

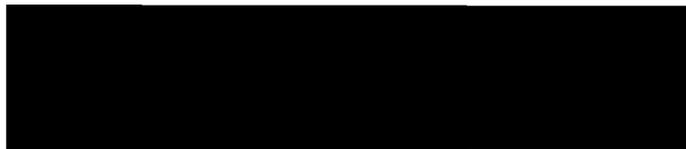
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



B6

Date: **JUN 30 2011**

Office: TEXAS SERVICE CENTER

FILE: 

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), 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 \$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: On May 27, 2003, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the VSC director on April 2, 2004. However, the Director of the Texas Service Center (TSC) revoked the approval of the immigrant petition on May 14, 2009, and the petitioner subsequently appealed the director's decision. The petition is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The appeal will be remanded to the TSC director for further action, consideration, and the entry of a new decision.

The petitioner is a convenience store/food market. It seeks to permanently employ the beneficiary in the United States as a convenience store manager/clerk pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii).¹ As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750). As noted above, the petition was initially approved in April 2004 but its approval was revoked later in May 2009. The director found that the petitioner did not follow the Department of Labor (DOL) recruitment requirements and obtained the approval of the Form ETA 750 by fraud or by willfully misrepresenting material facts.

On appeal to the AAO, counsel for the petitioner asserts that the director improperly concluded that the petitioner did not follow the DOL recruitment requirements and thus obtained the approval of the labor certification by fraud or by willfully misrepresenting material facts. Counsel states that the petitioner has submitted ample documents including copies of the advertisements and the in-house posting, among other things, to demonstrate that the labor certification was obtained in accordance with the DOL instructions and regulations. For these reasons, counsel concludes that the director's finding of fraud or willful misrepresentation against the petitioner is erroneous.

Citing *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1988), counsel states that where a notice of intention to revoke is based only on an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence, the director cannot revoke the approval of the visa petition. Counsel indicates that in the instant proceeding the director's notice of intent to revoke (NOIR) contains only vague allegations of fraud in other petitions filed by the petitioner's former attorney of record, [REDACTED].² Further, counsel states that the NOIR includes no specific evidence or information relating to the petitioner, petition, or documents in the present case. Therefore, counsel concludes that the director's decision to revoke the approval of the petition is erroneous.

¹ Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

² Current counsel of record, [REDACTED] will be referred to as counsel throughout this decision. Previous counsel, [REDACTED] and [REDACTED] will be referred to as previous or former counsel or by name.

Counsel also states that the director revoked the petition's approval under the authority of 8 C.F.R. § 205.1. This regulation, according to counsel, only applies to automatic revocation and is therefore the wrong regulation to revoke the approval of the petition in the instant proceeding.

Finally, counsel suggests that the director revoked the approval of the petition solely because the petition in the instant proceeding was filed by [REDACTED]

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

As a procedural matter, the AAO agrees with counsel that 8 C.F.R. § 205.1 only applies to automatic revocation and is not the proper authority to be used to revoke the approval of the petition in this instant proceeding. Under 8 C.F.R. § 205.1(a)(3)(iii), a petition's approval is automatically revoked if (A) the labor certification is invalidated pursuant to 20 C.F.R. § 656; (B) the petitioner or the beneficiary dies; (C) the petitioner withdraws the petition in writing; or (D) if the petitioner is no longer in business. Here, the labor certification has not been invalidated; neither the petitioner nor the beneficiary has died; the petitioner has not withdrawn the petition; nor has the petitioner gone out of business. Therefore, the approval of the petition cannot be automatically revoked. The director's erroneous citation of the applicable regulation is withdrawn. Nonetheless, as the director does have revocation authority under 8 C.F.R. § 205.2, the director's denial will be considered under that provision under the AAO's *de novo* review authority.⁴

One of the issues on appeal is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, states:

The Secretary of Homeland Security 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. Such revocation shall be effective as of the date of approval of any such petition.

Further, the regulation at 8 C.F.R. § 205.2 states:

³ 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).

⁴ The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

(a) *General.* Any Service [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this Service [USCIS].

