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U.S. Citizenship
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Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 18 2006
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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as Outstanding Professor or Researcher Pursuant to Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(B)

ON BEHALF OF PETITIONER:
[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.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a higher education and research institution. It seeks to classify the beneficiary as an outstanding researcher pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(B). According to the petition, the petitioner seeks to employ the beneficiary in the United States as a "Post Doctoral fellow." The director determined that the petitioner had not established that it had offered the beneficiary a permanent job as of the date of filing.

On appeal, counsel submits a brief. For the reasons discussed below, the petitioner has not overcome the director's basis of denial.

Section 203(b) of the Act states, in pertinent part, that:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (B) Outstanding Professors and Researchers. -- An alien is described in this subparagraph if --
> >
> > > (i) the alien is recognized internationally as outstanding in a specific academic area,
> > >
> > > (ii) the alien has at least 3 years of experience in teaching or research in the academic area, and
> > >
> > > (iii) the alien seeks to enter the United States --
> > >
> > > > (I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,
> > > >
> > > > (II) for a comparable position with a university or institution of higher education to conduct research in the area, or
> > > >
> > > > (III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

The regulation at 8 C.F.R. § 204.5(i)(3)(iii) provides that a petition must be accompanied by:

> An *offer* of employment from a prospective United States employer. A labor certification is not required for this classification. The offer of employment shall be in the form of a letter from:
>
> (A) A United States university or institution of higher learning *offering* the alien a tenured or tenure-track teaching position in the alien's academic field;
>
> (B) A United States university or institution of higher learning *offering* the alien a permanent research position in the alien's academic field; or
>
> (C) A department, division, or institute of a private employer *offering* the alien a permanent research position in the alien's academic field. The department, division, or institute must demonstrate that it employs at least three persons full-time in research positions, and that it has achieved documented accomplishments in an academic field.

(Emphasis added.) Black's Law Dictionary 1111 (7th ed. 1999) defines "offer" as "the act or an instance of presenting something for acceptance" or "a display of willingness to enter into a contract on specified terms, made in a way that would lead a reasonable person to understand that an acceptance, having been sought, will result in a binding contract." Black's Law Dictionary does not define "offeror" or "offeree." The online law dictionary by American Lawyer Media (ALM), available at www.law.com, defines offer as "a specific proposal to enter into an agreement with another. An offer is essential to the formation of an enforceable contract. An offer and acceptance of the offer creates the contract." Significantly, the same dictionary defines offeree as "a person or entity *to whom an offer to enter into a contract is made* by another (the offeror)," and offeror as "a person or entity who makes a specific proposal *to another (the offeree)* to enter into a contract." (Emphasis added.)

In light of the above, we concur with the director that the ordinary meaning of an "offer" requires that it be made to the offeree, not a third party. As such, regulatory language requiring that the offer be made "to the beneficiary" would simply be redundant. Thus, a letter addressed to Citizenship and Immigration Services (CIS) *affirming* the beneficiary's employment is not a job *offer* within the ordinary meaning of that phrase.

The regulation at 8 C.F.R. § 204.5(i)(2), provides, in pertinent part:

> *Permanent,* in reference to a research position, means either tenured, tenure track, or for a term of indefinite or unlimited duration, and in which the employee will ordinarily have an expectation of continued employment unless there is good cause for termination.

On Part 6 of the petition, the petitioner indicated that the proposed employment was a permanent position. The petitioner submitted a letter from [redacted] the petitioner's Vice Provost, and [redacted], a professor in the petitioner's Department of Physiology and Pharmacology, addressed to the beneficiary, asserting:

> This letter confirms our enthusiasm for offering you a full-time, on-going position as a Post Doctoral Fellow in the Department of Physiology and Pharmacology at [the petitioning institution]. We anticipate this to be an ongoing *project* without a definite termination date, and your position would be subject to the usual working conditions for other scientists of your rank, the availability of funding, and the Government approval of the relevant visa.
>
> . . . Again, this is an offer of on-going employment, with no specified date of termination.

The director questioned whether this letter constituted the original job offer and issued a request for additional evidence. In response, the petitioner submitted an August 15, 2005 letter from the same individuals addressed to the beneficiary offering him "a continued full-time, on-going permanent position as a researcher."

The director concluded that the initial letter was merely confirmation of an earlier job offer and, even if it was a job offer, only offered the beneficiary a postdoctoral position, which is typically temporary. The director further concluded that the second letter was dated after the date of filing and, thus, was not evidence of eligibility as of that date. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

On appeal, counsel asserts that the initial letter is a written confirmation of a previous oral job offer and, thus, is the original written job offer. Counsel further notes that The Association of American Universities' Committee on Postdoctoral Education in its *Report and Recommendations*, March 31, 1998, found that it is "common for institutions either to have no time limits on the length of postdoctoral appointments or regularly to ignore or waive established limits." Counsel ignores, however, that on the previous page, the second element of the definition of a doctoral appointment used by the committee in assessing the use of postdoctoral researchers is that "the appointment is temporary." Read in context, the language quoted by counsel expresses the committee's concern that institutions are placing researchers in postdoctoral holding patterns without offering timely promotion to truly "permanent" positions. Significantly, the report found that while "the preponderance of postdocs *expect* to end up in a tenure track position, only one-fourth of recent postdocs in the surveyed departments actually entered such a position." (Emphasis in original.) Thus, the report found a "disparity" between the expectations of postdoctoral researchers and reality.

