

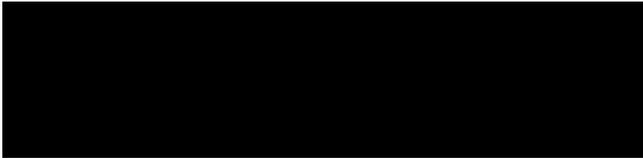
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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Date: **MAY 03 2011** Office: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner:
Beneficiary:



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:

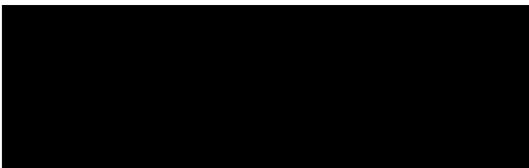
INSTRUCTIONS:

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 \$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

cc: 

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. The petitioner appealed the director's decision to the Administrative Appeals Office (AAO), and the AAO rejected the appeal. The petitioner has filed a motion to reopen and a motion to reconsider the AAO decision. The motion will be dismissed.

The petitioner, a restaurant named [REDACTED], initially filed an Immigrant Petition for Alien Worker, Form I-140, on November 16, 2001. The employment-based immigrant visa petition was initially approved by the Director of the Vermont Service Center (VSC) on December 29, 2001. The Director of the Texas Service Center (TSC), however, revoked the approval of the immigrant petition on May 19, 2009. On June 8, 2009, the beneficiary of the visa petition filed a Notice of Appeal or Motion, Form I-290B, with the Administrative Appeals Office (AAO), appealing the director's decision to revoke the approval of the visa petition. On August 4, 2010, the AAO rejected the appeal, finding that the beneficiary was not the affected party, and therefore, did not have legal standing to appeal in this proceeding. The AAO also stated, "If the appeal were not rejected, it would be dismissed based on the petitioner's failure to demonstrate that the beneficiary is qualified to perform the duties of the proffered position."

On motion, counsel for the petitioner maintains that the beneficiary is the affected party and has legal standing in this proceeding. To determine otherwise would constitute a violation of due process, according to counsel. Counsel also urges the AAO to reevaluate the beneficiary's qualifications for the proffered position. Submitted along with the motion is the following evidence:

- A sworn statement from the beneficiary stating that she worked as a cook for a restaurant in Brazil called "[REDACTED]" from June 1996 to June 2000;
- A sworn statement from the owner of [REDACTED] confirming that she employed the beneficiary as a cook at her restaurant from 1996 to 2000;
- Copies of pay vouchers dated February 1997, April 1998, January 1999, January 2000, and May 2000, issued to the beneficiary by [REDACTED];
- A revised translation of a declaration dated December 20, 2000 issued by a Brazilian company called "[REDACTED]" stating that the beneficiary worked as a cook for [REDACTED] from June 1996 to June 2000;¹ and
- Various photos of the exterior and interior of [REDACTED]

As noted earlier, the petitioner sought to employ the beneficiary as a cook in the United States permanently, pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the

¹ The original declaration mentioned the name of [REDACTED]. The beneficiary indicates in her sworn statement that [REDACTED] was a payroll and accounting firm that handled [REDACTED] accounting issues when she was working in Brazil as a cook.

Act), 8 U.S.C. § 1153(b)(3)(A)(i).² As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).

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 threshold issue, before the AAO can adjudicate the subject matter of the appeal, we must determine whether the beneficiary has legal standing to appeal in this proceeding.

The regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B), in pertinent part, states,

For purposes of this section and §§ 103.4 and 103.5 of this part, affected party (in addition to the Service) means the person or entity with legal standing in a proceeding. **It does not include the beneficiary of a visa petition.** (emphasis added).

Further, the regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(1) states, “An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed.”

The explicit language of the regulations noted above suggests that the beneficiary and/or his counsel would not have legal standing and would not be authorized to file the appeal in this matter. Here, the appeal was authorized by the beneficiary and filed by the beneficiary’s counsel, and no evidence of record suggests that the petitioner consented to the filing of the appeal. Hence, the beneficiary and his counsel are not entitled to appeal the director’s decision in this proceeding.

On motion, however, counsel argues that Congress implicitly intended to confer on the beneficiaries of approved employment-based visa petitions the right, after 180 days, to continue the adjustment process without depending on the original petitioners.⁴ Counsel contends that the beneficiaries

² Section 203(b)(3)(A)(i) of 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.