Further, the regulation at 8 C.F.R. § 103.2(b)(16) states:

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

Matter of Arias, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

The director advised the petitioner in the NOIR that the instant case might involve fraud since the petition was filed by [REDACTED] who is under USCIS investigation for submitting fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions. In the NOIR, the director stated that the position required a high school diploma, and requested that the petitioner submit evidence of the beneficiary's work experience.⁵ The director also specifically stated that in many of the other petitions filed by previous counsel, the respective petitioners had not followed the DOL's recruitment procedures. The director recognized similarities with these other petitions, particularly the language at section 21 of the ETA 750, where the employer describes the recruitment efforts undertaken or to be undertaken.

The director erred in stating that [REDACTED] filed the labor certification application. The record reflects that [REDACTED] an attorney in Boston, MA, filed the Form ETA 750, and

⁵ The Form ETA 750 requires the minimum of a high school degree. No work experience is required.

represented the petitioner during recruitment, not ██████████⁶ The director also erred in concluding that the petitioner had already conducted recruitment at the time of filing the labor certification application. The director erroneously stated that the language at section 21 of the Form ETA 750 in this case reads “Newspaper advertisements, internal posting, word of mouth and www.jobfind.com.” However, section 21 of the Form ETA 750 in this case reads “Recruitment efforts shall be conducted in accordance with Federal Regulations.”

The AAO finds that the director appropriately reopened the approval of the petition by issuing the NOIR. However, the director’s NOIR erroneously cites facts of record, noting the petitioner’s prior recruitment efforts listed in section 21 of the ETA 750, when there were no such efforts; and stating that ██████████ filed the labor certification application, when the labor certification was filed by ██████████ the director also requested evidence of the beneficiary’s work experience that was not required by the labor certification and was thus not relevant to the NOIR. Further, the NOIR failed to outline the recruitment procedures that the petitioner did not follow. The NOIR neither provided nor referred to specific evidence or information outlining the petitioner’s failure to comply with DOL recruitment. Without specifying or making available evidence specific to the petition in this case, the petitioner can have no meaningful opportunity to rebut or respond to that evidence. *See Ghaly v. INS*, 48 F.3d 1426, 1431 (7th Cir. 1995). Because of these deficiencies in the notice of derogatory information specific to the petitioner, the director’s NOIR will be withdrawn. Nevertheless, the AAO agrees with the director that the approval of the petition was erroneous, and will return the petition to the director for the issuance of a new NOIR.

The next issue on appeal is whether the director properly concluded that the petitioner did not comply with the recruitment procedures of the DOL.

Before 2005, there were two forms of recruitment procedures acceptable by the DOL – the supervised recruitment process and the reduction in recruitment process. *See* 20 C.F.R. § 656.21 (2004). Under the supervised recruitment process the Form ETA 750 must first be filed with the local State Workforce Agency (SWA), who then would: date stamp the Form ETA 750 and make sure that the Form ETA 750 was complete; calculate the prevailing wage for the job opportunity and put its finding into writing; and prepare and process the Employment Service job order and place the job order into the regular Employment Service recruitment system for a period of thirty (30) days. *See* 20 C.F.R. §§ 656.21(d)-(f) (2004).

The employer filing the Form ETA 750, in conjunction with the recruitment efforts conducted by the local office, should: place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication and supply the local office with required documentation or requested information in a timely manner. *See* 20 C.F.R. §§ 656.21(g)-(h) (2004).

⁶ ██████████ first entered his appearance in this case when the Form I-140 petition was filed on May 27, 2003.

Under the reduction in recruitment process, the employer could, before filing the Form ETA 750 with the local office, conduct all of the recruitment requirements including placing an advertisement in a newspaper of general circulation and posting a job notice in the employer's place of business. See 20 C.F.R. §§ 656.21(i)-(k).

The AAO notes that the approved Form ETA 750 was not originally filed for the beneficiary in the instant case. On May 27, 2003, [REDACTED] submitted, along with the Form I-140 petition a letter to USCIS – VSC requesting that the named beneficiary on the approved Form ETA 750 be replaced by the beneficiary in the instant proceeding.⁷ Along with the letter, [REDACTED] also submitted Part B of the Form ETA 750 listing the name, address, and date of birth of the beneficiary. No education, training, or work experience was listed on that form.

Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. See 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to USCIS based on a Memorandum of Understanding, which was recently rescinded. See 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007, and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

Here, the Form ETA 750 was filed by the petitioner on April 27, 2001. The DOL approved the Form ETA 750 on January 28, 2003. The Form I-140 petition was filed on May 27, 2003.

