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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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[REDACTED]

FILE: [REDACTED] EAC-03-078-50302

OFFICE: BALTIMORE DISTRICT

Date: SEP 19 2008

IN RE: Applicant: [REDACTED]

PETITION: Application to Register Permanent Residence or Adjust Status Pursuant to Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The employment-based application for adjustment of status was denied by the District Director, Baltimore District. The director certified the decision to the Administrative Appeals Office (AAO) for review. The decision of the director will be affirmed.

The applicant seeks to adjust status as the beneficiary of an approved employment-based immigrant petition pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The applicant seeks to adjust status under the provisions of section 245(a) of the Act, 8 U.S.C. § 1255(a), and use the provisions of section 245(i) of the Act, 8 U.S.C. § 1255(i). The applicant asserts that section 212(a)(5)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(5)(A)(iv) does not disqualify her from adjustment of status because she meets the requirements of portability under the American Competitiveness in the Twenty-first Century Act of 2000 (AC21) (Public Law 106-313); section 204(j) of the Act, 8 U.S.C. § 1154(j). The director determined that the applicant was ineligible for adjustment because a valid labor certification no longer supported that application and, accordingly, denied the application for adjustment of status. The director then issued a notice that was certified for review to the AAO pursuant to 8 C.F.R. § 103.4.

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. See DHS Delegation No. 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). See DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

Certifications by district directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

On certification, former counsel for the applicant referenced two memoranda. The first was issued by William R. Yates (Mr. Yates), Citizenship and Immigration Services (CIS) Associate Director for Operations, on May 12, 2005, and is entitled "Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by [AC21]," (2005 Memo). The second was issued on August 4, 2003, and is entitled "Continuing Validity of form I-140 Petition in accordance with Section 106(c) of [AC21]," (2003 Memo). In a subsequent brief, counsel references the latter memorandum for his premise that because the applicant's application to adjust status was pending for more than 180 days when the petitioner withdrew the approved Form I-140 visa petition, the applicant's adjustment application should be approved regardless of whether or not the labor certification formed the basis for another alien's adjustment to lawful permanent resident status.

Section 245(a) of the Act provides that:

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 under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1) or 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 (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

In the instant matter, the Form ETA 750 labor certification application was filed on April 23, 2001 and the Department of Labor (DOL) certified it on January 25, 2002. The petition's priority date is the date the labor certification application was accepted by DOL. *See* 8 C.F.R. § 204.5(d). Based on the certification of the Form ETA 750, the petitioner filed the Form I-140 petition on April 16, 2002 and it was approved on July 11, 2002. The beneficiary of the Form I-140, the applicant in this proceeding, filed the instant Form I-485, Application to Register Permanent Residence or Adjust Status, on December 9, 2002 based on the approved Form I-140. The petitioner submitted a request to withdraw the petition through counsel on January 15, 2004. The Service Center issued a notice that the petition was automatically revoked on June 4, 2004, citing to 8 C.F.R. § 205.1(a)(3)(iii)(C), and noting that the petitioner wanted to substitute a new alien into the proffered position utilizing the certified labor certification pursuant to a new petition. The record reveals that the labor certification was, in fact, substituted for a new alien in support of a new Form I-140. That Form I-140 was approved and the alien beneficiary has now adjusted to lawful permanent resident status. The applicant in the matter before us was interviewed on May 19, 2005, and her adjustment application was denied on January 26, 2006 and simultaneously certified to the AAO.

The director's decision denied the applicant's adjustment application because the director determined that "the petitioning employer submitted a request to withdraw the visa petition and use the labor certification on which it was based to substitute for another individual's petition." Therefore, the director stated that although the adjustment application had been pending for more than 180 days the applicant was "employed in a same or similar job classification, [she is] ineligible to adjust, as [she does] not have a valid labor certification."<sup>1</sup>

Section 204(a)(1)(F) of the Act provides that: "Any employer desiring and intending to employ within the United States an alien entitled to classification under section 1153(b)(1)(B), 1153(b)(1)(C), 1153(b)(2), or 1153(b)(3) of this title may file a petition with the Attorney General for such classification."

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

*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

<sup>1</sup> In this case, the I-485 was filed on December 9, 2002; the withdrawal was sought on January 21, 2004, 408 days later, and the revocation occurred on June 4, 2004, 543 days later. Thus, the I-485 was pending more than 180 days prior to the withdrawal.

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.

The issue in this matter is whether the applicant is eligible to adjust status based on the portability provisions of AC21.

At the time AC21 went into effect, legacy Immigration and Naturalization Service (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 at the time of enactment was as follows: first, an alien obtains an approved employment-based immigrant visa petition; second, the alien files an application to adjust status; and 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.

The available legislative history does not shed light on Congress' intent in specifically enacting section 106(c) of AC21. While the legislative history for AC21 discusses Congressional concerns regarding the nation's economic competitiveness, the shortage of skilled technology workers, U.S. job training, and the cap on the number of nonimmigrant H-1B workers, the legislative history does not specifically mention section 106(c) or any concerns regarding backlogs in adjustment of status applications. The legislative history briefly mentions "inordinate delays in labor certification and INS visa processing" in reference to provisions relating to the extension of an H-1B nonimmigrant alien's period of stay. *See* S. Rep. 106-260, 2000 WL 622763 at \*10, \*23 (April 11, 2000). In the 2001 Report On The Activities Of The Committee On The Judiciary, the House Judiciary Committee summarized the effects of AC21 on immigrant visa petitions: "[I]f an employer's immigrant visa petition for an alien worker has been filed and remains unadjudicated for at least 180 days, the petition shall remain valid with respect to a new job if the alien 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." H.R. Rep. 106-1048, 2001 WL 67919 (January 2, 2001). Notably, this report further confuses the question of Congressional intent since the report clearly refers to "immigrant visa petitions" and not the "application for adjustment of status" that appears in the final statute. Even if more specific references were available, the legislative history behind AC21 would not provide guidance in the current matter since, as previously noted, an approved employment-based immigrant visa was required to file for adjustment of status at the time Congress enacted AC21.

Counsel relies on the 2005 Memo for the proposition that a Form I-140 remains valid when it is revoked based on a withdrawal after the Form I-485 has been pending 180 days. The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*,

817 F.2d 74, 75 (9<sup>th</sup> Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9<sup>th</sup> Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even CIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5<sup>th</sup> Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

In this matter, the Form I-140 was not simply withdrawn. Rather the petitioner utilized the labor certification in support of a new Form I-140 in behalf of another alien, who has now used the labor certification to obtain lawful permanent resident status. This very specific fact pattern is not addressed in the memoranda on which counsel and prior counsel rely. Most significantly, the language in the 2005 memorandum on which counsel relies discusses whether the *Form I-140* remains valid. At issue in this matter is whether the underlying labor certification remains valid, a separate issue under section 212(a)(5)(A)(iv) of the Act.

The operative language in section 204(j) and section 212(a)(5)(A)(iv) of the Act states that the petition or labor certification "shall remain valid" with respect to a new job if the individual changes jobs or employers. The term "valid" is not defined by the statute, nor does the congressional record provide any guidance as to its meaning. *See* S. Rep. 106-260; *see also* H.R. Rep. 106-1048. Critical to the pertinent provisions of AC21, the labor certification and 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).

Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). We are expected to give the words used in the statute their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Furthermore, 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).

With regard to the overall design of the nation's immigration laws, section 204 of the Act provides the basic statutory framework for the granting of immigrant status. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), provides that "[a]ny employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(3) . . . of this title may file a petition with the Attorney General [now Secretary of Homeland Security] for such classification." (Emphasis added.)

Section 204(b) of the Act, 8 U.S.C. § 1154(b), governs CIS's authority to approve an immigrant visa petition before immigrant status is granted:

After an investigation of the facts in each case . . . the Attorney General [now 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 . . . eligible for preference under subsection (a) or (b) of section 203, approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.

Statute and regulations allow adjustment only where the alien has an approved petition for immigrant classification. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).<sup>2</sup>

Pursuant to the statutory framework for the granting of immigrant status, any United States employer desiring and intending to employ an alien “entitled” to immigrant classification under the Act “may file” a petition for classification. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). However, section 204(b) of the Act mandates that CIS approve that petition only after investigating the facts in each case, determining that the facts stated in the petition are true and that the alien is eligible for the requested classification. Section 204(b) of the Act, 8 U.S.C. § 1154(b). Hence, Congress specifically granted CIS the sole authority to approve an immigrant visa petition; an alien may not adjust status or be granted immigrant status by the Department of State until CIS approves the petition.

