to overseeing the negotiation or approval of contracts with suppliers and distributors and communication with federal and state agencies. Again, counsel's statements carry the underlying implication that someone other than the beneficiary actually negotiates supplier and distribution contracts and communicates with federal and state agencies. The AAO finds that the petitioner's staffing and organizational hierarchy at the time of filing did not include staff members to perform any of these tasks. Although the record does not include sufficient information about the contacts with federal and state agencies to determine whether this responsibility involves qualifying tasks, negotiating contracts with suppliers and distributors is indicative of non-qualifying operational tasks, which the beneficiary is likely to have been performing at the time of filing. While the AAO acknowledges that no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks would only be incidental to his/her proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The lack of sufficient information presented in this matter precludes a full analysis of the beneficiary's specific daily tasks and the qualifying or non-qualifying nature of those tasks.

Finally, with regard to the fourth criterion—receiving only general supervision or direction from higher level executives—counsel states that 20% of the beneficiary's time is spent supervising lower-level staff and handling human resources activities, including plans and activities, selecting directors and other high-level staff, and establishing major departments within the organization. Counsel provides no explanation to clarify the petitioner's need or ability to incorporate major departments and high-level directorial positions within the petitioner's organizational hierarchy at the time of filing; nor does counsel clarify which human resources activities in particular the beneficiary would be handling or how these activities are different from the human resource-related responsibilities that were mentioned in other portions of this job description. The AAO

further questions the validity of the time allotments that counsel has provided given that the sum of the percentages totals 120%. This obvious anomaly precludes the AAO from being able to gauge with any degree of certainty what specific tasks the beneficiary was intended to perform at the time of filing and whether the primary portion of those tasks would fit the definition of managerial or executive capacity.

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The AAO will then consider this information in light of the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks. In the present matter, the record lacks a comprehensive description of the beneficiary's day-to-day tasks and does not adequately establish that the necessary support personnel were available to perform the petitioner's daily operational tasks such that the beneficiary would be able to primarily focus his time on the performance of managerial or executive duties. Counsel's description of the proposed employment simply does not comport with the documentation on record, which fails to establish that the petitioner has an ownership interest in the two retail outfits that the petitioner claims are part of its organization. Given this lack of clarity and the inadequate job description that counsel has offered, the AAO finds that the record fails to provide a basis upon which to conclude that the petitioner was ready and able to employ the beneficiary in a qualifying managerial or executive capacity at the time of filing. Therefore, the petitioner is ineligible for the benefit sought for this additional reason.

Lastly, the AAO will address counsel's assertion that U.S. Citizenship and Immigration Services (USCIS) is estopped from revoking approval of the petitioner's Form I-140 by virtue of the time that has lapsed between the date of the approval and the date the director commenced the revocation of such approval. Counsel bases his argument on the American Competitiveness in the Twenty-First Century Act (AC21), Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000), which Congress passed in the year 2000. Section 106(c) of AC21 amended section 204 of the Act. The "portability provision" at section 204(j) of the Act provides that "an individual whose application for adjustment of status pursuant to section 245 has been filed and remained adjudicated 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." USCIS has not issued regulations governing this provision.

Generally, the director's decision to revoke the approval of a petition will be affirmed, notwithstanding the submission of evidence on appeal, where a petitioner fails to offer a timely explanation or rebuttal to a properly issued notice of intention to revoke. *See Matter of Arias*, 19 I&N Dec. 568, 569 (BIA 1988).

USCIS regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed. *See* 8 C.F.R. § 245.1(a). If the beneficiary of an approved visa petition is no longer eligible for the classification sought or if the petition was approved in error, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for "good and sufficient cause." Notwithstanding the USCIS burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

In this matter, the director raised two separate and valid issues in the notice of intent to revoke based on the eligibility requirements set by the applicable statute and regulations. *See generally*, section 203(b)(1)(C) of

the Act; 8 C.F.R. § 204.5(j). The director informed the petitioner that the record of proceeding: (1) did not contain a substantive description of the beneficiary's duties for the United States entity and showed that the beneficiary was the petitioner's sole employee; and (2) lacked evidence to establish that the petitioner has been doing business. After a thorough review, the AAO finds that the record does not contain evidence that the beneficiary qualifies for this visa classification.

Based on the record of proceeding, the director's initial approval of this petition was contrary to the statute and plainly in error. Any new employment that the beneficiary may have acquired since the time of the approval of the petition and the portability considerations of AC21 are separate issues that must be addressed in the adjudication of the beneficiary's I-485 application, not in the I-140 revocation decision. No appeal lies from the denial of an application for adjustment of status under section 245 of the Act, 8 C.F.R. § 245.2(a)(5)(ii). However, the AAO observes that for the portability provisions to apply, the underlying 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). In this matter, the director expressly determined, and the AAO has affirmed the determination, that the petitioner failed to establish eligibility for the immigration benefit sought.