In response to the director's NOIR, the petitioner submitted the following evidence to demonstrate that it complied with the DOL recruitment requirements:

⁷ The record indicates that the substituted beneficiary is the husband of the initial beneficiary.

- A copy of a letter, not on company letterhead, issued by the petitioner to the [REDACTED] signed by [REDACTED] and dated April 10, 2002, attaching copies of tear sheets from the newspaper advertisements and the internal job posting notice, and stating that no resumes were received;⁸
- Copies of advertisements published in the *Boston Herald* on Monday, March 11, 2002; Tuesday, March 12, 2002; and Wednesday, March 13, 2002;
- A copy of the in-house job posting (undated);⁹ and
- A copy of a letter dated April 10, 2002 from [REDACTED], the petitioner's former counsel, to the SWA in Massachusetts enclosing the petitioner's letter and attachments, and stating that, as no resumes were received, recruitment was complete.

The director stated in the Notice of Revocation (NOR) that the petitioner placed the advertisement for the position offered between March 11, 2001 and March 13, 2001, and that the beneficiary signed Part B of the Form ETA 750 on April 4, 2001, only three (3) weeks later. Based on these facts, the director found that the petitioner had not placed the advertisement long enough for other applicants to reply to the advertisement.

The director's finding is inconsistent with the evidence of record, which establishes that the petitioner conducted recruitment under supervision, a year after the labor certification application was filed. The finding of the director that the petitioner did not follow recruitment procedures because it waited an insufficient amount of time after advertising for the position to file the Form ETA 750 application is withdrawn.

Nevertheless, in adjudicating the appeal, the AAO finds serious inconsistencies in the recruitment process that must be resolved beginning with the issuance of a new NOIR on remand. As noted above, the Form ETA 750 requires no previous training or experience. The advertisements

⁸ On appeal, the petitioner, through counsel, also submits an original undated letter on [REDACTED] letterhead, addressed to the SWA, and signed by [REDACTED] Owner, informing the SWA that an advertisement was placed in the *Boston Herald* from March 11-13, 2002 and an internal notice was posted for ten days, and that no responses were received. It is unclear from the record why the petitioner would have an original letter addressed to the SWA, which was presumably sent to the SWA, to submit to USCIS in support of its statements that it conducted recruitment in accordance with the DOL procedures. This letter raises questions about why two different letters were sent by two different employer representatives to the same SWA on the same subject, e.g. publishing the March 11-13, 2002 advertisements in the *Boston Herald*, posting the notice internally, receiving no resumes, and completing recruitment, and whether either or both were issued contemporaneously with the completion of recruitment. The credibility of both letters is called into question.

⁹ The DOL regulations in place at the time of recruitment in this case included a requirement that the employer post notice of the job opening to its employees for ten consecutive days at the job site where the alien will work. 20 C.F.R. § 656.20(g)(1). The posting notice submitted by [REDACTED] states that some experience is required. This experience requirement is inconsistent with the Form ETA 750, which indicates that no training or experience is required.

submitted to the SWA by [REDACTED] the petitioner's counsel at the time the labor certification was filed and during the recruitment process, however, indicate that the petitioner recruited individuals requiring two years experience. In each copy of the March 2002 advertisement with the *Boston Herald*, the advertisement states, "Experience necessary, 2 yrs." The internal posting notice stated "Some Experience Required, Will Train." Further, the petitioner's submission of two letters to the SWA on the same subject matter, one not on letterhead, but signed, and one on letterhead with the name of the petitioner misspelled, raises questions about the letters' authenticity. There is no explanation of record for these inconsistencies. It is incumbent on the petitioner to resolve such inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

If the advertisements and internal posting notice submitted by [REDACTED] relate to the instant ETA 750, the DOL recruitment procedures were violated. The petitioner would have limited the pool of potential U.S. workers responding to the advertisements and to the internal posting notice by requiring two years of experience, and some experience, respectively, rather than no experience as stated on the labor certification application, and which allowed the petitioner to select the beneficiary, who had no experience. The test of the labor market would have been conducted for a more advanced position than the job offered in the instant proceeding, a clear breach of the labor certification procedures.¹⁰

The petition will be remanded in order for the director to reissue the NOIR, and give the petitioner notice of the adverse information in the record, e.g. the inconsistencies between the Form ETA 750 that requires no experience, and the advertisements published and the internal posting notice that require work experience; and the two different letters to the SWA on the same subject, which raise questions about whether these letters were contemporaneously prepared during the recruitment process and casting doubt on the validity of the procedures followed.

