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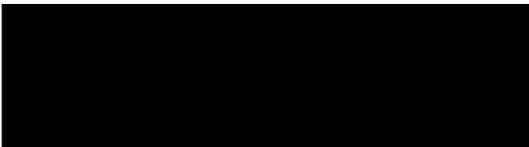
U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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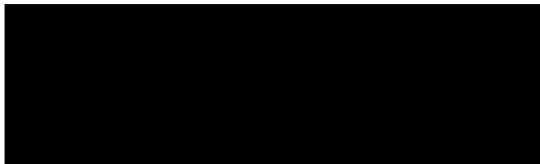


FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: SEP 28 2009  
WAC 03 012 55154

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:



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).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an audio, video and navigation system installer. It seeks to employ the beneficiary permanently in the United States as an electronic instrumentation technician. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience; that the petitioner has not established that a bona fide position is available to U.S. workers or that it has made a bona fide job offer to the beneficiary; and that the petitioner has not established that the proffered position was a genuine job offer or that the proffered position currently exists for the beneficiary. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's February 1, 2007 denial, the issues in this case are: (1) whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position; (2) whether or not the petitioner has established that a bona fide position is available to U.S. workers and that it has made a bona fide job offer to the beneficiary; and (3) whether or not the petitioner has established that the proffered position was a genuine job offer and that the proffered position currently exists for the beneficiary.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the labor certification application was accepted on April 30, 2001.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence

properly submitted upon appeal.<sup>1</sup> On appeal, counsel submits a brief. Other relevant evidence in the record includes a letter dated April 4, 2001, from [REDACTED] of Audio America, indicating that the beneficiary has been working as an installer for Audio America since 1998; an unsigned letter dated December 27, 2006, from [REDACTED] of Radwans Audio American Enterprise, Inc. in Ontario, California, indicating that the beneficiary was employed by Audio America Company from 1998 to 2001 as an installer/technician; an unsigned, undated letter from [REDACTED] of Western Sales & Marketing in Newport Beach, California, indicating that the beneficiary worked in the warehouse of Audio America; a letter dated December 26, 2006, from [REDACTED] of Auto Sound Pros in Riverside, California, indicating that the beneficiary worked from early 2000 to mid-2001 as a technician at Audio America; a letter dated December 26, 2006, from [REDACTED], indicating that he worked at Audio America and that the beneficiary worked full-time for Audio America as a technician from 1998 to 2001; a certificate dated 1999 from Audio Mobile Entertainment regarding the beneficiary's completion of the MA Audio Training Session; a certificate dated 1998 from Sony Mobile ES regarding the beneficiary's completion of the Sony Mobile ES Training Seminar; a certificate dated 2000 from Alpine regarding the beneficiary's completion of Alpine's training program; and a certificate dated 1999 from Alpine regarding the beneficiary's completion of Alpine's training program. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that the duties of the proffered position involve the same design and installation duties performed by the beneficiary at Audio America. Counsel further states that the Form ETA 750 does not have a space where a familial relationship between the beneficiary and the petitioner could be disclosed, and that the petitioner followed all of the proper procedures in the labor certification process. Further, citing an unnamed AAO decision, counsel states that the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) allows the beneficiary to change jobs within the same employer's operation as long as the job is in the same or similar occupation field. Counsel states that the beneficiary is employed as a technician with the petitioner and also oversees the work of four other technicians. Counsel asserts that the duties performed by the beneficiary fall within the same occupational field and the "same SOT code" as the proffered position.<sup>3</sup> Finally, counsel asserts that DOL, not United States Citizenship and Immigration Services (USCIS), has authority over the validity of labor certification applications.

Initially, in response to counsel's assertion that DOL, not USCIS, has authority over the validity of labor certification applications, we will provide an explanation of the general process of procuring an employment-based immigrant visa and the roles and respective authority of both agencies involved.

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>2</sup> The AAO notes the different spelling of [REDACTED] first name in the two letters.

<sup>3</sup> Counsel does not define "SOT" on appeal.

As noted above, the Form ETA 750 in this matter is certified by DOL. Section 212(a)(5)(A)(i) of the Act provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by Federal Circuit Courts.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).<sup>4</sup> *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

\* \* \*

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

*Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

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<sup>4</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9<sup>th</sup> Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). **The INS then makes its own determination of the alien's entitlement to sixth preference status.** *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9<sup>th</sup> Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

*Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9<sup>th</sup> Cir. 1984).

Therefore, it is DOL's responsibility to certify the terms of the labor certification, but it is the responsibility of USCIS to determine if the petition and the alien beneficiary are eligible for the classification sought.

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term

of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). According to the plain terms of the labor certification, the applicant must have six years of grade school education and two years of experience in the job offered.<sup>5</sup>

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he worked full-time for Audio America as an electronic instrumentation technician from June 1998 to the date he signed the Form ETA 750B on April 26, 2001. He does not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation*—

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

In his decision, the director determined that the letter dated December 27, 2006, from [REDACTED] of Radwans Audio American Enterprise, Inc. indicating that the beneficiary was employed by Audio America Company from 1998 to 2001 as an installer/technician, did not list the beneficiary's job duties and was unsigned. Therefore, the director determined that the letter was not credible evidence of the beneficiary's two years of experience in the job offered. The director noted that although Audio America claims that it paid the beneficiary in cash, no other evidence was

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<sup>5</sup> We note that the petitioner has not established that the beneficiary has the required six years of **grade school education**. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d at 1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis).

offered by the petitioner in support of cash payments made or received, including payroll ledgers, time card records, signed receipts, etc. In addition, with regard to the unsigned, undated letter from [REDACTED] of Western Sales & Marketing in Newport Beach, California, the letter dated December 26, 2006, from [REDACTED] of Auto Sound Pros, and the letter dated December 26, 2006, from [REDACTED], the director determined that they do not establish the beneficiary's two years of experience in the job offered. He noted that the letter from [REDACTED] is unsigned and does not verify the beneficiary's two years of prior employment in the job offered. Further, the director noted that the other letters do not verify the beneficiary's job duties at Audio America, that affidavits alone are not sufficient evidence, and that no documentary evidence has been submitted to support these affidavits.<sup>6</sup>

In addition, the director found that the training certificates were not credible evidence of the beneficiary's two years of experience in the job offered. The director noted that the certificates contain grammatical errors, missing punctuation and printing inconsistencies. Finally, with regard to the beneficiary's prior experience, the director determined that the beneficiary did not have experience in all of the duties of the proffered position. In sum, the director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience in the job offered.