Therefore, to be considered “valid” in harmony with the portability provisions of AC21 and with the statute as a whole, an immigrant visa petition must have been filed for an alien that is entitled to the requested classification and that petition must have been approved by CIS pursuant to the agency’s authority under the Act. *See generally* section 204 of the Act, 8 U.S.C. § 1154. **A petition is not validated merely through the act of filing the petition with CIS or through the passage of 180 days.**

The portability provisions of AC21 cannot be interpreted as allowing the adjustment of status of an alien based on an unapproved visa petition when section 245(a) of the Act explicitly requires an approved petition (or eligibility for an immediately available immigrant visa) in order to grant adjustment of status. To construe section 204(j) of the Act in that manner would violate the “elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.” *Dept. of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 340 (1994).

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 CIS backlogs, in the hopes that the application might remain adjudicated for 180 days.<sup>3</sup>

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<sup>2</sup> We note that the Act contains at least one provision that does apply to pending petitions; in that instance, Congress specifically used the word “pending.” *See* section 101(a)(15)(V) of the Act, 8 U.S.C. § 1101(a)(15)(V) (establishing a nonimmigrant visa for aliens with family-based petitions that have been pending three years or more).

<sup>3</sup> Moreover, every federal circuit court of appeals that has discussed the portability provision of section 204(j) of the Act has done so only in the context of deciding an immigration judge’s jurisdiction to determine the continuing validity of an approved visa petition when adjudicating an alien’s application for adjustment of status in removal proceedings. *Sung v. Keisler*, 2007 WL 3052778 (5<sup>th</sup> Cir. Oct. 22, 2007); *Matovski v. Gonzales*, 492 F.3d 722 (6<sup>th</sup> Cir. Jun. 15, 2007); *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4<sup>th</sup> Cir. 2007). In *Sung*, the court quoted section 204(j) of the Act and explained that the provision only addresses when “an approved immigration petition will remain valid for the purpose of an application of adjustment of status.” *Sung*, 2007 WL 3052778 at \*1 (emphasis added). *Accord Matovski*, 492 F.3d at 735 (discussing portability as applied to an alien who had a “previously approved I-140 Petition for Alien Worker”); *Perez-Vargas*, 478 F.3d at 193 (stating that “[s]ection 204(j) . . . provides relief to the alien who changes jobs after his visa petition has been approved”). Hence, the requisite approval of the underlying visa petition is explicit in each of these decisions.

The enactment of the job flexibility provision at section 204(j) of the Act did not repeal or modify sections 204(b) and 245(a) of the Act, which require CIS to approve an immigrant visa petition prior to granting adjustment of status.

We acknowledge that in this matter, the petition was approved and the issue is whether the labor certification remains valid. Under the portability provisions of AC21, the alien's decision to port to a new employer after an adjustment application has been pending for 180 days does not by itself invalidate the labor certification. Nevertheless, the labor certification must still remain valid under other relevant provisions.

Specifically, the labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The regulation at 20 C.F.R. § 656.30(c)(2) provides:

A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the Application for Alien Employment Certification form.

The Act does not provide for the substitution of aliens in the permanent labor certification process. Similarly, both the CIS and the Department of Labor's regulations are silent regarding substitution of aliens. The substitution of alien workers is a procedural accommodation that permits U.S. employers to replace an alien named on a pending or approved labor certification with another prospective alien employee. Historically, this substitution practice was permitted because of the length of time it took to obtain a labor certification or receive approval of the Form I-140 petition. *See generally* Department of Labor Proposed Rule, "Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity," 71 Fed. Reg. 7656 (February 13, 2006).

Section 212(a)(5)(A)(iv) of the Act cannot be interpreted as allowing the adjustment of status of an alien based on a labor certification that formed the basis for another alien's admissibility when section 212(a)(5)(A)(i) of the Act explicitly requires a labor certification as evidence of an individual alien's admissibility. To construe section 212(a)(5)(A)(iv) of the Act in that manner would violate the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Dept. of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. at 340 .