The DOL regulation at 20 C.F.R. § 656.21 required, at the time of recruitment in this case, that the employer clearly document, as a part of every labor certification application, its reasonable, good faith efforts to recruit U.S. workers without success. Such documentation should include the sources the employer may have used for recruitment, including, but not limited to, advertising; public and/or private employment agencies; colleges or universities; vocational, trade, or technical schools; labor unions; and/or development or promotion from within the employer's organization. The documentation should also identify each recruitment source by name; give the number of U.S. workers responding to the employer's recruitment; give the

¹⁰ See, 20 C.F.R. § 656.21(g)(6) which provided at the time of recruitment in this case, that in conjunction with the recruitment efforts, the employer must advertise the job opportunity, stating the employer's minimum job requirements. If the minimum job requirements were a high school diploma and no job experience, then the employer must advertise for the position stating these minimum requirements. Advertising for two years of experience in the paper, and posting the job internally requiring some experience, violates this regulation.

number of interviews conducted with U.S. workers; specify the lawful job-related reasons for not hiring each U.S. worker interviewed; and specify the wages and working conditions offered to the U.S. workers. If the employer advertised the job opportunity prior to filing the application for certification, the employer shall include also a copy of at least one such advertisement.

On remand, the director should in the new NOIR request the petitioner to explain, in detail, the discrepancies noted of record relating to the work experience requirement in the labor certification application process, and to submit independent, objective evidence resolving such discrepancies. If the petitioner contends that the March 11-13, 2002 *Boston Herald* advertisements and the internal posting notice do not relate to this case, it should explain why such advertisements were submitted into the current record of proceeding by [REDACTED] and [REDACTED] especially as both [REDACTED] and [REDACTED] attest to having used the advertisements to conduct recruitment for the proffered position. If the petitioner contends that the advertisements relate to a different case, the petitioner should submit evidence of such labor certification application filed with the DOL for a store manager/clerk in the same store requiring two years experience.¹¹ The director should in such a case request the petitioner to outline what specific steps it took to conduct good faith recruitment, in the instant case (if not by advertising in the *Boston Herald* on March 11-13, 2002 as reflected on the tear sheets submitted in support of its recruitment efforts), e.g. whether and how the company advertised in a newspaper of general circulation, and identifying the recruitment source by name, how many candidates were interviewed; and if so, whether and how it conducted interviews and determined that no other U.S. candidate was eligible for the position; and specifying the job related reason for not hiring each U.S. worker; and whether and for how long the company posted an in-house posting notice recruiting for the position. If the petitioner contends that the submitted advertisements do not relate to this case, the director should specifically ask the petitioner for copies of the advertisements and the in-house posting notice that it did use, and any other objective, independent evidence to establish that the petitioner followed the DOL requirements to ensure that no United States worker with a high school diploma and no work experience was qualified, willing and available to take the proffered position. If such evidence is unavailable, the petitioner should explain why it cannot be obtained.¹²

Further, the petition is currently not approvable, as the record does not reflect that on the priority date – which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL – the beneficiary had all of the qualifications stated on the Form

¹¹ In this hypothetical case, the petitioner should also explain the difference in the minimum job requirements between those in the instant proceeding and those for the same position advertised on March 11-13, 2002. See, 20 C.F.R. § 656.21(b)(5) which required at the time of recruitment in this case that the employer document the reasons for its minimum requirements.

¹² The AAO acknowledges the authority and interest of USCIS to request such documentation pursuant to our invalidation authority at 20 C.F.R. § 656.31(d) and the interest of the petitioner in proving its case by retaining and submitting such documentation to USCIS particularly in response to a fraud investigation. Further, the petitioner must resolve inconsistencies in the record by independent, objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-592.

