



U.S. Citizenship  
and Immigration  
Services

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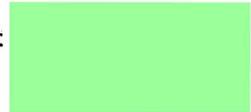


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**FEB 21 2013**

OFFICE: NEBRASKA SERVICE CENTER

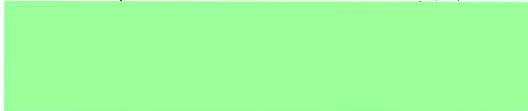
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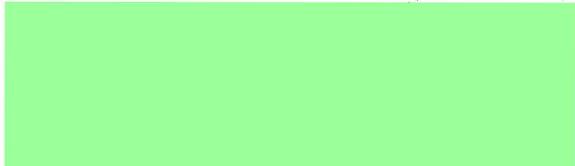
Petitioner:

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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The director, Nebraska Service Center, initially approved the employment-based visa petition. Subsequently, the director issued a Notice of Intent to Revoke (NOIR) and ultimately revoked approval of the petition. A timely appeal of the revocation was filed. The matter is now before the Administrative Appeals Office (AAO). The appeal will be rejected as it has not been filed by an affected party and the director's revocation will be affirmed pursuant to 8 C.F.R. §103.3(a)(2)(v)(A)(1).

The petitioner is a self-described software developer and computer consulting service. It seeks to employ the beneficiary permanently in the United States as an office manager. 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). The director approved the petition on June 22, 2004. Subsequently, the director issued a Notice of Intent to Revoke (NOIR). The director stated that the petitioner's 2001 and 2002 tax returns were insufficient to establish the petitioner's ability to pay the beneficiary's proffered wage. The director also requested: (1) evidence of the petitioner's ability to pay the proffered wage from 2003 to 2009 as well as proof of the ability to pay the proffered wage for each alien for which the petitioner had filed; (2) a list of all I-140 petitions the petitioner filed from 2006 until 2010; and (3) quarterly unemployment reports for each quarter of 2009 and 2010. The petitioner did not respond to the NOIR.<sup>1</sup> Therefore, in a decision dated January 11, 2011, the director found that the petitioner did not supply the information requested in the NOIR and therefore, failed to overcome the adverse finding that the petitioner did not establish that it had the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtained legal permanent resident status.<sup>2</sup> The director revoked the petition's approval accordingly.

The instant appeal was filed by new counsel on behalf of the beneficiary and [REDACTED] as a new employer on January 31, 2011.<sup>3</sup>

<sup>1</sup> A response was filed by new counsel for a new employer, [REDACTED]

<sup>2</sup> The director sent the NOIR to the petitioner, but sent the subsequent revocation to counsel for beneficiary's new employer.

<sup>3</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. 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 appellant is a different entity than the petitioner/labor certification employer, 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. 1986). An appellant 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.

On appeal, counsel asserts that the beneficiary is 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, who is, 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, given the novel issue raised by the appeal, i.e., whether AC21 permits the new employer to have legal standing in this proceeding, the AAO will address this. To make this determination, the AAO must therefore 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 as a VAWA self-petitioner may be adjusted by the Attorney General, 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.

(Emphasis added.)

In this matter, as the beneficiary was present in the United States at the time the I-140 petition was approved, 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>4</sup> Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000).

Even so, this does not answer the more specific question of whether a new employer may take the place of and become the petitioner of an I-140 petition in AC21 situations. To address this issue, it is important to closely 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:

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.

American Competitiveness in the Twenty-First Century Act of 2000 (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

<sup>4</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.

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

It is true that, absent revocation, the beneficiary may have been eligible for adjustment of status with a new employer provided, as counsel asserts here, 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). Here, the approval of the petition filed by the initial employer, [REDACTED] has been revoked and the petition is no longer valid.

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 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.