



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF T-M- INC.

DATE: OCT. 9, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, an equipment dealer, seeks to employ the Beneficiary as a “JDE Senior Developer” and to classify him as a nonimmigrant worker in a specialty occupation. See section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Director, California Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director denied the petition, determining that the Beneficiary had spent six years in the United States in H-1B classification and that the Petitioner had not established that the Beneficiary was eligible for an exemption to extend his stay in H-1B status in the United States.

The record of proceeding includes the following: (1) the Form I-129 and supporting documentation; (2) the Director’s request for evidence (RFE); (3) the Petitioner’s response to the RFE; (4) the notice of decision; and (5) the Form I-290B, Notice of Appeal or Motion, and supporting documentation.

Upon review of the entire record of proceeding, we find that the Petitioner has not overcome the Director’s grounds for denying this petition.<sup>1</sup> Accordingly, the appeal will be dismissed.

I. LEGAL FRAMEWORK FOR SUBSECTIONS 104(c), 106(a)  
AND 106(b) OF THE “AMERICAN COMPETITIVENESS  
IN THE TWENTY-FIRST CENTURY ACT”

In general, section 214(g)(4) of the Act provides that: “[T]he period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years.” However, the “American Competitiveness in the Twenty-First Century Act” (AC21) as amended by the “Twenty-First Century Department of Justice Appropriations Authorization Act” (DOJ21), temporarily removes the six-year limitation on the authorized period of stay in H-1B visa status for certain aliens whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays.

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<sup>1</sup> We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

A. Exemption for Beneficiaries With Approved Immigrant Petitions

Section 104(c) of AC21 reads in pertinent part:

Notwithstanding section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(4)), any alien who—

(1) is the Beneficiary of a petition filed under section 204(a) of that Act [8 U.S.C. § 1154(a)] for a preference status under paragraph (1), (2), or (3) of section 203(b) of that Act [8 U.S.C. § 1153(b)]; and

(2) is eligible to be granted that status but for application of the per country limitations applicable to immigrants under those paragraphs,

may apply for, and the [Secretary of Homeland Security] may grant, *an extension of such nonimmigrant status* until the alien's application for adjustment of status has been processed and a decision made thereon.

Pub. L. No. 106-313, § 104(c), 114 Stat. 1251, 1253 (2000).

B. Exemption for Beneficiaries With Pending Labor Certifications or Immigrant Petitions

As amended by section 11030A(a) of DOJ21, section 106(a) of AC21 reads:

(a) EXEMPTION FROM LIMITATION. -- The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. § 1184(g)(4)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of *such Act* (8 U.S.C. § 1101(a)(15)(H)(i)(b)), if 365 days or more have elapsed since *the filing of any of the following*:

(1) *Any application for labor certification under section 212(a)(5)(A) of such Act (8 U.S.C. § 1182(a)(5)(A)), in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act (8 U.S.C. § 1153(b)).*

(2) *A petition described in section 204(b) of such Act (8 U.S.C. § 1154(b)) to accord the alien a status under section 203(b) of such Act.*

Section 11030A(b) of DOJ21 amended section 106(b) of AC21 to read:

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(b) EXTENSION OF H-1B WORKER STATUS--The [Secretary of Homeland Security] shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one-year increments until such time as a final decision is made—

*(1) to deny the application described in subsection (a)(1), or, in a case in which such application is granted, to deny a petition described in subsection (a)(2) filed on behalf of the alien pursuant to such grant;*

*(2) to deny the petition described in subsection (a)(2); or*

*(3) to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.*

Pub. L. No. 106-313, § 106(a) and (b), 114 Stat. 1251, 1253-54 (2000); Pub. L. No. 107-273, § 11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21).

Section 106(c) of AC21 amended section 204(j) of the Act, 8 U.S.C. § 1154(j), by adding the following provision:

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.

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.

## II. FACTUAL BACKGROUND

On April 6, 2007, [REDACTED], filed a Form I-129 petition [REDACTED] to extend the Beneficiary's H-1B status which was approved for a validity period from April

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12, 2007 to April 4, 2010.<sup>2</sup> On November 10, 2009, RFP submitted a second Form I-129 petition [REDACTED] to continue the Beneficiary's H-1B employment which was approved for a validity period from April 5, 2010 to April 4, 2013.

