



U.S. Citizenship
and Immigration
Services

(b)(6)

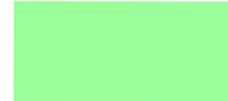


DATE:

JAN 11 2013

OFFICE: TEXAS SERVICE CENTER

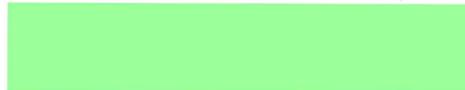
FILE:



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.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: On April 11, 2002, 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 July 11, 2002. The director of the Texas Service Center (the director), however, revoked the approval of the immigrant petition on May 23, 2009. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1).

The petitioner describes itself as a restaurant. It seeks to permanently employ the beneficiary in the United States as a cook. 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 director's decision revoking the approval of the petition states that the petitioner did not demonstrate that it followed recruitment guidelines.

Along with the appeal filed on June 15, 2009, a properly executed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, was submitted naming [REDACTED] as the beneficiary's representative.¹ The Form I-290B, Notice of Appeal or Motion, was signed by [REDACTED]. The regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B) specifically prohibits a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing an appeal. Although a Form G-28 was subsequently submitted naming [REDACTED] as the petitioner's representative, that Form G-28 was dated January 29, 2010, which was more than six months after the appeal was filed and received by the AAO on February 17, 2010. Furthermore, on the Form I-290B, counsel stated that the petitioner was out of business and included a statement indicating that she had not been able to locate the petitioner even after hiring a private investigator.

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.

On appeal, the beneficiary's counsel argues that the beneficiary is now working for [REDACTED] in Everett, Massachusetts and should be accorded legal standing pursuant to section 106(c) of the American Competitiveness in the Twenty First Century Act of 2000 (AC21).

¹ The AAO notes that previous counsel, [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.

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.²

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 filed by counsel for the beneficiary, and no evidence in the record suggests that the petitioner consented to the filing of the appeal at the time the appeal was filed. Thus, the beneficiary is not entitled to appeal in this proceeding.

Counsel states that the beneficiary 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 . . . has standing to appeal the renovation of the I-140 petition since he is protected by the provisions of INA Section 204(j) as a party on interest on the I-140 petition.” 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:

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 adjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the

² 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).

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).

Previous counsel stated in response to the director's NOIR that 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.

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).³

³ 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

The statutory language provides no benefit or right for a new employer to "substitute" itself for the previous petitioner. Nor does the statutory language provide that a beneficiary may pursue a petition after the petitioner declines to do so. 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 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.

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.

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 (9th 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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ORDER: The appeal is rejected as improperly filed. The director's decision to revoke the approval of the petition remains undisturbed.