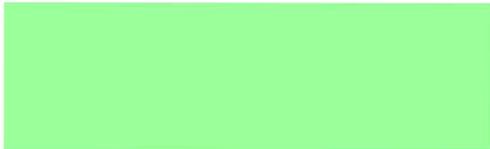


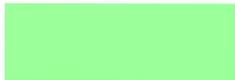


U.S. Citizenship  
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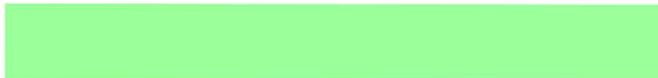
(b)(6)



DATE: **JUN 15 2012** OFFICE: NEBRASKA SERVICE CENTER

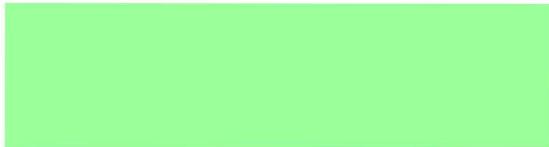
FILE: 

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.

Thank you,

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner is a retail store. It seeks to employ the beneficiary permanently in the United States as a human resource director. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL).<sup>1</sup> The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The instant appeal was filed by counsel on behalf of [REDACTED] as a new employer of the beneficiary, on April 24, 2009.<sup>2</sup>

The immigrant petition (Form I-140) was filed by [REDACTED] on August 16, 2007. According to the records at the Florida Department of State Division of Corporations website, the petitioner, [REDACTED] was incorporated on January 7, 2005 and dissolved on May 31, 2007. See [REDACTED]

[REDACTED] = (accessed May 16, 2012). The Form I-140 was filed August 16, 2007, after the petitioner's dissolution. This is material to whether the job offer, as outlined on the immigrant petition filed by this organization, was a *bona fide* job offer at the time of filing the Form I-140. Moreover, any concealment of the true status of the organization by the petitioner seriously compromises the credibility of the evidence in the record. See *Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988)(stating that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.) It is incumbent upon the petitioner to resolve any 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.

On appeal, counsel asserts that on June 3, 2008 the beneficiary ported his employment from [REDACTED] Counsel asserts that the beneficiary

<sup>1</sup> The employer listed on Form ETA 750 is [REDACTED] According to the records at the Florida Department of State Division of Corporations website, [REDACTED] was incorporated on February 7, 2001, with its principal address at [REDACTED] The registered agent and officer was [REDACTED] was voluntarily dissolved on January 18, 2005. See [REDACTED]

[REDACTED] (accessed May 16, 2012).

<sup>2</sup> There is no evidence in the record to suggest, and counsel does not allege, that [REDACTED] is a successor-in-interest to [REDACTED] the petitioner in these proceedings.

was entitled to "port" to [REDACTED] in a same or similar position as the job offered by the petitioner pursuant to the job flexibility provisions of section 204(j) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(j), as added by section 106(c) of the American Competitiveness in the Twenty First Century Act of 2000 (AC21) since his adjustment of status application has been pending more than 180 days.

U.S. Citizenship and Immigration Services (USCIS) regulations and precedent decisions specifically limit the filing of an appeal to the affected party, i.e., in the instant case, the petitioner. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B). The Form G-28, Notice of Entry of Appearance as Attorney or Representative, that was submitted for the record for the Form I-290B was signed by the representative of [REDACTED] not by an authorized representative of the petitioner. The beneficiary of a visa petition is not a recognized party on appeal. *See* 8 C.F.R. § 103.2(a)(3). As the beneficiary and his new employer, [REDACTED] are not recognized parties in this matter, the new employer's counsel would not be authorized to file the appeal in this matter. 8 C.F.R. § 205.2(d); 8 C.F.R. § 103.3(a)(1)(iii)(B); 8 C.F.R. § 103.3(a)(2)(v)(A)(1).

However, the AAO will discuss whether a new employer takes the place of an original petitioner in AC21 situations where the beneficiary's I-485 has been pending for 180 days or more.

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

Governing adjustment of status, section 245(a) of the Act, 8 U.S.C. § 1255(a), requires the adjustment applicant to have an "approved" petition:

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an *approved* petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1) or [sic] may be adjusted by the [Secretary of Homeland Security], in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if:

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

(b)(6)

(Emphasis added.)

