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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

DATE: **OCT 03 2012**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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.

Thank you,

*Elizabeth McCormack*

Perry Rhew  
Chief, Administrative Appeals Office

CC: [REDACTED]

**DISCUSSION:** On April 26, 2002, the 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 Director, VSC (director) on November 7, 2002. The director, however, revoked the approval of the immigrant petition on May 22, 2009. On June 10, 2009, the beneficiary of the visa petition, through his counsel<sup>1</sup>, 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, because neither the beneficiary or his new employer is 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 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).<sup>2</sup> 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 November 7, 2002, but that approval was revoked in May 2009. The director determined that the petitioner failed to follow the U.S. Department of Labor (DOL) recruitment procedures in connection with the approved labor certification application and that the documents submitted in were in themselves a willful misrepresentation of material facts, constituting fraud. The director sent a notice of intent to revoke (NOIR) to the petitioner on May 4, 2009. In the NOIR, the petitioner was asked to submit evidence that establishes that it complied with the DOL requirements and that the beneficiary possessed the minimum experience requirements of the labor certification prior to the filing of the ETA 750. The director subsequently revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

In the revocation decision, the director found fraud because the petitioner failed to respond with evidence or explanation of its recruitment procedures for the labor certification application. The record does not currently reflect fraud involving the recruitment procedures. *Matter of S & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961). Thus, the director's finding of fraud will be withdrawn.

The beneficiary's counsel submitted a response to the NOIR which was rejected by the director because the petitioner had not submitted a Form G-28 Notice of Entry of Appearance as

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<sup>1</sup> The beneficiary's counsel will be provided a courtesy copy of this decision. The petitioner's counsel of record, [REDACTED] will not receive one, as the AAO notes that [REDACTED] was suspended from the practice of law before the Immigration Courts, Board of Immigration Appeals (BIA), and Department of Homeland Security (DHS) for a period of three years from March 1, 2012 to February 28, 2015. [REDACTED] representations in this matter will be considered.

<sup>2</sup> 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.

Attorney or Representative allowing [REDACTED] the beneficiary's counsel to represent the petitioner.

On appeal, the beneficiary's counsel submits a letter, dated June 3, 2009, from another restaurant, [REDACTED] and argues that the beneficiary should be accorded legal standing pursuant to section 106(c) of the American Competitiveness in the Twenty First Century Act of 2000 (AC21).

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.<sup>3</sup>

As a threshold issue before the AAO can adjudicate the subject matter of the appeal, we must determine whether the beneficiary or his new employer have 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 his new employer and filed by counsel for the beneficiary, and no evidence in the record suggests that the petitioner consented to the filing of the appeal. Thus, the beneficiary and Laurino's are not entitled to appeal in this proceeding.

Counsel appears to suggest that the beneficiary and/or his new employer may take the place of and become the petitioner of an I-140 petition in AC21 situations and thus have standing in the proceeding. Counsel contends that "the beneficiary is eligible for portability as his application for permanent residence has been pending over 180 days and he is working in the same occupational classification as a cook." The AAO disagrees.

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:

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<sup>3</sup> 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).

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:

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 suggests that [REDACTED] the beneficiary's new employer, could step into the shoes of the petitioner of the I-140 petition once the Form I-140 petition was approved, the Form I-485 application had been pending for 180 days, and the beneficiary ported or began his employment with [REDACTED] in a similar position as the job offered by the petitioner.<sup>4</sup>

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<sup>4</sup> The June 2009 letter from [REDACTED] submitted on appeal verifies that the beneficiary is employed there. However, there is no other evidence in the record to indicate his position or whether the beneficiary is still working there.

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).<sup>5</sup>

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 and / or his new employer 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.

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<sup>5</sup> 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 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 (9<sup>th</sup> 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.

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Because 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 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.