ETA 750 as certified by the DOL and submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).¹³

Here, the Form ETA 750, as noted earlier, was filed and accepted for processing by the DOL on April 27, 2001. The name of the job title or the position for which the petitioner sought to hire is "Store Manager/Clerk." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote:

General management duties at convenience store, including supervision of staff, register reconciliation, stock ordering, customer service, and overseeing food preparation and handling.

Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of a high school education.

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must ascertain whether the beneficiary is, in fact, qualified for the certified job. 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, Madany v. Smith*, 696 F.2d, 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).

As set forth above, the proffered position requires the beneficiary to have a minimum of a high school education. On the Form ETA 750, part B, signed by the beneficiary on April 4, 2003, she did not represent that she had any education. To show that the beneficiary had the requisite education before April 10, 2001, the petitioner submitted copies of the beneficiary's secondary examination certificates issued by Gujarat Secondary Education Board in March 1995 and March 1997.¹⁴ The AAO notes that the names listed on these certificates are different from the name of

¹³ 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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

¹⁴ We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, www.aacrao.org, AACRAO is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in 28 countries." <http://www.aacrao.org/about/> (accessed June 23, 2011). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* According to

the beneficiary. [REDACTED] The 1995 certificate was issued to [REDACTED] and the 1997 certificate was issued to [REDACTED].¹⁵

On remand, the director should request additional evidence and/or explanation to resolve the inconsistencies in the record pertaining to the beneficiary's identity, education, and her failure to list any education on the Form ETA 750B. The director should send a separate Notice of Derogatory Information (NDI) to the beneficiary, requesting an explanation regarding the irregularities of the birth certificate, which does not state her full name and states that her father's full name is [REDACTED] and further does not list the name of [REDACTED] as either the beneficiary's or her father's name. The director should also request the beneficiary to explain why she claims to have passed secondary school examinations in the name of [REDACTED] or [REDACTED] when her passport and Form G-325 reflect that her former name was [REDACTED]. The director should request the beneficiary to submit an original birth certificate establishing her identity and an original marriage certificate reflecting her marriage to [REDACTED] the original beneficiary of the Form ETA 750 in this case. The director may request original school examination certificates and any other independent, objective evidence to establish that the names on the school examination certificates belong to the beneficiary. It is incumbent on the petitioner to resolve such inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. at 591-592. The director should give the beneficiary a reasonable period of time to respond to the NDI.

The AAO will next address the director's finding that the petitioner engaged in fraud and/or misrepresentation. Counsel asserts that because the DOL approved the labor certification under supervised recruitment, it can be assumed that all DOL recruitment procedures were followed and

the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." *Id.* According to the website, the Higher Secondary Certificate/Higher Secondary School Certificate in India "represents attainment of a level of education comparable to completion of senior high school in the United States." *Id.* If, on remand, the inconsistencies of record regarding the *bona fides* of the examination certificates are resolved, as discussed in more detail below, the Gujarat Secondary Education Board March 1997 Higher Secondary School Certificate Examination pass result would be the equivalent of a high school diploma.

¹⁵ The record contains serious inconsistencies regarding the beneficiary's name. The March 1997 Higher Secondary Examination Certificate indicates that [REDACTED] passed the examination. The beneficiary's passport states the beneficiary's name is [REDACTED]. The beneficiary lists her former name as [REDACTED] on the Form G-325 that she submitted in connection with the Form I-485 application to adjust status to permanent residence. The beneficiary's birth certificate, however, does not list hers or her father's last name as [REDACTED] and does not identify the beneficiary's full name. The birth certificate states: "Name: [REDACTED] Father/Mother's Name: [REDACTED]" The beneficiary's marriage certificate reflecting her marriage to [REDACTED] is not in the record. These inconsistencies call into question the beneficiary's identity and the *bona fides* of her educational credentials.

that the petitioner did not engage in fraud or material misrepresentation. The AAO disagrees with counsel's assumption. If the petitioner or either of its previous counsel, and/or the beneficiary deceived the DOL in the recruitment process, including in the presentation of the beneficiary's credentials as truthful, then the labor certification is not valid and should be invalidated. For the reasons discussed above, the AAO finds that the record does not currently reflect sufficient facts upon which the director can conclude that the petitioner failed to follow recruitment procedures. Similarly, there has been insufficient development of the facts upon which the director can rely to find that the petitioner and/or the beneficiary engaged in fraud or material misrepresentation.¹⁶

On remand, the director should request objective, independent evidence from the petitioner to resolve the discrepancies in recruitment and in the presentation of the beneficiary's credentials noted above and to support any explanation given in response. The director should advise the petitioner, and the beneficiary in a separate NDI, that he may find fraud and/or material misrepresentation based on the defective advertising, the unexplained letters, the inconsistencies regarding the beneficiary's name and educational credentials and/or that USCIS intends to invalidate the labor certification.

