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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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FILE: [Redacted]
WAC-04-154-53200

Office: CALIFORNIA SERVICE CENTER

Date: OCT 29 2009

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

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

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

Cc: [Redacted]

DISCUSSION: The Director, California Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) pursuant to an appeal that was filed by a third-party corporation. The third-party appeal will be rejected and the director's decision will be affirmed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a cost estimator. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that there is no permanent, full-time offer of employment. The director denied the petition on April 15, 2009 accordingly.

The instant appeal was filed by counsel on behalf of the beneficiary and Pacific Flooring Company as a new employer on May 17, 2005. On appeal, counsel asserts that the beneficiary is entitled to "port" to Pacific Flooring Company in a same or similar position as the job offered by the petitioner pursuant to the provisions of section 204(j) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(j), as added by section 106(c) of the American Competitiveness in the Twenty First Century Act of 2000 (AC21) since his adjustment of status application has been pending more than 180 days.

U.S. Citizenship and Immigration Services (USCIS) regulations and precedent specifically limit the filing of an appeal to the affected party, i.e., in the instant case, the petitioner. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B). The Form G-28, Notice of Entry of Appearance as Attorney or Representative, that was submitted for the record for the Form I-290B was signed by the representative of Pacific Flooring Company, not by an authorized representative of the petitioner. The beneficiary of a visa petition is not a recognized party on appeal. *See* 8 C.F.R. § 103.2(a)(3). As the beneficiary and his new employer, Pacific Flooring Company, are not recognized parties in this matter, the new employer's counsel would not generally be authorized to file the appeal in this matter. 8 C.F.R. § 205.2(d); 8 C.F.R. § 103.3(a)(1)(iii)(B); 8 C.F.R. § 103.3(a)(2)(v)(A)(1).

However, given the novel issue raised by the director's decision and the appeal, i.e., whether AC21 permits the new employer to have legal standing in this proceeding, the AAO will address this.¹ To make this determination, the AAO must therefore discuss whether a new employer takes the place of an original petitioner in AC21 situations where the beneficiary's I-485 has been pending for 180 days or more, and whether a petition that has not been approved is still "valid" for purposes of 8 U.S.C. § 204(j) as added by section 106(c) of AC21.

Governing adjustment of status, section 245(a) of the Act, 8 U.S.C. § 1255(a), requires the adjustment applicant to have an "approved" petition:

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an *approved* petition for classification

¹ The beneficiary's counsel will be provided a courtesy copy of this decision. It is noted that the beneficiary's counsel subsequently attempted to withdraw the appeal; however, as already explained, the beneficiary's counsel has no legal standing to file the appeal or withdraw the appeal.

under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1) or [sic] may be adjusted by the [Secretary of Homeland Security], in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if:

- (i) the alien makes an application for such adjustment,
- (ii) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and
- (iii) an immigrant visa is immediately available to him at the time his application is filed.

(Emphasis added.)

To address whether a new employer may take the place of and become the petitioner of an I-140 petition in AC21 situations, it is important to closely analyze section 106(c) of AC21 and determine the interpretation of the statute as intended by Congress. Specifically, section 106(c) of AC21 added the following to section 204(j) to the Act:

Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence.- A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

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

Section 212(a)(5)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(5)(A)(iv), states further:

Long Delayed Adjustment Applicants- A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

USCIS implemented concurrent filing as a convenience for aliens and their U.S. employers. Because section 204(j) of the Act applies only in adjustment proceedings, USCIS never suggested that concurrent filing would make the portability provision relevant to the adjudication of the underlying visa petition. Rather, the statute and regulations prescribe that aliens seeking employment-based preference classification must have an immigrant visa petition approved on their

behalf before they are even eligible for adjustment of status. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).

Section 204(j) of the Act prescribes that “A petition . . . shall remain valid with respect to a new job if the individual changes jobs or employers.” The term “valid” is not defined by the statute, nor does the congressional record provide any guidance as to its meaning. *See* S. Rep. 106-260, 2000 WL 622763 (Apr. 11, 2000); *see also* H.R. Rep. 106-1048, 2001 WL 67919 (Jan. 2, 2001). However, the statutory language and framework for granting immigrant status, along with recent decisions of three federal circuit courts of appeals, clearly show that the term “valid,” as used in section 204(j) of the Act, refers to an approved visa petition.

Statutory interpretation begins with the language of the statute itself. *Hughey v. U.S.*, 495 U.S. 411, 415 (1990). We are expected to give the words used in the statute their ordinary meaning. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (citing *I.N.S. v. Phinpathya*, 464 U.S. 183, 189 (1984)). We must also 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). *See also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561, 573 (1989); *Matter of W-F-*, 21 I&N Dec. 503, 506 (BIA 1996).

With regard to the overall design of the nation’s immigration laws, section 204 of the Act provides the basic statutory framework for the granting of immigrant status. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), provides that “[a]ny employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(1)(B) . . . of this title may file a petition with the Attorney General [now Secretary of Homeland Security] for such classification.” (Emphasis added.)

Section 204(b) of the Act, 8 U.S.C. § 1154(b), governs USCIS’s authority to approve an immigrant visa petition before immigrant status is granted:

After an investigation of the facts in each case . . . 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 203, 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.