While the Beneficiary was in H-1B classification as an RFP employee, RFP filed an Application for Permanent Employment Certification (ETA Form 9089) on November 26, 2007, on his behalf. The Department of Labor (DOL) certified the ETA Form 9089 on January 16, 2008, for a validity period from January 16, 2008 to July 14, 2008. During the validity period of the ETA Form 9089, RFP filed an Immigrant Petition for Alien Worker (Form I-140) [REDACTED] on April 3, 2008, on the Beneficiary's behalf, which was approved on March 18, 2009 with a priority date of November 26, 2007. U.S. Citizenship and Immigration Services (USCIS) records do not show that an Application to Register Permanent Residence or Adjust Status (Form I-485) was filed in connection with this approved Form I-140.<sup>3</sup>

Subsequent to the approval of the Form I-140, the Beneficiary ceased employment with RFP. USCIS records show that RFP submitted a letter, dated September 23, 2011, requesting that the approved Form I-140 be withdrawn as the Beneficiary no longer worked for RFP. USCIS records further show that RFP was notified by correspondence dated November 7, 2011, and sent the same day, that the Form I-140 was automatically revoked on November 7, 2011, in accordance with 8 C.F.R. § 205.1(a)(3)(iii)(C), based on RFP's written notice of withdrawal.

On August 26, 2011, the Petitioner in this matter filed a petition [REDACTED] to employ the Beneficiary in H-1B status which was approved for a validity period from November 2, 2011 to August 30, 2014. The Petitioner filed a Form 9089, on the Beneficiary's behalf on September 14, 2012, which was denied on October 23, 2013. The Petitioner filed the instant Form I-129 to extend the Beneficiary's stay in the United States in H-1B status on June 13, 2014. Thereafter, on June 19, 2014, the Petitioner filed a second Form 9089. The H-1B petition was denied on September 23, 2014 and is the subject of this appeal.

### III. ANALYSIS

The Petitioner's principal basis for its appeal is twofold: (1) that the *filing* of the Form 9089 and the *filing* of the Form I-140 by RFP were the triggering actions to acquire and to *maintain* eligibility for an extension of the Beneficiary's H-1B status pursuant to AC21; and (2) that revocation of the

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<sup>2</sup> The Beneficiary was initially admitted into the United States on November 14, 2004, as an H-1B worker for [REDACTED] [REDACTED] for a validity period ending on February 14, 2007. Another petitioner, [REDACTED] also filed a Form I-129 petition [REDACTED] to continue the Beneficiary's H-1B status. The validity period of that petition was June 6, 2006 to February 4, 2007. Although a second petition filed by [REDACTED] was initially approved for a validity period from May 3, 2007 to January 29, 2010, the petition was revoked on September 16, 2008.

<sup>3</sup> The pertinent visa bulletin indicates that visa numbers were not current for employment-based, third preference category workers from India during this time period.

approved Form I-140 petition, absent fraud or misrepresentation, is irrelevant. However, we do not find that either the intent of AC21 or the resulting statute supports the Petitioner's contentions.

Preliminarily, we observe that 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).

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).

The Petitioner asserts that the mere *filing* of the Form 9089 and the *filing* of the Form I-140 are the sole triggering actions to acquire and to *maintain* eligibility for an extension of the Beneficiary's H-1B status pursuant to AC21, and that to interpret this section otherwise would undermine Congressional intent in allowing a beneficiary to change employers.

We note here the background and interplay between the Form 9089 and the Form I-140. That is, the DOL regulation at 20 C.F.R. § 656.30(b), provides for a 180-day validity period for labor certifications that are approved on or after July 16, 2007. Petitioning employers have 180 calendar days after the date of approval by DOL within which to submit the approved permanent labor certification in support of a Form I-140 petition filed with USCIS. The Petitioner asserts that this "180-day" rule is not meant to void the Form 9089 and that USCIS cannot invalidate a Form 9089, approved by DOL. The Petitioner asserts, moreover, that invalidating an approved labor certification, based on the DOL 180-day rule would also undermine the Congressional intent behind AC21.<sup>4</sup> The Petitioner asserts further that the once a Form I-140 is filed within the validity period,

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<sup>4</sup> We are not persuaded that incorporating DOL's 180-day rule into AC21 would eviscerate or otherwise make ineffective the portability provision of section 105 of AC21. We acknowledge that requiring a petitioner to file the pertinent petition or application within 180 days of the approval of the labor certification application would mean that an H-1B worker would lose eligibility for extensions pursuant to AC21 if the worker wished to change jobs because of a new employer. However, if the employer that filed the labor certification truly intends to employ the Beneficiary at some point in the future, it will comply with DOL requirements and timely file an immigrant petition with USCIS. *See generally* 72 Fed. Reg. 27904, 27925, 27939. In this matter, RFP, the Beneficiary's previous employer and entity that filed the Form 9089, complied with the DOL requirements and timely filed the Form I-140 immigrant petition.

the approved permanent labor certification cannot be invalidated by an I-140 revocation, absent fraud or misrepresentation.

We find, however, that the mere filing of a Form I-140 cannot be used as a permanent placeholder to effectuate the continued validity of the Form 9089. The Petitioner provides insufficient statutory or regulatory authority allowing USCIS to extend DOL's certification period. After all, a limited certification period is necessary to accurately reflect the job market in support of an employment-based immigrant petition which requires such a labor certification. Notably, to assist USCIS adjudicators when considering an extension of stay under AC21 section 106(a), in light of the DOL regulations, USCIS issued guidance on this issue. In pertinent part, USCIS expressly stated:

USCIS will *not* grant an extension of stay under AC21 § 106(a) if, at the time the extension request is filed, the labor certification has expired by virtue of not having been timely filed in support of an EB immigrant petition during its validity period, as specified by DOL. USCIS sees no reason to consider a labor certification that has expired through the passage of time differently than one that had been denied or, for that matter revoked. In addition, the filing of an immigrant petition with an expired labor certification would result in the automatic rejection, or if accepted in error, denial of that EB immigrant petition, which in turn, acts as a statutory bar to the granting of an extension beyond the 6-year maximum.

*See Supplemental Guidance Relating to Processing Forms I-140, Employment-Based Immigrant Petitions and I-129 H-1B Petitions, and Form I-485, Adjustment Applications Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313), as amended, and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) Title IV of Div. D. of Public Law 105-277, HQ 70/6.2 AD 08-06 (May 30, 2008).*

Under the above guidance, any new Form I-140 filed on behalf of any beneficiary pursuant to an expired labor certification period would be rejected. Accordingly, once the Form 9089 expires, there is no basis upon which to file a new Form I-140.<sup>5</sup>

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<sup>5</sup> Unless the DOL regulations on the validity of labor certifications are deemed to be ultra vires and/or otherwise contrary to the plain language of the Act, USCIS must take into consideration these regulations when evaluating the *bona fides* of labor certifications certified by DOL. An "administrative agency's regulations are presumed valid and, unless they are shown to be inconsistent with the authorizing statute, they have the force and effect of a statute." *Travelers Ins. Co. v. Kulla*, 216 Conn. 390, 399 (1990) (citing *Phelps Dodge Copper Products Co. v. Groppo*, 204 Conn. 122, 128 (1987)). Therefore, based upon the supplemental information in DOL's Perm Fraud rule as well as the plain language of 20 C.F.R. § 656.30, a labor certification that is invalid may not provide the basis for an approval of a petition described in section 204(b) of the Act to accord the alien a status under section 203(b) of the Act. *See generally* 72 Fed. Reg. 27904, 27925, 27939. Therefore, it follows, for the reasons discussed *infra*, that a labor certification that is invalid may not provide a basis for an AC21 based exemption to section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4).

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We note that sections 106(b)(1) and 106(b)(2) use only the term “deny” when outlining the parameters of the factors involved in the extension of an alien’s stay under AC21 and we have reviewed the legislative history of AC21 in order to interpret Congress’ meaning of the word deny in subsections 106(b)(1) and (2). That is, we recognize that the plain meaning of the word “deny” does not by its own definition incorporate the term “invalid” or “expired” or “revoked” when referring to either a labor certification or a Form I-140, which forms the basis for an extension of an alien’s stay based on an exemption under subsections 106(b)(1) and (2). Thus, we must examine the legislative intent in enacting AC21 and the subsequent amendment of AC21 by DOJ21 to ensure that a literal application of the statute will not produce a result demonstrably at odds with the intent of its drafters. See *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975, *cert. denied*, 112 S. Ct. 416. [REDACTED] and [REDACTED] (TX), sponsors of the DOJ21, but not of AC21, both made comments stating that section 11030A of DOJ21 permits H-1B aliens who have labor certification applications caught in lengthy agency backlogs to extend their status beyond the sixth year limitation. 148 Cong. Rec. H6745 (daily ed. Sept. 26, 2002); *accord* 148 Cong. Rec. S11063 (daily ed. Nov. 14, 2002). [REDACTED] also noted that AC21 was put in place to recognize the lengthy delays at the legacy Immigration and Naturalization Service (INS) in adjudicating petitions and that DOJ21 addresses the lengthy processing delays at DOL. [REDACTED] observed that the DOJ21 legislation allowed those who are about to exceed their six years in H-1B status to not be subject to the additional requirement of having to file the immigrant petition by the end of the sixth year, which he noted “is impossible when DOL had not finished its part in the process.” 148 Cong. Rec. H6745 (daily ed. Sept. 26, 2002). Thus, the legislative history of DOJ21 underscores the legislative concern regarding the lengthy processing delays occurring at DOL. More importantly, the main purpose of the legislative change appears centered on providing an additional means by which aliens may remain in the United States and continue to work during the time their application for permanent resident status is pending.

We do not, however, find that the legislative history of DOJ21 reflects the intent to indefinitely extend an alien’s stay in a temporary, nonimmigrant status once DOL finishes its part, i.e., adjudicating the labor certification application, in the employment-based immigrant visa process or even once USCIS finishes its part, i.e., adjudicating the Form I-140. Both a denial by DOL issued through an individualized decision as well as an expiration of the validity of a labor certification result in the invalidity of the labor certification and are evidence that DOL has completed its process of adjudicating the labor certification application and that the Beneficiary’s application process for obtaining lawful permanent resident status in the United States *by way of that labor certification* has ended.

Thus, whether the validity of a labor certification application is terminated by a denial or by regulatory expiration, the lack of a valid labor certification application precludes USCIS from further processing petitions or applications dependent upon those labor certification applications. To accept the Petitioner’s apparent interpretation, USCIS would be required to indefinitely extend an individual’s stay in the United States in one-year increments once a labor certification had been approved, even if the labor certification expired according to DOL regulations or was otherwise considered invalid.

As noted above, the law was designed to permit H-1B nonimmigrants to continue their stay in the United States and work in H-1B status as long as there was a pending process to obtain lawful permanent resident status in the United States. As the Beneficiary in this matter does not have a pending application to obtain lawful permanent residence, and did not have a Form 9089 or Form I-140 pending for 365 days or more prior to the requested start date (August 30, 2014), the Beneficiary may not extend his stay in H-1B classification in the United States. To interpret the statutory provisions otherwise and provide a means by which an alien can remain indefinitely and thereby permanently in the United States in a temporary, nonimmigrant status is demonstrably at odds with the Act as a whole as well as with the clear intent behind the drafting of section 106 of AC21 as amended by DOJ21.

As noted above, the Beneficiary's previous employer, RFP, submitted a written notice of withdrawal to USCIS resulting in the automatic revocation of the Form I-140. *See* 8 C.F.R. § 205.1(a)(3)(iii)(C). The automatic revocation is effective as of the date of approval. *See* 8 C.F.R. § 205.1(a). A revoked employment-based petition is not valid. *See* 8 C.F.R. § 204.5(n)(3). The enactment of the AC21 portability provisions did not alter the authority of USCIS to revoke the previous approval of an I-140 visa petition. *See Herrera v. USCIS*, 571 F.3d 881 (9th Cir. 2009).

Contrary to the Petitioner's assertions, the revoked petition is not irrelevant. The Form I-140 filed by RFP was filed pursuant to section 204(a)(1)(F) of the Act which states:

Any employer desiring and intending to employ within the United States an alien entitled to classification under section ... 203(b)(3) may file a petition with the Attorney General (now Secretary of Homeland Security) for such classification.

Although RFP intended to employ the Beneficiary when it filed its Form I-140, once the Beneficiary changed employers, RFP necessarily was no longer the intending employer.<sup>6</sup> Rather, RFP submitted a written notice of withdrawal to USCIS resulting in the automatic revocation of the Form I-140.

