



U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: OFFICE: NEBRASKA SERVICE CENTER

FILE:

APR 08 2013

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: 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** On August 14, 2007, United States Citizenship and Immigration Services (USCIS), Nebraska Service Center (the director), 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 on March 9, 2009. On March 19, 2009, the petitioner subsequently requested that the petition be withdrawn. The director revoked the approval of the immigrant petition on June 11, 2009. The matter is now before the Administrative Appeals Office (AAO) on appeal. As the petitioner's request to withdraw the approved petition was received by the director prior to the director's decision to revoke the approval of the petition, the petition's approval was automatically revoked. The issues in this proceeding are now moot and the appeal will be dismissed on that basis.

The petitioner is an elderly care facility. It seeks to employ the beneficiary permanently in the United States as an Administrative Assistant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As required by statute, a labor certification approved by the Department of Labor accompanied the petition.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

On March 23, 2009, the director was informed in a letter from [REDACTED] the current owner of the petitioner, that the petitioner no longer employed the beneficiary and requested termination of the petition. In the letter, dated March 19, 2009, [REDACTED] notified the director that the petitioner never employed the applicant in the capacity of an Administrative Assistant and never had any intent to employ the beneficiary (or another person) in this permanent position and requested that the petition be terminated. The regulations at 8 C.F.R. § 205.1(a)(iii)(C) provide that the approval of the petition is automatically revoked "upon written notice of withdrawal filed by the petitioner...with any officer of [USCIS] who is authorized to grant or deny petitions." Therefore, the petition was automatically revoked when it was received by USCIS on March 23, 2009, regardless of whether USCIS acted upon it.<sup>1</sup>

Moreover, the AAO notes that 8 C.F.R. § 103.2(b)(6) states that a petitioner can withdraw an approved petition up until the beneficiary's adjustment of status to permanent residence. This withdrawal may not be retracted. Thus, the petitioner's attempt to continue with the petition as per the appeal submitted by the beneficiary's counsel (the petitioner's former counsel) has no effect.<sup>2</sup>

On appeal, counsel asserts that the petition is still approvable due to the terms of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). The petitioner has submitted

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<sup>1</sup> The regulation at 8 C.F.R. § 205.1(b) states that USCIS shall send a notice of automatic revocation to the petitioner when it appears that an automatic revocation provision has been triggered. This notice is not a requirement to perfect the automatic revocation. The automatic revocation occurred by operation of law when USCIS received the petitioner's request to terminate the proceedings on March 23, 2009.

<sup>2</sup> On appeal, the beneficiary's counsel contends that the beneficiary ported to a new employer as of April 20, 2009 and is now working for [REDACTED] and should be accorded legal standing pursuant to section 106(c) of the American Competitiveness in the Twenty First Century Act of 2000 (AC21).

evidence to establish that the beneficiary ported to new employment on April 20, 2009. However, 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. AC21 allows an application for adjustment of status 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 from 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 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).

It is also noted that in *Herrera v. USCIS*, 571 F.3d 881 (9th Cir. 2009), 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. 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. Under the plaintiff's interpretation, an applicant would have a very large incentive to change jobs in order to guarantee that the approval of an I-140 petition could not be revoked." *Id.*

In this case, the petitioner requested USCIS to terminate the petition in a letter dated March 9, 2009 and received by USCIS on March 23, 2009. The petition was automatically revoked prior to the date the beneficiary attempted to port to new employment on April 20, 2009. The porting by the beneficiary did not reinstate the petition's approval.

The AAO concludes that the petitioner's March 19, 2009 withdrawal resulted in an automatic revocation of the petition which predates the director's June 11, 2009 revocation. Accordingly, the

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director's decision to revoke the petition will be withdrawn and the issues in this proceeding are moot.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed as moot.