**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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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[redacted]

Date: APR 2 4 2012 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

SELF-REPRESENTED

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,

Elizabeth M'Cormack

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION:** The petitioner named above filed an immigrant petition for alien worker, Form I-140, on January 19, 2001. The employment-based immigrant visa petition was initially approved by the Director of the Vermont Service Center (VSC) on September 14, 2001. The Director of the Texas Service Center (TSC), however, revoked the approval of the immigrant petition on July 16, 2009 with a finding of fraud. On August 3, 2009, 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. 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 not be disturbed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, 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).[1] 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 September 14, 2001.

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 June 1, 2009. The TSC director requested that the petitioner submit additional 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 on December 30, 1999 and that the petitioner complied with all of the DOL recruiting requirements.

In response to the director's NOIR, counsel for the beneficiary asserted that the director's intent to revoke the approval of the petition was not based on good and sufficient cause, as required by section 205 of the Act; 8 U.S.C. § 1155. Counsel noted that the NOIR did not contain specific facts or detailed findings as required by applicable law. *See In Re Estime*, 19 I&N Dec. 450 (BIA 1987).

Additionally, counsel indicated that the DOL would not have approved the petitioner's Form ETA 750 had the petitioner not followed the DOL recruitment requirements. Further, counsel noted that the issuance of the NOIR more than seven years after the approval of the employment-based immigrant visa petition constitutionally violated the due process rights guaranteed to the

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[1] 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.

beneficiary by the United States Constitution. Counsel argued that the director requested documentation that the petitioner was not required to keep after the approval of the labor certification.[2]

On appeal to the AAO, the beneficiary through his counsel submitted the following evidence to demonstrate that he had the requisite work experience in the job offered before the date of filing of the Form ETA 750 on December 30, 1999 (the priority date):

- A sworn statement dated July 31, 2009 from the beneficiary attesting to the truthfulness of his claim that he was employed as a cook by from June 23, 1991 to October 31, 1994, that he has tried to contact to obtain another employment verification letter and other evidence but has not been able to locate him, and that at no time he has submitted fraudulent documents;
- A sworn statement dated December 23, 2009 from the beneficiary's former co-worker, stating that he and the beneficiary worked together as cooks at in Brazil from 1991 to 1994;
- A sworn statement dated December 22, 2009 from the beneficiary's former employer in Brazil, stating that the beneficiary worked at his hotel, as a cook from May 8, 1989 to June 17, 1991;[3] and

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[2] At the time the petitioner filed the labor certification application with the DOL for processing in December 1999, employers were not required to maintain any records documenting the labor certification process once the labor certification had been approved by the DOL. *See* 45 Fed. Reg. 83933, Dec. 19, 1980 as amended at 49 Fed. Reg. 18295, Apr. 30, 1984; 56 Fed. Reg. 54927, Oct. 23, 1991. Not until 2005, when the DOL switched from paper-based to electronic-based filing and processing of labor certifications, were employers required to maintain records and other supporting documentation, and even then employers were only required to keep their labor certification records for five years. *See* 69 Fed. Reg. 77386, Dec. 27, 2004 as amended at 71 Fed. Reg. 35523, June 21, 2006; *also see* 20 C.F.R. § 656.10(f) (2010).

Nevertheless, 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. 582, 591-592 (BIA 1988).

[3] The AAO notes that the beneficiary did not list the employment at on the Form ETA 750, part B, thus lessening the probative value of this letter. *See Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted.

- [redacted]

The director found that the response to the NOIR was filed by counsel for the beneficiary, not by a person or entity authorized to represent the petitioner. The director declined to accept the evidence submitted above. Because the petitioner failed to demonstrate that the beneficiary possessed the requisite work experience in the job offered prior to the priority date and that the petitioner followed the recruitment requirements, the director revoked the approval of the petition and further found willful misrepresentation against the petitioner.

On appeal, counsel for the beneficiary states that the original petitioner is no longer in business, and naturally, no longer has any interest in appealing the director's decision to revoke the approval of the petition.[5] Citing the portability provisions of section 204(j) of the Act, 8 U.S.C. § 1154(j), as amended by section 106(c) of the American Competitiveness in the Twenty First Century Act of 2000 (AC21), counsel indicates that the beneficiary, on the other hand, continues to have an interest in this proceeding, as he has ported to another similar job after the petition was approved. The record contains documentation that the beneficiary is currently employed as a cook at [redacted] Counsel also notes that the beneficiary qualifies for the benefits of AC21 because his application to register permanent residence or adjust status (Form I-485) had been pending and remained unadjudicated for more than 180 days before the approval of the employment-based visa petition was revoked in July 2009.

Essentially, counsel argues 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.[6]

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[4] [redacted] is a database which shows all businesses in Brazil, with each company having a unique [redacted] number similar to Federal Employer Identification Number in the United States.

[5] The AAO notes that where there is no active business (e.g., where the business is closed, dissolved or otherwise not active), no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

[6] 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

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

The regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B) unequivocally 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 language of the cited regulations explicitly states that neither the beneficiary nor his counsel has legal standing in this visa petition proceeding, and neither is authorized to file the appeal in this matter. Here, the appeal was authorized by the beneficiary and filed by the beneficiary's counsel. As the beneficiary and his counsel are not entitled to appeal the director's decision in this proceeding, the appeal must be rejected.

Moreover, the beneficiary may not take the place of and become the petitioner of a Form I-140 when the beneficiary is claiming eligibility under the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). 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 address this issue.

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) of 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 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.

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:

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documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

> 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 Form I-140 petition by virtue of the portability provisions of AC21. That is, counsel suggests that the beneficiary became the petitioner of the Form I-140 petition once the 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 beneficiary's 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]

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[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 unadjudicated for 180 days. In a case pertaining to the revocation of a Form 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 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 Form 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 Form 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 authorized 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 the question of whether the beneficiary had the requisite work experience before the priority date, 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, and whether the labor certification involved fraud or misrepresentation.

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

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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.