



U.S. Citizenship
and Immigration
Services

(b)(6)



Date:

Office: TEXAS SERVICE CENTER FILE:



APR 16 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:



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 December 31, 2001, 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 VSC director on March 20, 2002. The director of the Texas Service Center (“the director”), however, revoked the approval of the immigrant petition on June 30, 2009, and the petitioner subsequently appealed the director’s decision to revoke the petition’s approval to the Administrative Appeals Office (AAO). The appeal will be dismissed.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by her under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

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 Act, 8 U.S.C. §1153(b)(3)(A)(i).¹ As required by statute, the petition is submitted along with an approved Form ETA 750 labor certification. As stated earlier, this petition was approved on March 20, 2002 by the VSC, but that approval was revoked in June 2009. The director determined that the beneficiary did not have the requisite work experience in the job offered before the priority date. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

On appeal, counsel for the petitioner² contends that the director improperly revoked the approval of the petition. Specifically, counsel asserts that the director did not have good and sufficient cause as required by section 205 of the Act; 8 U.S.C. § 1155 to revoke the approval of the petition. Counsel argues that the petitioner did comply with the DOL recruitment requirements and that the beneficiary possessed the minimum requirements required on the Form ETA 750 prior to the filing of the labor certification application.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381

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.

² Current counsel of record, [REDACTED] will be referred to as counsel throughout this decision. Previous counsel, [REDACTED] will be referred to by name. 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.

F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

As a threshold issue, regarding the director's Notice of Revocation (NOR), although not raised by counsel, as a procedural matter, the AAO finds that 8 C.F.R. § 205.1 only applies to automatic revocation and is not the proper authority to be used to revoke the approval of the petition in this instant proceeding. Under 8 C.F.R. § 205.1(a)(3)(iii), a petition is automatically revoked if (A) the labor certification is invalidated pursuant to 20 C.F.R. § 656; (B) the petitioner or the beneficiary dies; (C) the petitioner withdraws the petition in writing; or (D) if the petitioner is no longer in business. Here, the labor certification has not been invalidated; neither the petitioner nor the beneficiary has died; the petitioner has not withdrawn the petition; nor has the petitioner gone out of business. Therefore, the approval of the petition cannot be automatically revoked. The director's erroneous citation of the applicable regulation is withdrawn. Nonetheless, as the director does have revocation authority under 8 C.F.R. § 205.2, the director's denial will be considered under that provision under the AAO's *de novo* review authority.

Moreover, on November 15, 2012, the AAO sent a Notice of Intent to Dismiss and Derogatory Information (NOID/NDI) to the petitioner noting that [REDACTED] appeared to no longer be an active organization according to evidence publicly available on the internet and, as such, no bona fide job offer would exist rendering the petition and appeal moot. In response, counsel submitted a letter from [REDACTED], Director of Operations for [REDACTED] stating that the restaurant located at [REDACTED] was known as [REDACTED] until May 2010 when the name was changed to [REDACTED]. [REDACTED] stated that the restaurant "has a new name and serves different food [but] continues to be owned by the same entity and continues to operate under the same federal employer tax ID number which is [REDACTED]" In support of [REDACTED] assertions, he submits two Forms W-3 to demonstrate that both [REDACTED] and [REDACTED] were operated by the same entity. The Forms W-3 list the employer's name as [REDACTED] with a Federal Employer Identification Number (FEIN) of [REDACTED].

On January 28, 2013, the AAO sent a Request for Evidence and Notice of Derogatory Information (RFE/NDI) to the petitioner requesting further information concerning the relationship between [REDACTED]

[REDACTED] The RFE/NDI advised the petitioner that a labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). The petitioner did not respond to the RFE/NDI.

³ 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).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The petitioner's name as listed on the Form I-140 petition and Form ETA 750 is [REDACTED]. Although the space for the FEIN on the Form I-140 was left blank by the petitioner, the records kept by the Commonwealth of Massachusetts Secretary of the Commonwealth, Corporations Division, reflect that the petitioner's FEIN is [REDACTED]. This FEIN is different than the one provided by [REDACTED] for [REDACTED]. No evidence has been submitted to demonstrate a relationship between [REDACTED], the petitioner, and [REDACTED]. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The record is unclear as to which entity operated [REDACTED] and which entity currently operates the restaurant located at [REDACTED]. If the petitioner was not the entity operating as [REDACTED] at the time the petition was filed, it is unclear that the job offer would have been *bona fide*. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner failed to demonstrate that the job offer remains *bona fide* and the petition is denied on this ground.

The next issue on appeal is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition.

Section 205 of the Act, 8 U.S.C. § 1155, states:

The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204. Such revocation shall be effective as of the date of approval of any such petition.

The regulation at 8 C.F.R. § 205.2 states:

(a) *General*. Any Service [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on **any ground** other than those specified in § 205.1 **when the necessity for the revocation comes to the attention of this Service [USCIS]**. (emphasis added).

The regulation at 8 C.F.R. § 103.2(b)(16) states:

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

Further, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987), provide that:

A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

The director issued a Notice of Intent to Revoke (NOIR) on January 29, 2009. That NOIR advised the petitioner that the instant case might involve fraud and identified numerous problems including fraud and willful misrepresentation in other Form I-140 petitions and labor certification applications filed by the petitioner's former attorney of record, [REDACTED].

In addition to the issue discussed above as to whether the job offer was *bona fide*, the AAO's RFE/NDI specified that the petitioner had not established its ability to pay the proffered wage from the priority date onwards and that the petitioner did not establish that the beneficiary had the experience required by the terms of the labor certification. Specifically, the AAO requested Forms W-2 or 1099s issued by the petitioner to the beneficiary, annual reports, federal tax returns, or audited financial statements for 2002 to the present. The RFE/NDI also specifically referred to the letter submitted from [REDACTED] Human Resources Manager, stating that the petitioner employs over 500 individuals, has annual sales "in the millions of dollars," and that the petitioner otherwise elected not to submit any further financial evidence. The RFE/NDI noted that 8 C.F.R. § 204.5(g)(2) states that the director may accept a statement from a financial officer of an organization that employs 100 or more workers as evidence of its ability to pay the proffered wage, but that [REDACTED] is not a financial officer of the petitioner and that her letter was dated three years prior to the priority date.

The RFE/NDI also requested additional evidence concerning the beneficiary's claimed former employment. It noted that the letter submitted did not list the author's name or a specific description of the duties performed by the beneficiary and that only a translation of the letter was submitted and the original was not included. The RFE/NDI also noted a discrepancy in the dates of employment as the beneficiary stated on his Form G-325, submitted with the Form I-485

Application to Register Permanent Residence or Adjust Status, that he resided in Brazil until 1998, but stated on the Form ETA 750B that he worked in Massachusetts from November 1997 to December 1999. The Form G-325 also stated that the beneficiary resided in [REDACTED] Brazil from 1966 to 1998, but Formiga is approximately 250 kilometers from the municipality of [REDACTED] where he claimed to have worked from 1995 to 1997. The RFE/NDI advised that the petitioner should submit evidence resolve the inconsistencies in the record pursuant to *Matter of Ho*, 19 I&N Dec. at 591-92. The petitioner did not respond to this RFE/NDI.

As noted above, section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. at 590.

The AAO finds that the director appropriately reopened the approval of the petition by issuing the NOIR and that the RFE/NDI issued by the AAO on January 28, 2013 gave the petitioner notice of the derogatory information specific to the current proceeding. The AAO finds that the issues raised by the director and AAO would warrant a revocation of the approval of the petition if unexplained and un rebutted by the petitioner and thus, that the director had good and sufficient cause to issue the NOIR. See *Matter of Arias*, 19 I&N Dec. at 568; *Matter of Estime*, 19 I&N Dec. at 450.

The director’s decision concluded that the petitioner did not comply with the recruitment procedures of the DOL. The director indicated that the petitioner did not conduct good faith recruitment and found that the petitioner had engaged in fraud or material misrepresentation with respect to the recruitment process. The AAO disagrees. The record does not show inconsistencies or anomalies in the recruitment process that would justify the issuance of a NOIR based on the criteria of *Matter of S & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961). Therefore, the director’s conclusion that the petitioner did not comply with DOL requirements is withdrawn.

The AAO will next address the director’s finding that the petitioner engaged in fraud and/or material misrepresentation. On appeal, counsel contends that the director’s finding of fraud or willful misrepresentation against the petitioner was arbitrary and based on a USCIS investigation of other petitioners that had been represented by the same counsel, [REDACTED].

With regard to immigration fraud, the Act provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of DHS has delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, make recommendations for prosecution, and take other "appropriate action." DHS Delegation Number 0150.1 at para. (2)(I).

The administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation for any issue of fact that is material to eligibility for the requested immigration benefit. Within the adjudication of the visa petition, a finding of fraud or material misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. at 591-592.

Outside of the basic adjudication of visa eligibility, there are many critical functions of DHS that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or willfully misrepresenting a material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.⁴

Section 204(b) of the Act states, in pertinent part, that:

After an investigation of the facts in each case . . . the [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 an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition

Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in a petition filed pursuant to section 203(b) of the Act are true. Section 212(a)(6)(C) of the Act governs misrepresentation and states the following: "Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."

The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either:

⁴ It is important to note that, while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. See *Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. See sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). Nevertheless, the AAO and USCIS have the authority to enter a fraud finding, if during the course of adjudication, the record of proceedings discloses fraud or a material misrepresentation.