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

Counsel asserts on appeal that the petition is still "approvable" due to the terms of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). The AAO does not agree that the terms of AC21 make it so that the instant *immigrant petition* can be approved despite the fact that the petitioner has not demonstrated its eligibility. As noted above, AC21 allows an *application for adjustment of status*<sup>4</sup> to be approved despite the fact that the initial job offer is no longer valid. The language of AC21 states that the I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer the new employer must be for a "same or similar" job. A plain reading of the phrase "will remain valid" suggests that the petition must be valid *prior* to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or

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

<sup>4</sup> The AAO notes that after the enactment of AC21, USCIS altered its regulations to provide for the concurrent filing of immigrant visa petitions and applications for adjustment of status. This created a possible scenario wherein after an alien's adjustment application had been pending for 180 days, the alien could receive and accept a job offer from a new employer, potentially rendering him or her eligible for AC21 portability, prior to the adjudication of his or her underlying visa petition. A USCIS memorandum signed by William Yates, May 12, 2005, provides that if the initial petition is determined "approvable", then the adjustment application may be adjudicated under the terms of AC21. See *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)* at 3. This memorandum was superseded by *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010), which determined that the petition must have been valid to begin with if it is to remain valid with respect to a new job.

similar. In other words, it is not possible for a petition to remain valid if it is not valid currently. The AAO would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petition for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, USCIS regulations required that the underlying I-140 was approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term "remains valid" was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer. *See Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010).

The operative language in section 204(j) and section 212(a)(5)(A)(iv) of the Act states that the petition or labor certification "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; *see also* H.R. Rep. 106-1048. Critical to the pertinent provisions of AC21, the labor certification and 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).

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).

With regard to the overall design of the nation's immigration laws, section 204 of the Act provides the basic statutory framework for the granting of immigrant status. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), provides that "[a]ny employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(3) . . . of this title may file a petition with the Attorney General [now Secretary of Homeland Security] for such classification." (Emphasis added.)

Section 204(b) of the Act, 8 U.S.C. § 1154(b), governs USCIS's authority to approve an immigrant visa petition before immigrant status is granted:

After an investigation of the facts in each case . . . the Attorney General [now 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 . . . eligible for preference under subsection (a) or (b) of section 203, approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.

Statute and regulations allow adjustment only where the alien has an approved petition for immigrant classification. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).<sup>5</sup>

Pursuant to the statutory framework for the granting of immigrant status, any United States employer desiring and intending to employ an alien “entitled” to immigrant classification under the Act “may file” a petition for classification. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). However, section 204(b) of the Act mandates that USCIS approve that petition only after investigating the facts in each case, determining that the facts stated in the petition are true and that the alien is eligible for the requested classification. Section 204(b) of the Act, 8 U.S.C. § 1154(b). Hence, Congress specifically granted USCIS the sole authority to approve an immigrant visa petition; an alien may not adjust status or be granted immigrant status by the Department of State until USCIS approves the petition.

Therefore, to be considered “valid” in harmony with the portability provisions of AC21 and with the statute as a whole, an immigrant visa petition must have been filed for an alien that is entitled to the requested classification and that petition must have been approved by USCIS pursuant to the agency’s authority under the Act. *See generally* section 204 of the Act, 8 U.S.C. § 1154. A petition is not validated merely through the act of filing the petition with USCIS or through the passage of 180 days.

The portability provisions of AC21 cannot be interpreted as allowing the adjustment of status of an alien based on an unapproved visa petition when section 245(a) of the Act explicitly requires an approved petition (or eligibility for an immediately available immigrant visa) in order to grant adjustment of status. To construe section 204(j) of the Act in that manner would violate the “elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.” *Dept. of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 340 (1994).

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.<sup>6</sup>

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<sup>5</sup> We note that the Act contains at least one provision that does apply to pending petitions; in that instance, Congress specifically used the word “pending.” *See* section 101(a)(15)(V) of the Act, 8 U.S.C. § 1101(a)(15)(V) (establishing a nonimmigrant visa for aliens with family-based petitions that have been pending three years or more).

<sup>6</sup> 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 (5<sup>th</sup> Cir. Oct. 22, 2007); *Matovski v. Gonzales*, 492 F.3d 722 (6<sup>th</sup> Cir. Jun. 15, 2007); *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4<sup>th</sup> 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

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The enactment of the job flexibility provision at section 204(j) of the Act did not repeal or modify sections 204(b) and 245(a) of the Act, which require USCIS to approve an immigrant visa petition prior to granting adjustment of status.

Although section 204(j) of the Immigration and Nationality Act (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 U.S. Citizenship and Immigration Services (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.*

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

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

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

There is no evidence that Congress intended to confer anything more than a benefit to beneficiaries of long delayed adjustment applications. In other words, the plain language of the statute indicates that Congress intended to provide the alien, as a "long delayed applicant for adjustment," with the ability to change jobs if the individual's I-485 took 180 days or more to process. Section 106(c) of AC21 does

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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.

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not mention the rights of a subsequent employer and does not provide other employers with the ability to take over already adjudicated immigrant petitions.

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

**ORDER:** The appeal is rejected as improperly filed.