As immigration officers, USCIS Appeals Officers and Center Adjudications Officers possess the full scope of authority accorded to officers by the relevant statutes, regulations, and the Secretary of Homeland Security's delegation of authority. *See* sections 101(a)(18), 103(a), and 287(b) of the Act; 8 C.F.R. §§ 103.1(b), 287.5(a); DHS Delegation Number 0150.1 (effective March 1, 2003).

With regard to immigration fraud, the Immigration and Nationality Act (the Act) provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of Homeland Security has delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, make recommendations for prosecution, and take other "appropriate action." DHS Delegation Number 0150.1 at para. (2)(I).

The administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation for any issue of fact that is material to eligibility for the requested immigration benefit. Within the adjudication of the visa petition, a finding of fraud or material misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. at 591-592.

Outside of the basic adjudication of visa eligibility, there are many critical functions of the Department of Homeland Security that hinge on a finding of fraud or material

¹⁶ The director has not addressed the factual inconsistencies of record regarding the beneficiary's educational credentials.

misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or willfully misrepresenting a material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.¹⁷

Section 204(b) of the Act states, in pertinent part, that:

After an investigation of the facts in each case . . . the [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 an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition

Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in a petition filed pursuant to section 203(b) of the Act are true.

Section 212(a)(6)(C) of the Act governs misrepresentation and states the following: "Misrepresentation – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."

The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either:

- (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

Matter of S & B-C-, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on

¹⁷ It is important to note that, while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. *See Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. *See* sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). Nevertheless, the AAO and USCIS have the authority to enter a fraud finding, if during the course of adjudication, the record of proceedings discloses fraud or a material misrepresentation.

the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

Furthermore, a finding of misrepresentation may lead to invalidation of the Form ETA 750. *See* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

In this case, the factual record does not establish that the petitioner or the beneficiary engaged in fraud or material misrepresentation with respect to the recruitment process or in presenting the beneficiary's qualifications as truthful to the DOL. As noted above, the petitioner, and the beneficiary in a separate NDI, must first be advised of derogatory information and then given the opportunity to prove that the advertising was conducted in accordance with the DOL procedures, that no false or fabricated documents were submitted, and no misrepresentation occurred. On remand, the director should in his NOIR advise the petitioner that the DOL issued the certification on the premise that the DOL recruitment procedures were followed and that the beneficiary's qualifications were truthfully presented. If the petitioner submitted false statements or fraudulent documents with respect to the recruiting procedures, if for example, the petitioner intentionally advertised only for candidates with two years of experience, and/or misrepresented the results of recruitment; or if, for example, the petitioner or the beneficiary misrepresented the beneficiary's qualifications, then the director may find that the recruitment procedures were not followed; that the petitioner, its former counsel and/or the beneficiary engaged in fraud or material misrepresentation and that the labor certification is invalid; and that the beneficiary is inadmissible on the true facts. If the DOL relied upon false or fraudulent documents in determining the labor certification application's approval, the resulting labor certification was erroneous and would be subject to invalidation by USCIS. *See* 20 C.F.R. § 656.30(d). Further, as a third preference employment-based immigrant, the petitioner was required to obtain a permanent labor certification from the DOL in order for the beneficiary to be admissible to the

United States. *See* section 212(a)(5) of the Act. If on the true facts the labor certification was obtained through fraud or misrepresentation, and is thus invalid, then the beneficiary is not admissible as a third preference employment-based immigrant, and as such the misrepresentation relating to the recruitment procedures is material.