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<sup>6</sup> On June 19, 2001, former Immigration and Naturalization Services (INS) distributed a Policy Memorandum from Michael Pearson outlining the proper procedures for handling cases affected by AC21. Language in the Pearson Memorandum interpreted section 106(c), the Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence, as only applying to an Immigrant Petition approval. The Pearson Memo stated that "§ 106(c) provides that the certification or Form I-140 *approval* of an EB immigrant petition shall remain valid when an alien changes jobs, if: (a) a Form I-485, Application to Adjust Status, on the basis of the EB immigrant petition has been filed and remained adjudicated for 180 days or more; and (b) the new job is in the same or similar occupational classification as the job for which the certification or approval was initially made." Memorandum from Michael A. Pearson, Executive Assoc. Comm., Office of Field Operations, INS (now USCIS), *Initial Guidance for Processing H-1B Petitions as Affected by the American Competitiveness in the Twenty-First Century Act (Public Law 106-313) and Related Legislation*, HQCIS 70/6.2.8-P (June 19, 2001); *see also* section 20.2(c) of the AFM. The record here does not show that the Beneficiary met the initial condition to trigger the continued validity of the certification or the Form I-140, when the Beneficiary changed employers as he was unable to file the Form I-485, Application to Adjust Status.

See 8 C.F.R. § 205.1(a)(3)(iii)(C). The automatic revocation is effective as the date of approval. See 8 C.F.R. § 205.1(a). The automatic revocation is a final decision.

The portability provisions of section 204(j) of the Act do not alter agency authority to revoke approved petitions. Whether the revocation occurred through an automatic revocation process or through revocation based on good and sufficient cause, a revoked Form I-140 is no longer valid for any purpose, absent the satisfaction of the conditions set out in section 204(j) of the Act.<sup>7</sup>

Thus, we disagree with the Petitioner's inherent implication that once a Form 9089 has been approved and a Form I-140 filed and approved within the certified period, the Form 9089 remains valid even though the approved Form I-140 is revoked. In this matter, DOL entered a decision on January 16, 2008 certifying that the Form 9089, filed by RFP, the Petitioner's prior employer, would be valid from January 16, 2008 to July 14, 2008. During this validity period, a Form I-140 was filed (on April 3, 2008) and was approved on March 18, 2009. Once the Beneficiary left RFP's employment, RFP properly withdrew the Form I-140 petition resulting in its automatic revocation.<sup>8</sup>

The evidence of record does not establish that the Beneficiary is exempt from the six-year limitation contained in section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4) pursuant to section 104(c) of AC21. Section 104(c) of AC21 refers specifically to section 214(g)(4) of the Act, the section which specifically limits an extension of period of authorized admission for an H-1B nonimmigrant to a total of six years. Section 104(c) enables H-1B nonimmigrants with approved Form I-140 petitions who are unable to adjust status because of per-country limits to be eligible to extend their stay in H-1B nonimmigrant status until their application for adjustment of status has been adjudicated. In this matter, there is no approved Form I-140 petition on which the Petitioner and beneficiary may rely. Accordingly, the Beneficiary is not eligible to adjust status except for the per-country limitations under this section.

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<sup>7</sup> In response to inquiries that arose from publication of the "concurrent filing" regulations, USCIS issued a Memorandum from William R. Yates, Acting Assoc. Dir. for Operations, CIS, *Continuing Validity of Form I-140 Petition in accordance with Section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000*, HQCIS 70/6.2.8-P (August 4, 2003). In that memorandum, USCIS addressed portability for those aliens with approved I-140 petitions and instructed adjudicators that "If the Form I-140 ("immigrant petition") has been approved and the Form I-485 ("adjustment application") has been filed and remained unadjudicated for 180 days or more (as measured from the Form I-485 receipt date), the approved Form I-140 will remain valid ... " (emphasis added). USCIS has issued no memorandum to the effect that an unadjudicated, much less a denied or revoked immigrant visa petition "shall remain valid" simply through the passage of 180 days. Moreover, section 106(c) of AC21 does not repeal or modify section 204 of the Act, which requires USCIS to approve a petition prior to the granting of immigrant status, nor does it repeal Section 245(a) of the Act, 8 U.S.C. § 1255(a), which requires an alien to have an *approved* immigrant visa petition.

<sup>8</sup> Again, we note that the H-1B portability provision of section 105 of AC21 allows a Form I-485 to be approved even with an employer who is different from the Petitioner who filed the Form I-140, however, section 105 of AC21 does not guarantee an approval of the Form I-140 petition, nor does it make the Beneficiary exempt from the six-year maximum period of stay permitted for H-1B nonimmigrants. In this matter, as noted above, the Beneficiary did not have a Form I-485 application filed on the basis of the RFP approved Form I-140. Thus, there was no pending Form I-485 when the Form I-140 filed by RFP was revoked.

