

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

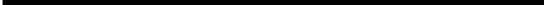
PUBLIC COPY



B6

Date: **MAY 16 2011**: 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:

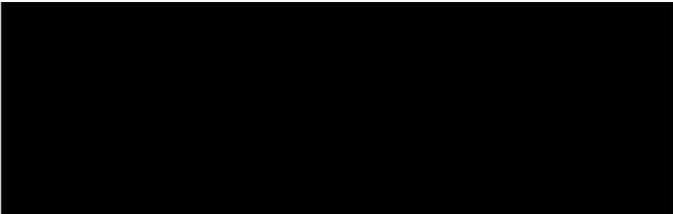
INSTRUCTIONS:

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 record shows that the petitioner filed an immigrant petition for alien worker, Form I-140, on September 27, 2002. The employment-based immigrant visa petition was initially approved by the Director of the Vermont Service Center (VSC) on May 5, 2003. The Director of the Texas Service Center (TSC), however, revoked the approval of the immigrant petition on August 25, 2010. On September 9, 2010, the beneficiary of the visa petition through his counsel 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 October 18, 2010, the TSC director rejected the appeal. The decision of the director rejecting the appeal is now before the AAO. Upon review, the AAO finds that the director's decision to reject the appeal is procedurally erroneous. The AAO, not the director, pursuant to 8 C.F.R. § 103.3(a)(2)(iv) shall have the jurisdiction over a properly filed appeal in this case.¹ Therefore, the director's decision rejecting the appeal will be withdrawn. Nonetheless, the appeal will be rejected as improperly filed since the beneficiary through his counsel is not entitled to file the appeal in this proceeding, pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1). *See infra.* The revocation of the approval of the petition will remain undisturbed.

The petitioner is a pastry and coffee shop. It seeks to employ the beneficiary permanently in the United States as a baker, pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the 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). As noted above, the VSC director initially approved the petition on May 5, 2003.

United States Citizenship and Immigration Services (USCIS), however, found numerous problems including fraud and willful misrepresentation in *other* I-140 petitions and labor certification applications that the beneficiary's former attorney of record, [REDACTED], filed. Because of these other petitions and since [REDACTED] filed the petition in this case, USCIS – TSC sent a notice of intent to revoke (NOIR) to the petitioner on April 21, 2009. The TSC director found that the business registration number or the [REDACTED] of the company where the beneficiary allegedly used to work in Brazil belonged to another company.³ For these reasons, the director requested that the petitioner submit additional

¹ The regulation at 8 C.F.R. § 103.3(2)(iv) specifically states, "If the reviewing official will not be taking favorable action or decides favorable is not warranted, that official shall promptly forward the appeal and the relating record of proceeding to the AAO in Washington, DC."

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 CNPJ is a database which shows all registered businesses in Brazil, with each company having

evidence to demonstrate that the beneficiary had at least two years working experience in the job offered prior to the filing of the labor certification application in June 2001 and that the petitioner complied with all of the DOL recruiting requirements.

In response to the director's NOIR, Mr. [REDACTED] submitted the following evidence:

- A letter stating that the beneficiary no longer works for the petitioner;
- A letter from [REDACTED] stating that the beneficiary has been working at [REDACTED] since March 6, 2006;
- A sworn statement from the beneficiary attesting to his employment in Brazil at a company called "[REDACTED]" as a baker from February 1996 to April 1998;
- A copy of a letter from [REDACTED], the owner of the petitioner, informing the DOL that he had advertised the proposed position in the [REDACTED] and on the website [REDACTED] and [REDACTED];
- A copy of the advertisement from the [REDACTED]

The director determined that that the evidence submitted was not sufficient to demonstrate that the beneficiary had the requisite two years work experience in the job offered before the priority date and that the petitioner complied with the DOL's recruitment procedures. The approval of the petition was revoked, accordingly.