If the DOL relied upon false or fraudulent documents submitted by the petitioner, its former counsel, or by the beneficiary through the petitioner, which is not currently reflected by the record of proceedings, then the DOL would have been unable to make a proper investigation of the facts when determining whether the labor certification application should be approved, because the petitioner, its previous counsel or the beneficiary would have shut off a line of relevant inquiry. In such a case, if the DOL had known the true facts, it would have denied the employer's labor certification, as the petitioner would not have complied with DOL's recruitment requirements, and there would have been an invalid test of the labor market.¹⁹ In other words, the concealed facts, if known, would have resulted in the employer's labor certification being denied. Accordingly, the petitioner's and/or the beneficiary's presentation of false documentation or misrepresentation would be material under the second and third inquiries of *Matter of S & B-C-*, 9 I&N Dec. at 447.

The evidence of record currently does not support the director's finding of fraud or willful misrepresentation in connection with the labor certification process. Nevertheless, the petition, as it currently stands, remains unapprovable, as the record raises serious questions about the *bona fides* of the recruitment process, including the presentation of the beneficiary's credentials as truthful. Therefore, on remand the director may pursue the revocation of approval of the petition for fraud and misrepresentation in connection with the labor certification process, provided that the director specifically outlines what the particular deficiencies are with respect to the labor certification, points out how the petitioner and/or the beneficiary may have engaged in fraud or misrepresentation in the labor certification process including in the presentation of the beneficiary's educational credentials, and gives the petitioner and the beneficiary each the opportunity to respond.

The record also does not establish that the petitioner has the ability to pay the beneficiary's wage. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the

¹⁹ *See*, 20 C.F.R. § 656.2, which provides that the role of the DOL in the permanent labor certification process is to determine that there are not sufficient United States workers, who are able, willing, qualified and available to take the position at the time of the alien's application and admission to perform such labor, and that the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed. The DOL executes this role through a test of the labor market where the alien beneficiary will perform the work.

²¹ This is often called "porting."

ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

As noted above, the priority date in this case is April 27, 2001. The rate of pay or the proffered wage as indicated on the Form ETA 750 is \$15 per hour, \$600 per week, or \$31,200 per year. The petitioner is, therefore, required to demonstrate that it has the continuing ability to pay the proffered wage from April 27, 2001 until the beneficiary receives legal permanent residence.

The record, however, contains only copies of the 2001 and 2002 federal tax returns of the petitioner, which the petitioner filed on IRS Forms 1120S, U.S. Income Tax Return for an S Corporation. No other relevant evidence (i.e. federal tax returns, annual statements, or audited financial statements) is found in the record to show that the petitioner has the continuing ability to pay the proffered wage from 2003 and thereafter.

The beneficiary stated in her Biographic Information (Form G-325), which she submitted in connection with her Application to Register Permanent Residence or Adjust Status (Form I-485), that she started to work for the petitioner in 2001. The record does not include any evidence, such as a copy of the beneficiary's Form W-2, Form 1099-MISC, or other evidence, which shows that she has been employed by the petitioner since 2001.

Therefore, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that the petitioner is making a realistic job offer and that the petitioner has the continuing ability to pay the proffered wage from the priority date, on remand, in the new NOIR, the director must require the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wage from 2003 until the most recent evidence available. The totality of the circumstances affecting the petitioning business should be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Finally, the record contains an affidavit from the petitioner's owner indicating that the beneficiary left her position with the petitioner in November, 2005. As the petition remains unapproved at this time, the petitioner must intend to employ the beneficiary. The director should request the petitioner in the NOIR to provide an original letter that it intends to employ the beneficiary. If not, the petition is moot, but would not prevent a determination of fraud or misrepresentation.

On appeal, counsel the petitioner indicates that the beneficiary is no longer with the petitioning employer, but that she is working in a similar job. Counsel cites Section 204(j) of the Act and references the May 12, 2005 USCIS memorandum on portability and Form I-140 petitions.