Section 106 of AC21, as amended by DOJ21, removes the six-year limitation on the authorized period of stay in H-1B visa status for certain aliens whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays and broadens the class of H-1B nonimmigrants who may avail themselves of this provision. In this matter, the Petitioner filed the Form 9089 on the Beneficiary's behalf on June 19, 2014. As the Director correctly determined, the Form 9089 was not pending for at least 365 days or more prior to the requested start date (August 30, 2014) for an extension of the Beneficiary's stay.

Again, the Petitioner in this matter may not rely on either the expired Form 9089 of RFP or the revoked approval of RFP's Form I-140 to request an extension of stay under section 106 of AC21.

#### IV. DUE PROCESS CLAIMS

Although the Petitioner asserts that its right to procedural due process was violated, it has no standing to challenge the revocation of a petition filed by a different petitioner. That is, the Petitioner is not an affected party to the petition filed by a different unrelated party. The Petitioner has not submitted any evidence that it has received authority from the unrelated party to challenge any decision regarding the unrelated party. *See* 8 C.F.R. § 103.2(a)(3). Moreover, it has not shown that any violation of the regulations resulted in "substantial prejudice" to it. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). The Petitioner has fallen far short of meeting this standard.

In this matter, the Petitioner acknowledges that it filed a Form 9089, the beginning process to file a Form I-140 petition, on September 14, 2012.<sup>9</sup> On October 23, 2013, its Form 9089 was denied. The Petitioner did not appeal DOL's denial decision and did not re-file a new Form 9089 until more than seven months later. A review of the record and the instant adverse decision indicates that the Director properly applied the statute and regulations to the Petitioner's case. The Petitioner's primary complaint is that the Director denied the petition. As previously discussed, the Petitioner has not met its burden of proof and the denial was the proper result under the statute and regulation. Accordingly, the Petitioner's due process claim is without merit.

The Petitioner also asserts that the Beneficiary's right to procedural due process was violated and cites to cases decided in the eleventh and sixth circuits which address a beneficiary's standing to challenge the revocation of a Form I-140.<sup>10</sup> The Petitioner, however, has not demonstrated that the facts of the revocation of the Form I-140 benefiting the Beneficiary in this matter are analogous to the facts of the revocations in those matters. That is, the revocation in this matter was automatic,

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<sup>9</sup> We observe that the Petitioner could have filed a Form 9089 even earlier, if it had chosen to do so.

<sup>10</sup> The eleventh circuit case cited by the Petitioner has been vacated and remanded on motion on the issue of the Beneficiary's standing. *Kurapati v. U.S. Citizenship and Immigration Services*, 950 F.Supp.2d 1230 (M.D.Fla. Jun 10, 2013) (NO. 8:13-CV-68-T-30AEP).

based on the Beneficiary's action of leaving his employer and that employer properly notifying USCIS that it was withdrawing the approved Form I-140 as it no longer intended to employ him.

Further, in contrast to a practice of acquiescence to the holdings of a circuit court in cases arising within the jurisdiction of that circuit, we are not required to accept a determination by one circuit court of appeals as binding throughout the United States.<sup>11</sup> *Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989); *cf. Matter of K-S-*, 20 I&N Dec. 715, 719 (BIA 1993). Although the reasoning underlying a circuit court's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *See Matter of Anselmo*, 20 I&N Dec. at 31.

## V. CONCLUSION

The Beneficiary is not eligible for an extension of his H-1B nonimmigrant status. There have been no lengthy delays in the adjudication of a Form I-140 petition or the required underlying Form 9089 application. The record does not include a Form I-140, filed on the Beneficiary's behalf, by the Petitioner. Additionally, the Form 9089 filed by the Petitioner on behalf of the Beneficiary had not been pending more than 365 days prior to the requested start date in the instant petition. Accordingly, we shall not disturb the Director's denial of the petition.

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.<sup>12</sup>

**ORDER:** The appeal is dismissed.

Cite as *Matter of T-M- Inc.*, ID# 12536 (AAO Oct. 9, 2015)

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<sup>11</sup> This matter arises within the eighth circuit.

<sup>12</sup> As the identified ground of ineligibility is dispositive of the Petitioner's appeal, we need not address any additional issues in the record of proceeding.