Statute and regulations allow adjustment only where the alien has an approved petition for immigrant classification. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).²

² We note that the Act contains at least one provision that does apply to pending petitions; in that instance, Congress specifically used the word “pending.” *See* Section 101(a)(15)(V) of the Act, 8 U.S.C. § 1101(a)(15)(V) (establishing a nonimmigrant visa for aliens with family-based petitions that have been pending three years or more).

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, 8 U.S.C. § 1154(a)(1)(F). However, section 204(b) of the Act mandates that USCIS 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. Section 204(b) of the Act, 8 U.S.C. § 1154(b). Hence, 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.

Therefore, to be considered “valid” in harmony with the portability provision of section 204(j) of the Act and with the statute as a whole, an immigrant visa petition must have been filed for an alien that is entitled to the requested classification and that petition must have been approved by USCIS pursuant to the agency’s authority under the Act. *See generally* section 204 of the Act, 8 U.S.C. § 1154. A petition is not validated merely through the act of filing the petition with USCIS or through the passage of 180 days.

Section 204(j) of the Act cannot be interpreted as allowing the adjustment of status of an alien based on an unapproved visa petition when section 245(a) of the Act explicitly requires an approved petition (or eligibility for an immediately available immigrant visa) in order to grant adjustment of status. To construe section 204(j) of the Act in that manner would violate the “elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.” *Dept. of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 340 (1994).

Accordingly, 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.³

³ Moreover, every federal circuit court of appeals that has discussed the portability provision of section 204(j) of the Act has done so only in the context of deciding an immigration judge’s jurisdiction to determine the continuing validity of an approved visa petition when adjudicating an alien’s application for adjustment of status in removal proceedings. *Sung v. Keisler*, 2007 WL 3052778 (5th Cir. Oct. 22, 2007); *Matovski v. Gonzales*, 492 F.3d 722 (6th Cir. Jun. 15, 2007); *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007). In *Sung*, the court quoted section 204(j) of the Act and explained that the provision only addresses when “an approved immigration petition will remain valid for the purpose of an application of adjustment of status.” *Sung*, 2007 WL 3052778 at *1 (emphasis added). *Accord Matovski*, 492 F.3d at 735 (discussing portability as applied to an alien who had a “previously approved I-140 Petition for Alien Worker”); *Perez-Vargas*, 478 F.3d at 193 (stating that “[s]ection 204(j) . . . provides relief to the alien who changes jobs after his visa petition has been approved”). Hence, the requisite approval of the underlying visa petition is explicit in each of these decisions.

In the case at hand, the I-140 petition has never been approved. The beneficiary would therefore not have a valid immigrant visa petition approved on his behalf to be eligible for adjustment of status. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).

The enactment of the portability provision at section 204(j) of the Act did not repeal or modify sections 204(b) and 245(a) of the Act, which require USCIS to approve an immigrant visa petition prior to granting adjustment of status. Accordingly, as this petition was denied, it cannot be deemed valid by improper invocation of section 204(j) of the Act.

Counsel asserts that the petition does not need to have been “approved” to “remain valid” under AC21. 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).

On appeal, counsel also contends that to require approval of the I-140 would frustrate Congress’s intent in passing AC21. However, the available legislative history does not shed light on Congress’s intent in specifically enacting section 106(c) of AC21. The legislative history for AC21 discusses Congressional concerns regarding the nation’s economic competitiveness, the shortage of skilled technology workers, U.S. job training, and the cap on the number of nonimmigrant H-1B workers. *See* S. REP. 106-260, 2000 WL 622763 at *10, *23 (April 11, 2000). However, there is no mention in AC21 of the new employer taking the place of the prior petitioner or any other language that would support a theory that a new third-party employer should be granted rights as a new petitioner. There is no evidence that Congress intended to confer anything more than a benefit to beneficiaries of long delayed adjustment applications. In other words, the plain language of the statute indicates that Congress intended to provide the alien, as a “long delayed applicant for adjustment,” with the ability to change jobs if the individual’s I-485 took 180 days or more to process.

In conclusion, the plain meaning of the language in section 106(c) requires a petition be approved to remain valid with respect to a new job or new employer. The AAO concurs with the director’s interpretation that there is simply no portability in cases where the underlying Form I-140 has not been approved. In the instant case, the petition has never been approved, and therefore, the beneficiary prematurely left the petitioner and availed himself of AC21 without an approved I-140 petition to enable his doing so. AC21 does not grant Pacific Flooring Company any rights or benefits as the beneficiary’s new employer.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(I) provides that an appeal filed with USCIS by a person not entitled to file it “must be rejected as improperly filed.” As the appeal was improperly filed by a third party, the appeal must be rejected.

It is noted that even if the appeal had been filed by the petitioner or by counsel on behalf of the petitioner, the AAO would otherwise dismiss the instant appeal because as discussed in detail above, counsel failed to establish that the beneficiary met the condition for him to benefit the portability of

job or employer under AC21, i.e., a petition filed on his behalf had been approved before he ported his job to a new employer.

The AAO also notes that if the appeal would not be rejected for being improperly filed by a third party, it would otherwise be dismissed as moot because the petitioner has been suspended. During the adjudication of the appeal, evidence came to light that the petitioner in this matter has been suspended. *See* [REDACTED] (accessed on October 28, 2009). The AAO would dismiss the instant appeal as moot⁴ since the petitioner is no longer an active business, and therefore, further pursuit of the instant petition and subsequent appeal had become moot even if the instant appeal had been filed by the petitioner itself.

ORDER: The appeal is rejected as improperly filed.

⁴ Where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot.