

(b)(6)



U.S. Citizenship  
and Immigration  
Services

DATE: APR 17 2013 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:

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:** The employment-based preference visa petition was initially approved by the Director, Texas Service Center (the director). In connection with the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485), the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 he deems to be good and sufficient cause, revoke the approval of any petition approved by him 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 describes itself as a software consulting business. It seeks to permanently employ the beneficiary in the United States as a programmer analyst.<sup>1</sup> The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). The petition is accompanied by a labor certification approved by the U.S. Department of Labor.

The director's decision revoking the petition concludes that the petitioner had failed to establish that it would be the actual employer of the beneficiary and that, therefore, no *bona fide* job offer existed.

The appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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>2</sup>

On January 31, 2013, the AAO issued a Notice of Intent to Deny and Derogatory Information (NOID/NODI) informing the petitioner that, while the Commercial Recording System of the Secretary of the State of Connecticut reflects that the petitioner is active, according to the New

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<sup>1</sup> The AAO notes that the petitioner listed the job title as engineer on the Form I-140 petitioner. However, USCIS must look to the terms of the labor certification. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

<sup>2</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 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).

Hampshire Corporation Division and other public databases indicate that the petitioner was administratively dissolved or suspended on August 2, 2010.

It is noted that the petitioner's claimed location at [REDACTED] Nashua, New Hampshire, is the only location of the certified job offer as stated in sections C, D and H of the Form ETA 9089 and in Part 1 and Item 4 of Part 6 of the Form I-140 petition. It is noted that the address of the petitioner, [REDACTED], specified on the 2006 federal tax returns is [REDACTED], Nashua, New Hampshire"; however, the address on the 2007 through 2012 tax documents is [REDACTED] Windsor, Connecticut.<sup>3</sup>

In the response to the NOID/NODI, dated March 1, 2013, counsel informed the AAO that the petitioner closed its Nashua New Hampshire location in 2009 and relocated its headquarters to Windsor, Connecticut. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). We first note that the 2007 through 2009 federal tax returns reflect that petitioners address as Windsor, Connecticut, not Nashua, New Hampshire. There is no evidence in the record indicating that the petitioner continues to operate in Nashua, New Hampshire beyond 2006. Since the petitioning business is not a viable, active business in the only location given where the job will be located, the petition and its appeal to this office have become moot.<sup>4</sup> Even if the appeal could be otherwise sustained, the approval of the petition would be subject to automatic revocation due to the termination of the petitioner's business in the location for which the labor certification was certified by the DOL. *See* 8 C.F.R. § 205.1(a)(iii)(D).

In response to the NOID/NODI, 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 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

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<sup>3</sup> The ETA Form 9089 signed by the petitioner on December 15, 2006, states that the site where the beneficiary is to perform the work is in Nashua, New Hampshire, not Windsor, Connecticut. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2). The discrepancies in the petitioner's addresses, and the petitioner continuing to file applications following its dissolution or suspension raise issues as to the *bona fide* nature of the job offer.

<sup>4</sup> Where there is no active business, no *bona fide* 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. The petitioner is not in compliance with the terms of the labor certification and has not established that the proposed employment will be in accordance with its terms. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966).

an *application for adjustment of status*<sup>5</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 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).

Counsel contends that once the immigrant petition was approved in January 2007, the beneficiary was entitled to port to a new employer under AC21 and that it is fundamentally unfair to revoke the immigrant petition in these situations. Counsel contends that, since the immigrant petition had been approved for more than 180 days with a pending I-485, the beneficiary is entitled to port from the petitioner's New Hampshire location to the Connecticut location. Counsel cites to *Rahman v. Napolitano*, 814 F.Supp.2<sup>nd</sup> 1098 (D.DC. 2011) to support his contentions that the revocation of such an immigrant petition is arbitrary and capricious. The decision in *Rahman v. Napolitano*, is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Rahman v. Napolitano* is distinguishable from the instant case. The I-140 petition in *Rahman v. Napolitano* was

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<sup>5</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.

revoked because it was withdrawn and the petitioner had revived its corporate status under Maryland law. In the instant case, the petition was not revoked because it was withdrawn and the petitioner has not revived its corporate status. Moreover, the USCIS memorandum signed by William Yates, May 12, 2005, to which counsel cites as authorization to apply AC21 to the instant beneficiary's immigrant petition clearly states that an I-140 no longer remains valid for porting purposes if it is revoked at any time, except when it is revoked based on a withdrawal that was submitted after an I-485 had been pending for 180 days. 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.

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.