Section 204(b) of the Act, 8 U.S.C. § 1154(b), governs USCIS' authority to approve an immigrant visa petition and grant immigrant status:

After an investigation of the facts in each case, and after consultation with the Secretary of Labor with respect to petitions to accord a status under section 1153(b)(2) or 1153(b)(3) of this title, the Attorney General [now Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is . . . eligible for preference under subsection (a) or (b) of section 1153 of this title, approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.

Accordingly, pursuant to the statutory framework for the granting of immigrant status, any United States employer desiring and intending to employ an alien "entitled" to immigrant classification under the Act "may file" a petition for classification. Section 204(a)(1)(F) of the Act. However, section 204(b) of the Act mandates that USCIS may approve that petition only after investigating the facts in each case, determining that the facts stated in the petition are true and that the alien is eligible for the requested classification, and consulting with the Secretary of Labor when required. Section 204(b) of the Act.

Congress specifically granted USCIS the sole authority to approve an immigrant visa petition; an alien may not adjust status or be granted immigrant status by the Department of State until USCIS "approves" the petition. As in the present case, Congress also granted USCIS the sole authority to revoke the approval of an immigrant visa petition for good and sufficient cause. Section 205 of the Act.

Therefore, to be considered "valid" in harmony with the thrust of the related provisions and with the statute as a whole, the petition must have been filed for an alien that is "entitled" to the requested classification and that petition must have been "approved" by a USCIS officer pursuant to his or her authority under the Act. *See generally*, § 204 of the Act, 8 U.S.C. § 1154. Contrary to counsel's assertions, a petition is not made "valid" merely through the act of filing the petition with USCIS or through the passage of 180 days. And if the approval of a petition is ultimately revoked, the revocation serves as the USCIS notice that the petition was

not valid. To interpret this provision in any other manner would subvert the statutory scheme of the U.S. immigration laws.¹

Considering the statute as a whole, it would severely undermine the immigration laws of the United States 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 visa classification. It would be irrational to believe that Congress intended to throw out the entire statutorily mandated scheme regulating immigrant visas whenever that scheme requires more than 180 days to effectuate. It would also be absurd to suppose that Congress enacted a statute that would encourage large numbers of ineligible aliens to file immigrant visa petitions, if the legislation was actually meant to be an impetus for USCIS to reduce its backlogs. To construe section 106(c) to include unadjudicated, denied, and revoked petitions would create a situation where ineligible aliens would gain a "valid" visa simply by filing frivolous visa petitions and adjustment applications, thereby increasing USCIS backlogs, in the hopes that the application might remain unadjudicated for 180 days.

In the present matter, the petition was filed on behalf of an alien who was not "entitled" to the classification and the petition's approval was ultimately revoked pursuant to the statutory authority of USCIS. Section 106(c) of AC21 does not repeal or modify section 204(b), section 205, or section 245 of the Act, which all require an approved petition prior to USCIS granting immigrant status or adjustment of status and further provide that USCIS may revoke the approval at any time for good and sufficient cause. Accordingly, this petition cannot be deemed to have been "valid" for purposes of section 106(c) of AC21.

The approval of the petition will be revoked for the above stated reasons, with each considered as an independent and alternative basis for revocation. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.

¹ The problematic issues presented by this case are primarily the result of immigration procedures that have arisen since the enactment of section 106(c) of AC21. USCIS implemented the "concurrent filing" process on July 31, 2002 whereby an employer may file an employment-based immigrant visa petition and an application for adjustment of status for the alien beneficiary at the same time. See 8 C.F.R. § 245.2(a)(2)(B) (2004); see also 67 Fed. Reg. 49561 (July 31, 2002). USCIS implemented the concurrent filing process as a convenience for aliens and their U.S. employers; USCIS in no way suggested that an unadjudicated I-140 could be the basis for I-485 approval under the portability provisions of section 106(c). Prior to this date, only immediate relatives and family-based preference cases could concurrently file a visa petition and an adjustment application. Accordingly, at the time that Congress enacted AC21, no alien could assert that a denied or unadjudicated immigrant visa petition "shall remain valid" through the passage of 180 days, since the application for adjustment could not be filed until after the petition was approved by USCIS. It is presumed that Congress is aware of INS regulations at the time it passes a law. See *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).