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 Counsel cites section 204(j) of the Act; 8 U.S.C. § 1154(j), as amended by section 106(c) of the

whose employment-based petitions have been approved, and whose Applications to Register Permanent Residence or Adjust Status (Form I-485) have been pending for more than 180 days have the right to change employment and to continue to adjust their legal status to permanent residence without the help of their original petitioners or employers. According to counsel, such beneficiaries continue to have legal standing even after they have left their employers, who filed the petitions on their behalf. By the same token, counsel argues that the beneficiary whose employment-based petitions have been revoked should continue to have legal standing to appeal the director's decision. Counsel specifically states:

If beneficiaries are not given standing, the Service [USCIS] may, as it has done in the instant case, arbitrarily and capriciously revoke the visa petition with impunity, placing the beneficiary in the impossible position of relying on the original petitioner – whose employ he or she has left – to defend the petition. It is precisely this type of strained reliance on the original petitioner years after the approval of the original petition that Congress sought to prevent in passing AC21, thus increasing job flexibility for beneficiaries while preserving their ultimate path to permanent residence.

...

Knowing that the Service [USCIS] can revoke the previously approved petition at any time and for any reason without the possibility of even administrative review, the beneficiary would be forced to remain in the employ of the original petitioner in order to protect her interest in adjustment. Thus, delaying the adjudication of the beneficiary's adjustment of status application, in this case for over seven (7) years, and then requiring the beneficiary to rely on the original employer to defend the revoked petition at the 11th hour, deprives the beneficiary of the employment flexibility conferred on her by Congress.

The AAO notes that section 204(j) of the Act; 8 U.S.C. § 1154(j), as amended by section 106(c) of the AC21, generally provides relief to the alien beneficiary who changes jobs after his visa petition has been approved. More specifically, this section permits an application for adjustment of status to remain pending when (1) it has remained unadjudicated for at least 180 days, and (2) the beneficiary's new job is in the same or similar occupational classification as the job for which the

American Competitiveness in the Twenty First Century Act of 2000 (AC21), which states:

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.

visa petition was approved. *See Perez-Vargas v. Gonzales*, 478 F.3d 191, 193 (4th Cir. 2007); *also see Sung v. Keisler*, 505 F.3d 372, 374 (5th Cir. 2007).

It is important to note here that section 204(j) does not apply to an immigrant visa petition process but to an application for adjustment of status. Neither AC21 nor section 204(j) addresses the specific question as to whether the beneficiary continues to have legal standing to file an appeal or a motion with the AAO, once she has left her employment with the original petitioner. This question, which arises as a consequence of the statutory provisions at AC21 and section 204(j) of the Act, is appropriately deferred to the Form I-485 adjustment of status adjudication.⁵

The AAO has no jurisdiction to adjudicate an adjustment of status application; only USCIS has the exclusive jurisdiction over adjustment of status issue along with the immigration judge, when the immigration judge adjudicates the application under 8 C.F.R. § 1245.2(a)(1). *See* 8 C.F.R. § 245.2(a).

Here, the appeal was authorized by the beneficiary and filed by the beneficiary's counsel, and no evidence of record suggests that the petitioner consented to the filing of the appeal. The language of the regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B) explicitly excludes the beneficiary of a visa petition as an affected party, and therefore, bars the beneficiary from filing an appeal or a motion with the AAO. As the language of the regulation is plain and unambiguous, we decline to interpret the language of the regulation differently.

The beneficiary and his counsel are not entitled to appeal in this proceeding. The motion to reopen and to reconsider in this case is, therefore, improperly filed, pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1), and must be dismissed.⁶

Further, since the motion is improperly filed and dismissed, we will not address the issue of whether the beneficiary had the requisite work experience before the priority date, whether the petitioner had the continuing ability to pay the proffered wage from the priority date, and whether the director's decision to revoke the approval of the petition was consistent with the evidence of record.

ORDER: The motion is dismissed as improperly filed. The AAO's decision affirming the director's decision remains undisturbed.

⁵ Another question not addressed by AC21 or section 204(j), and which should be reviewed at the adjustment of status adjudication, is the continuing validity of the beneficiary's porting to a new employer when approval of the underlying petition is subsequently revoked. In this case, the immigrant visa petition was approved in 2001; the beneficiary changed jobs in 2006 (according to counsel); and the petition's approval was revoked in 2009.

⁶ Normally when the appeal or motion is improperly filed, the AAO does not send its decision to the non-affected party; however, since this case involves a novel interpretation of the regulation, the beneficiary's counsel will be provided a courtesy copy.