On appeal, counsel for the beneficiary contends that statutory authority and the constitutional requirements of due process require that the beneficiary be granted legal standing to appeal the revocation of the previously approved visa petition. Counsel states that since the petitioner no longer employs the beneficiary, it may no longer have any interest in pursuing the visa petition or appealing the director's decision. Counsel states that the beneficiary, on the other hand, continues to have an interest in this proceeding; his interest is in fact vested, once he has ported to another similar job after the petition was approved, according to counsel. Counsel also notes that the beneficiary in this case should be accorded legal standing because his application to register permanent residence or adjust status (Form I-485) had been pending and remained adjudicated for more than 180 days.⁴ This is allowed by the job flexibility provisions of section 204(j) of 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), according to counsel. Counsel indicates that Congress intended, upon passing AC21, to recognize and protect the beneficiary's interest in the employment-based visa petition process. Thus, "to reject the appeal here deprives the beneficiary of the employment flexibility conferred on him by Congress," claims counsel.

a unique CNPJ number.

⁴ Counsel cited a memo by William R. Yates, Acting Associate Director for Operations, Bureau of Citizenship and Immigration Services (BCIS), dated May 12, 2005 where he stated that "the petition remains valid even if the petitioner withdraws the petition after the I-485 has been pending for 180 days."

Counsel specifically states:

[t]he beneficiary of an approved employment-based visa petition whose adjustment has been pending for more than 180 days and who has changed employers, has the right to continue pursuing adjustment even without the support of the original employer. Furthermore, those petitions *must* remain valid irrespective of the petitioner's interest. Such beneficiaries must, then, be permitted to appeal revocations of visa petitions that violate USCIS [*sic*] regulations. If beneficiaries are not given standing, USCIS may, as it has done in the present case, arbitrarily and capriciously revoke the visa petition, placing the beneficiary in the position of relying on the original petitioner – whose employ he or she has left – to defend the petition.

Counsel additionally states that the director's decision to revoke the previously approved petition was not supported by the evidence of record and that the director's NOIR contains only vague allegations of fraud in other petitions filed by [REDACTED] and similarities in the description regarding recruitment efforts present in the petitioner's labor certification application and other unrelated applications filed by [REDACTED]. Counsel states that the NOIR includes no specific evidence or information relating to the petitioner, the petition, or to documents in the present case. 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).

Counsel states:

This case also demonstrates the extremely high risk of deprivation of those interests if the beneficiary of a properly-ported I-140 is not permitted to appeal its revocation. [USCIS] has revoked the already-approved petition without permitting [the beneficiary] to review the evidence upon which it relied, without providing him an opportunity to rebut specific allegations, and without any reasoning for its disregard of evidence in the administrative record. All of this demonstrates the extreme risk of erroneous deprivation of beneficiaries' rights by arbitrary and capricious acts of [USCIS] if beneficiaries are not given standing to challenge such actions.

Counsel essentially claims that the beneficiary in this case is the "affected party" as defined by the regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B), and therefore, should have legal standing to appeal the revocation of the petition.

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.⁵

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 in this proceeding.

Even so, this does not answer the more specific question of whether the beneficiary may take the place of and become the petitioner of an I-140 petition in AC21 situations. Given the novel issue raised by the appeal, i.e., whether AC21 permits the beneficiary to have legal standing in this proceeding, the AAO will, at this time, address this issue.⁶

To address this issue, it is important to 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

⁵ 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).

⁶ The beneficiary’s counsel will be provided a courtesy copy of this decision.

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

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

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

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

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 beneficiary seems to suggest that the beneficiary has become the petitioner with respect to the approved I-140 petition by virtue of the portability provisions of AC21. That is, counsel suggests that the beneficiary became the petitioner of the I-140 petition once the I-140 petition was approved, the I-485 application had been pending for 180 days, and the beneficiary ported to a new employer and began his new employment in a similar position as the job offered by the petitioner.

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).⁷

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 assertions that the beneficiary has now become the petitioner, and an affected party, in these proceedings.

As no evidence of record suggests that the original petitioner consented to the filing of the appeal, the appeal was improperly filed pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1) and must be rejected.

Since the appeal is rejected, we will not elaborate on whether the beneficiary had the requisite work experience before the priority date, whether the petitioner had the continuing ability to pay

⁷ Furthermore, 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 adjudicated for 180 days. 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*, 571 F.3d 881 (9th Cir. 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.

the proffered wage from the priority date, and whether the director's decision to revoke the approval of the petition was based on good and sufficient cause, in accordance with Section 205 of the Act, 8 U.S.C. § 1155.

ORDER: The appeal is rejected as improperly filed. The director's decision to revoke the approval of the petition remains undisturbed.