- (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

Matter of S & B-C-, 9 I&N Dec. at 447. Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

Furthermore, a finding of misrepresentation may lead to invalidation of the Form ETA 750. *See* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

Here, as noted above, the evidence of record currently does not support the director's finding that the petitioner failed to follow recruitment procedures. Similarly, there has been an insufficient development of the facts upon which the director can make a determination of fraud or willful misrepresentation in connection with the labor certification process based on the criteria of *Matter of S & B-C-*, 9 I&N Dec. at 447. Thus, the director's finding of fraud or misrepresentation is withdrawn. In summary, the AAO withdraws the director's conclusion that the petitioner failed to follow DOL recruitment requirements. The AAO also withdraws the petitioner's finding of fraud and material misrepresentation against the petitioner.

Concerning the petitioner's ability to pay the proffered wage from the priority date, the regulation at 8 C.F.R. § 204.5(g)(2), in pertinent part, provides:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the instant case, the ETA 750 labor certification was accepted for processing on April 18, 2001. The rate of pay or the proffered wage specified on the ETA 750 is \$12.57 per hour or \$22,877.40 per year based on the indicated 35 hour work week.⁵ The record contains no Internal Revenue Service (IRS) Forms W-2 or other evidence that the petitioner paid the beneficiary any wages in any year. As noted above, in conjunction with the original submissions, the petitioner submitted a letter from [REDACTED] Human Resources Manager, stating that the petitioner employs over 500 individuals, has annual sales “in the millions of dollars,” and that the petitioner otherwise elected not to submit any further financial evidence. 8 C.F.R. § 204.5(g)(2) provides that “[i]n a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.” In this case, as discussed above, it is unclear that the petitioner operated [REDACTED] as opposed to [REDACTED] as claimed in response to the AAO's NOID/NDI in November 2012. The AAO specifically noted in the 2013 RFE/NDI that doubt has thus been cast on the reliability of the evidence provided and a statement from its officer would be insufficient to demonstrate the ability to pay the proffered wage and requested additional information. The petitioner did not respond to the RFE/NDI. As a result, we are unable to conclude that the petitioner has the ability to pay the proffered wage. The director's decision is affirmed on this basis as well.

Concerning the beneficiary's qualifications for the position, the AAO finds that the record does not support the petitioner's contention that the beneficiary had the requisite work experience in the job offered before the priority date. Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, on the priority date, the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

Here, as stated earlier, the Form ETA 750 was filed and accepted for processing by the DOL on April 18, 2001. The name of the job title or the position for which the petitioner seeks to hire is “cook.” Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, “Prepare all types of meats, fish, etc.” Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered.

On the Form ETA 750, part B, signed by the beneficiary on December 26, 2000, he represented that he worked 35 hours a week at [REDACTED] in Brazil as a cook from November 1997 to December 1999. The record contains a letter of employment dated December 19, 2001 from [REDACTED] stating that the beneficiary worked there as a cook from May 15, 1995 until September 12, 1997. However, the letter does not meet the requirements in the regulations as it does not list the author's name or list a specific description of the duties performed

⁵ The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. See 20 C.F.R. § 656.3; 656.10(c)(10). The DOL Memo indicates that full-time means at least 35 hours or more per week. See Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

by the beneficiary. See 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). In addition, only the translation of the letter was submitted instead of the original. In response to the NOIR/NDI, the petitioner submitted a February 10, 2009 letter from [REDACTED] re-affirming that the beneficiary worked as a cook from May 15, 1995 to September 12, 1997. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), 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. The evidence submitted is unclear as to whether the beneficiary had the required experience as of the priority date. The RFE/NDI specifically noted these discrepancies and requested additional evidence to resolve them. The petitioner submitted nothing in response to the RFE/NDI. Therefore, the AAO is not persuaded that the beneficiary possessed the minimum two years of experience in the proffered job as of the priority date and the petition will remain revoked on this basis as well.

In response to the AAO's NOIR/NDI, counsel stated that the beneficiary is no longer with the petitioning employer, but that as his approved Form I-140 and Form I-485 adjustment of status application have been pending for more than 180 days, he was entitled to port to a different employer doing the same or a similar job, and that his application to adjust status should survive the revocation of approval of the underlying Form I-140 petition.

Counsel's assertion relies on 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. 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 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).

Where the approval of the Form I-140 petition is revoked for good and sufficient cause, the beneficiary cannot invoke the portability provision of section 204(j), because there would not be a valid, approved petition underlying the request to adjust status to permanent residence by virtue

of having ported to the same or similar job. *See Herrera v. USCIS*, 571 F.3d 881 (9th Cir. July 6, 2009) (the Ninth Circuit held 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 petition will remain revoked for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The director's decision is affirmed. The appeal is dismissed and the approval of the petition remains revoked.