On appeal, counsel asserts that the duties of the proffered position involve the same design and installation duties performed by the beneficiary at Audio America. However, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel submits no new evidence regarding this issue on appeal. The inconsistencies noted by the director have not been resolved with independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). Therefore, the AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience in the proffered job from the evidence submitted into this record of proceeding. The petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The director also determined that the petitioner has not established that a bona fide position is available to U.S. workers or that it has made a bona fide job offer to the beneficiary. Under 20 C.F.R. § 656.20(c)(8) and § 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). In the instant case, the evidence in the record shows that a corporate officer of the petitioner and the beneficiary are related. The director noted in his decision that the corporate officer's name and the beneficiary's last name were not identical, and therefore, a familial relationship would not

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<sup>6</sup> Although the letters from [REDACTED] and [REDACTED] are entitled "affidavits," the statements are not affidavits as they were not sworn to by the declarant before an officer that has confirmed the declarant's identity and administered an oath. *See Black's Law Dictionary* 58 (West 1999).

have been readily apparent to DOL.<sup>7</sup> On appeal, counsel states that the Form ETA 750 does not have a space where a familial relationship between the beneficiary and the petitioner could be disclosed, and that the petitioner followed all of the proper procedures in the labor certification process. However, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Counsel submits no new evidence regarding this issue on appeal, such as evidence that it did properly notify and disclose the relationship to DOL during the labor certification process. Thus, the petitioner has not established that it has made a *bona fide* job offer to the beneficiary or that the relationship between the petitioner and the beneficiary was disclosed to the DOL during labor certification proceedings. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986).

The director also determined that the petitioner has not established that the proffered position was a genuine job offer or that the proffered position currently exists for the beneficiary. On appeal, citing an unnamed AAO decision, counsel states that AC21 allows the beneficiary to change jobs within the same employer's operation as long as the job is in the same or similar occupation field.<sup>8</sup> Counsel states that the beneficiary is employed as a technician with the petitioner and also oversees the work of four other technicians. Counsel further asserts that the duties performed by the beneficiary fall within the same occupational field and the "same SOT code" as the proffered position. However, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Counsel submits no new evidence regarding this issue on appeal.

The initial petition was denied based on the petitioner's failure to demonstrate that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience; that the petitioner has not established that a bona fide position is available to U.S. workers or that it has made a bona fide job offer to the beneficiary; and that the petitioner has not established that the proffered position was a genuine job offer or that the proffered position currently exists for the beneficiary. Counsel did not provide any further evidence on appeal. As the initial petition was denied, counsel appears to seek portability for the beneficiary based on an unapproved I-140 petition. No related statute or regulation would render the beneficiary portable under these facts.

The pertinent section of AC21, Section 106(c)(1), amended section 204 of the Act, codified at section 204(j) of the Act, 8 U.S.C. § 1154(j) provides:

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<sup>7</sup> This office notes that the beneficiary's name is listed on the Form ETA 750 as [REDACTED] and the beneficiary's name on the Form I-140 is listed as [REDACTED]. The petitioner's corporate secretary who signed the Form ETA 750 and the Form I-140 is [REDACTED].

<sup>8</sup> Counsel refers to a decision issued by the AAO, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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.

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.

Section 204(a)(1)(F) of the Act includes the immigrant classification for individuals holding baccalaureate degrees who are members of the professions and skilled workers under section 203(b)(3) of the Act, the classification sought in the petition.

An immigrant visa is immediately available to an alien seeking employment-based preference classification under section 203(b) of the Act (such as the beneficiary in this case) when the alien's visa petition has been approved and his or her priority date is current. 8 C.F.R. § 245.1(g)(1), (2). Hence, adjustment of status may only be granted "by virtue of a valid visa petition approved in [the alien's] behalf." 8 C.F.R. § 245.1(g)(2).

After enactment of the portability provisions of AC21, on July 31, 2002, USCIS published an interim rule allowing for the concurrent filing of Form I-140 petitions and Form I-485 petitions, 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 without the need to wait for an approved I-140 petition. *See* 8 C.F.R. § 245.2(a)(2)(B)(2004); *see also* 67 Fed. Reg. 49561 (July 31, 2002). The beneficiary in the instant matter filed his Form I-485 petition on October 7, 2002, and the petitioner filed the Form I-140 petition on the same date.

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).<sup>9</sup>

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

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<sup>9</sup> 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).

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.<sup>10</sup>

In the case at hand, the I-140 petition was denied. The petitioner failed to provide any evidence on appeal to overcome the basis for denial. The beneficiary would therefore not have a valid immigrant visa petition approved on their 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).

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<sup>10</sup> 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 (5<sup>th</sup> Cir. Oct. 22, 2007); *Matovski v. Gonzales*, 492 F.3d 722 (6<sup>th</sup> Cir. Jun. 15, 2007); *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4<sup>th</sup> 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.

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.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.