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.") *See also* Stephen R. Viña, Legislative Attorney, Congressional Research Service (CRS) Memorandum, to the House Subcommittee on Immigration, Border Security, and Claims regarding "Questions on Internal Policy Memoranda issued by the Immigration and Naturalization Service," dated February 3, 2006. The memorandum addresses, "the specific questions you raised regarding the legal effect of internal policy memoranda issued by the former Immigration and Naturalization Service (INS) on current Department of Homeland Security (DHS) practices." The memo states that, "policy memoranda fall under the general category of nonlegislative rules and are, by definition, legally nonbinding because they are designed to 'inform rather than control.'" CRS at p.3 citing to *American Trucking Ass'n v. ICC*, 659 F.2d 452, 462 (5th Cir. 1981). *See also Pacific Gas & Electric Co. v. Federal Power Comm'n*, 506 F.2d 33 (D.C. Cir. 1974), "A general statement of policy . . . does not establish a binding norm. It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy announces what the agency seeks to establish as policy." The memo notes that "policy memoranda come in a variety of forms, including guidelines, manuals, memoranda, bulletins, opinion letters, and press releases. Legislative rules, on the other hand, have the force of law and are legally binding upon an agency and the public. Legislative rules are the product of an exercise of delegated legislative power." *Id.* at 3, citing to Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and Like – Should Federal Agencies Use them to Bind the Public?*, 41 Duke L.J. 1311 (1992). In view of the above, the May 12, 2005 policy memorandum cited by counsel is not binding in this case.

Section 204(a)(1)(F) of the Immigration and Nationality Act (Act) provides that: "Any employer desiring and intending to employ within the United States an alien entitled to classification under section 1153(b)(1)(B), 1153(b)(1)(C), 1153(b)(2), or 1153(b)(3) of this title may file a petition with the Attorney General for such classification."

Once an alien has an approved petition, section 245(a) of the Act, 8 U.S.C. § 1255, allows the beneficiary to adjust status to an alien lawfully admitted for permanent residence:

- (a) 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 as a VAWA self-petitioner 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

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

Section 106(c) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21) (Public Law 106-313); section 204(j) of the Act, 8 U.S.C. § 1154(j) amended section 204 of the Act by adding the following provision, codified as section 204(j) of the Act, 8 U.S.C. § 1154(j):

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 employers²¹ if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

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.

Although section 204(j) of the Act, 8 U.S.C. § 1154(j), provides that an employment-based immigrant visa petition shall remain valid with respect to a new job if the beneficiary’s application for adjustment of status has been filed and remained unadjudicated for 180 days, the petition must have been “valid” to begin with if it is to “remain valid with respect to a new job.” *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010). To be considered valid in harmony with related provisions and with the statute as a whole, the petition must have been filed for an alien who 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. An unadjudicated immigrant visa petition is not made “valid” merely through the act of filing the petition with USCIS or through the passage of 180 days. *Id.*

In a case pertaining to the revocation of an I-140 petition, the Ninth Circuit Court of Appeals determined that the government’s authority to revoke a Form I-140 petition under section 205 of the Act survived portability under section 204(j) of the Act. *Herrera v. USCIS*, 2009 WL

1911596 (9th Cir. July 6, 2009). Citing a 2005 AAO decision, the Ninth Circuit reasoned that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start. The Ninth Circuit stated that if the plaintiff's argument prevailed, an alien who exercised portability would be shielded from revocation, but an alien who remained with the petitioning employer would not share the same immunity. The Ninth Circuit noted that it was not the intent of Congress to grant extra benefits to those who changed jobs. Under the plaintiff's interpretation, an applicant would have a very large incentive to change jobs in order to guarantee that the approval of an I-140 petition could not be revoked. *Id.*²²

On remand, upon consideration of the petitioner's response to the new NOIR, if the director determines that the Form I-140 petition's approval should be revoked for good and sufficient cause, the beneficiary may not invoke AC21's I-140 portability provisions pursuant to section 204(j). In that case, any claim by the beneficiary that she may continue with her application to adjust status to permanent residence by virtue of having ported to the same or a similar job, must be denied, as there would not be a valid, approved petition underlying that request.

The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not reinstate the approval of the petition at this time. The petition is remanded to the director for the issuance of a NOIR to the petitioner and an NDI to the beneficiary consistent with the above. The director may advise the petitioner that if it chooses to withdraw the Form I-140 petition, such withdrawal may not prevent a finding of fraud or material misrepresentation and the invalidation of the labor certification. Upon consideration of the responses to the NOIR and the NDI, if any, and the evidence of record, the director should issue a new, detailed decision which, if adverse to the petitioner, is to be certified to the AAO for review.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for the issuance of a NOIR to the petitioner and an NDI to the beneficiary and a new, detailed decision consistent with above, which if adverse to the petitioner shall be certified to the AAO for review.

²² 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.