Significantly, CIS may not approve a visa petition when the approved labor certification has already been used by another alien. *See Matter of Harry Bailen Builders, Inc.*, 19 I&N Dec. 412 (Comm. 1986). When Congress enacted the job flexibility provision of section 204(j) of the Act, Congress made no correlative amendments to the admissibility requirements of section 212(a)(5)(C) of the Act that would allow a labor certification to be used as evidence of admissibility for two aliens. We must assume that Congress was aware of the agency's previous interpretation that a labor certification can only support the adjustment of one alien under the Act when AC21 was passed and did not specifically alter that interpretation. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)(Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). The labor certification on which the underlying petition is based has already served as the basis of admissibility for a different alien and is no longer "valid." Counsel provides no legal authority, and we know of none, that would allow CIS to rely on the labor certification of an adjusted alien to adjust a second alien.

Even if the statute had been amended to allow two aliens to use a single labor certification to adjust status to lawful permanent resident, the applicant has not established that the new employment is in a same or similar occupation in accordance with section 204(j) of the Act. The Form ETA 750A describes the proffered position as a patient care technician. DOL categorized the proffered position as patient care technician on the front of Form ETA 750A in its endorsements box with the occupational code of 354.374-010. DOL categorized the proffered position as practical nurse on the front certification page of the Form ETA 750. The duties of the proffered position are listed on Item 13 as follows:

Under supervision of Registered Nurse, will perform the following duties: Documents assessments, intervention and therapies administered on the Nursing Flow Sheet to be Countersigned by RN. Anticipate safety problems and intervene appropriately. Prepare equipment and aid physician/RN during treatments and examinations of patients/residents. Observe and reports changes in patient's/resident's/condition. Take vital signs of patients / residents and keep records of nurses' notes. Prepare or examine food trays for prescribed diets and feed patients, etc.

The proffered position requires a two-year associate's degree in nursing/medicine or allied professions and two years of experience in the proffered position or the related occupation of geriatric caregiver/nurse aid. The proffered wage is listed as \$10.10 per hour (\$21,008 annually) and the duties of the proffered position would be performed at the petitioner's nursing and rehabilitation center in Leesburg, Virginia according to Item 7 of the Form ETA 750 A.

On the Form ETA 750 B, Item 15, the applicant did not represent her employment from 1994 onwards although she signed the form on March 10, 2001 under a declaration that her statements were true and correct under penalty of perjury. Item 15 elicited information concerning all jobs held by the applicant for the prior three years. In connection with her adjustment application, the applicant submitted a Form G-325, Biographic Information sheet and did not represent her employment after 1994 although she signed the form on September 1, 2002 above a warning for knowingly and willfully falsifying or concealing a material fact. That section elicited information concerning her past employment for the prior five years. A handwritten note in red ink in that section states "currently works as patient caregiver tech" and appears to be a CIS

adjudicator's notes from the applicant's adjustment interview.

The applicant's adjustment application contains a letter, dated August 20, 2004, from [REDACTED] stating that she was confirming the employment of the applicant as a patient care technician/geriatric caregiver for her mother's household in Washington, D.C. The letter stated that the applicant would look after her 86-year old mother performing nursing and caregiving duties, "administering medication, feeding the patient, assisting visiting nurses and physicians, taking vital signs, and recording and observing [the] patient's condition, etc." [REDACTED] also stated that the applicant receives \$2,000 per month in wages and has been working with them for several years.

W-2 forms and the applicant's individual income tax returns for 2003 and 2004 are included with the adjustment application and reflect wages earned by [REDACTED] in the amount of \$7,000 in 2003 and \$29,500 in 2004. There are also three memos from [REDACTED] letterhead with an address in [REDACTED] 20, 2005, March 24, 2005, and March 9, 2005 titled "Payroll" and explaining that the applicant is paid \$15.00 per hour but no further description of her employment.

Also included with the applicant's adjustment application is a letter from [REDACTED] of [REDACTED] and dated April 27, 2005. [REDACTED] states that she is the applicant's current full-time employer since January 31, 2005 and provides no further details concerning the work the applicant performs for her.

The record of proceeding is thus unclear concerning the applicant's employment history and intended employment. It is unclear to the AAO if the applicant intends to work for [REDACTED] mother, who Ms. [REDACTED] mother is, or if the applicant would work for [REDACTED] and if so, what her duties are or would be for [REDACTED]. Without a description of duties from the new employer with a clearly set forth intention of employment, no such analysis is possible. For this additional reason, the petition may not be approved.

The burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden.

ORDER: The director's January 26, 2006 decision is affirmed. The application remains denied.