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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



B6

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: AUG 03 2010
EAC 02 255 50630

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:

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 \$585. 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 director, Texas Service Center, initially approved the employment-based visa petition. Subsequently, the director issued a Notice of Intent to Revoke (NOIR) and ultimately revoked approval of the petition. A timely appeal of the revocation was filed. The director rejected the appeal, finding that it had not been filed by an affected party. The matter is now before the Administrative Appeals Office (AAO). The director's decision will be withdrawn. However, the appeal will be rejected and the director's revocation will be affirmed. 8 C.F.R. §103.3(a)(2)(v)(A)(I).

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director approved the petition on June 5, 2003. Subsequently, the director issued a NOIR, finding that information had been received which cast doubt upon the reliability of the petitioner's documentation as well as the petitioner's compliance with DOL requirements. The petitioner did not respond to the NOIR. Therefore, in a Notice of Revocation (NOR) dated August 12, 2009, the director found that the petitioner failed to establish that it had engaged in "an authentic recruitment effort for U.S. workers." The director further found that no evidence had been submitted regarding the validity of the beneficiary's work experience letter. The director concluded that the application for labor certification involved willful misrepresentation and revoked the petition's approval accordingly.

The instant appeal was filed by counsel on behalf of Stone Hearth Pizza as a new employer on August 27, 2009.¹ On March 31, 2010, the director rejected the appeal because the entity filing the appeal, Stone Hearth Pizza, was not the petitioner and was therefore not entitled to file the appeal.

If the reviewing official will not be taking favorable action or decides favorable action is not warranted, that official shall promptly forward the appeal and the relating record of proceeding to the AAO in

¹ There is no evidence in the record to suggest, and counsel does not allege, that [REDACTED] is a successor-in-interest to [REDACTED] the petitioner in these proceedings. A valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor. Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets, but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1981).

Washington, DC, pursuant to the regulatory requirements of 8 C.F.R. § 103.3(a)(2)(iv). In this instance, the director failed to follow the proper procedure by terminating the appeal at the service center instead of forwarding the appeal and the record of proceeding to the AAO. Therefore, this office will withdraw the director's rejection of the Form I-290B, Notice of Appeal or Motion, and render a decision.

On appeal, counsel asserts that the beneficiary is entitled to "port" to [REDACTED] in a same or similar position as the job offered by the petitioner pursuant to the job flexibility 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 decisions 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 [REDACTED], 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, [REDACTED], are not recognized parties in this matter, the new employer's counsel would not 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, the AAO will address the issue of whether AC21 permits the new employer to have legal standing in this proceeding.² 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.

In general, an alien may acquire permanent resident status in the United States through two legal mechanisms: the alien may pick up their approved visa packet at an overseas consulate and be "admitted" to the United States for permanent residence; or, if the alien is already in the United States in a lawful nonimmigrant or parolee status, the alien may "adjust status" to that of an alien admitted for permanent residence. *Cf.* § 211 of the Act, 8 U.S.C. § 1181 ("Admission of Immigrants into the United States"); § 245 of the Act, 8 U.S.C. § 1255 ("Adjustment of Status of Nonimmigrant to that of Person Admitted for Permanent Residence").

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 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

² The beneficiary's counsel will be provided a courtesy copy of this decision.

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.)

In this matter, as the beneficiary was present in the United States at the time the I-140 petition was approved, he was eligible to and chose to apply to adjust his status in the United States to that of a permanent resident instead of pursuing consular processing abroad. Furthermore, based on the record of proceeding, as the beneficiary's I-485 was pending for more than 180 days, it would appear, absent revocation, that the approved petition would remain valid with respect to a new position with a different employer.³ Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000).

Even so, this does not answer the more specific question of whether a new employer may take the place of and become the petitioner of an I-140 petition in AC21 situations. To address this issue, 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 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.

³ It should be noted that at the time AC21 came into effect, legacy INS regulations provided that an alien worker could not apply for permanent resident status by filing a Form I-485, application to adjust status, until he or she obtained the approval of the underlying Form I-140 immigrant visa petition. See 8 C.F.R. § 245.2(a)(2)(i) (2000). Therefore, the process under section 106(c) of AC21 was as follows: first, an alien obtains an approved employment-based immigrant visa petition; second, the alien files an application to adjust status; third, if the adjustment application was not processed within 180 days, the underlying immigrant visa petition remained valid even if the alien changed employers or positions, provided the new job was in the same or similar occupational classification.

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.

Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int'l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975 (2d Cir.), *cert. denied*, 112 S. Ct. 416 (1991).

In addition, we are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996).

Counsel for the new employer, [REDACTED] seems to suggest that [REDACTED] has become the petitioner with respect to the approved I-140 petition by virtue of the portability provisions of AC21. That is, counsel seems to suggest that once the I-140 petition was approved, the I-485 application had been pending for 180 days, and the beneficiary began his new employment, [REDACTED] became the petitioner of the I-140 petition which had been filed by another employer.

It is true that, absent revocation, the beneficiary would have been eligible for adjustment of status with a new employer provided, as counsel points out, that "the new job is in the same or similar occupation as that for which the petition was filed." However, critical to section 106(c) of AC21, the petition must be "valid" to begin with if it is to "remain valid with respect to a new job." Section 204(j) of the Act, 8 U.S.C. § 1154(j) (emphasis added).

The statutory language provides no benefit or right for a new employer to "substitute" itself for the previous petitioner. Section 106(c) states that the underlying I-140 petition "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." Pub. L. No. 106-313, § 106(c), 114 Stat. 1251, 1254 (Oct. 17, 2000); § 204(j) of the Act, 8 U.S.C. § 1154(j). Thus, the statute simply permits the beneficiary to change jobs and remain eligible to adjust based on a prior approved petition if the processing times reach or exceed 180 days.

There is no evidence that Congress intended to confer anything more than a benefit to beneficiaries of long delayed adjustment applications. In other words, the plain language of the statute indicates that Congress intended to provide the alien, as a "long delayed applicant for adjustment," with the ability to change jobs if the individual's I-485 took 180 days or more to process. Section 106(c) of AC21 does not mention the rights of a subsequent employer and does not provide other employers with the ability to take over already adjudicated immigrant petitions.

Counsel has failed to show that the passage of AC21 granted any rights, much less benefits, to subsequent employers of aliens eligible for the job portability provisions of section 106(c). Based on a review of the statute and legislative history, the AAO must reject counsel's suggestion that the new employer, [REDACTED] has now become the petitioner, and an affected party, in these proceedings.

ORDER: The appeal is rejected as improperly filed.

cc: [REDACTED]