The first paragraph of the initial letter confirms the petitioner's previously expressed *enthusiasm* for offering a position, it does not expressly confirm a previous offer made in a different context such as an

oral offer. The letter then discusses the petitioner's expectation that the beneficiary's *project* will cotntinue without a termination date. The final sentence, while referencing an actual offer, is inconsistent with the first paragraph.

Ultimately, the director advised the petitioner of her finding that postdoctoral positions are inherently temporary. Rather than submit evidence that the petitioner has a unique institution-wide policy permitting postdoctoral appointments for an indefinite period, the petitioner submitted a report confirming that the common definition of a postdoctoral position is that it is temporary. This report does not overcome the director's basis of denial.

In the alternative, counsel asserts that the beneficiary is entitled to be "ported" from one research position to another due to the delay in processing the petition since the beneficiary's current position is the "same or similar" to the position offered as of the date of filing. Counsel relies on a May 12, 2005 memorandum from William Yates, Associate Director for Operations at CIS.

CIS memoranda merely articulate internal guidelines for INS personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely. *Loa-Herrera v. Trominski*, 231 F. 3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill,* 806 F. 2d 1262, 1264 (5th Cir. 1987)). *See also R.L. Inv. Partners, Ltd. v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. Mar. 3, 2000) *aff'd* 273 F. 3d 874 (9th Cir.) for the proposition that unpublished decisions from this office and General Counsel opinions carry no precedential weight and are not binding on CIS.

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.* Section 211 of the Act, 8 U.S.C. § 1181 ("Admission of Immigrants into the United States"); Section 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 under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1) or [sic] may be adjusted by the Attorney General [now the CIS], 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.

In 2000, Congress passed the American Competitiveness in the Twenty-First Century Act (AC21), Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000). Section 106(c) of AC21 amended section 204 of the Act by adding the following provision, codified as 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 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.

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.

Upon review, counsel's assertions that the provisions of AC21 are relevant are not persuasive. The operative language in section 106(c) is the following phrase: "A petition . . . 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 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).

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).

The problematic issues presented by this case are primarily the result of immigration procedures that have arisen since the enactment of section 106(c) of AC21. As previously noted, CIS implemented the "concurrent filing" process on July 31, 2002 whereby an employer may file an employment-based immigrant visa petition and an application for adjustment of status for the alien beneficiary at the same time. *See* 8 C.F.R. § 245.2(a)(2)(B)(2004); *see also* 67 Fed. Reg. 49561 (July 31, 2002). CIS implemented the concurrent filing process as a convenience for aliens and their U.S. employers; CIS in no way suggested that an unadjudicated I-140 could be the basis for I-485 approval under the portability provisions of section 106(c). More significant to this matter, CIS did not suggest that allowing concurrent filing would make AC21, applicable when enacted only to the adjudication of the I-485, relevant to the initial adjudication of the underlying I-140. Prior to July 31, 2002, only

immediate relatives and family-based preference cases could concurrently file a visa petition and an adjustment application. Accordingly, at the time that Congress enacted AC21, no alien could assert that an unadjudicated immigrant visa petition "shall remain valid" through the passage of 180 days, since the application for adjustment could not be filed until after the petition was approved by CIS. It is presumed that Congress is aware of INS regulations at the time it passes a law. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).

Contrary to the ordinary meaning of the word, counsel's ultimate position would require the AAO to construe the term "valid" to include unadjudicated petitions. *See* Webster's New College Dictionary 1218 (2001) (defining "valid" as "well-grounded," "producing the desired results," or "legally sound and effective.") Since an approved petition was required to file an application for adjustment of status, it is extremely doubtful that Congress intended the term "valid" to include petitions that remain pending after the close of the 180-day period.[1]

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 . . . 1153(b)(1)(C) . . . 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' authority to approve an immigrant visa petition and grant immigrant status:

> After an investigation of the facts in each case, and after consultation with the Secretary of Labor with respect to petitions to accord a status under section 1153(b)(2) or 1153(b)(3) of this title, 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 1153 of this title, 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.

Accordingly, 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. 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

[1] It is also noted that the Act contains at least one provision that does apply to pending petitions; in that instance, Congress specifically used the word "pending." *See* § 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).

requested classification, and consulting with the Secretary of Labor when required. Section 204(b) of the Act. 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 thrust of the related provisions and with the statute as a whole, the petition must have been filed for an alien that is "entitled" to the requested classification and that petition must have been "approved" by a CIS officer pursuant to his or her authority under the Act. *See generally*, Section 204 of the Act, 8 U.S.C. § 1154. A petition is not made "valid" merely through the act of filing the petition with CIS or through the passage of 180 days. To interpret this provision in any other manner would subvert the statutory scheme of the U.S. immigration laws.

Considering the statute as a whole, it would severely undermine the immigration laws of the United States to find that a petition is "valid" when that petition was never approved or, even if it was approved, if it was filed on behalf of an alien that was never "entitled" to the requested visa classification. It would be irrational to believe that Congress intended to throw out the entire statutorily mandated scheme regulating immigrant visas whenever that scheme requires more than 180 days to effectuate. It would also be absurd to suppose that Congress enacted a statute that would encourage large numbers of ineligible aliens to file immigrant visa petitions, if the legislation was actually meant to be an impetus for CIS to reduce its backlogs. We will not construe section 106(c) in a manner that would create a situation where ineligible aliens would gain a "valid" visa simply by filing frivolous visa petitions and adjustment applications, thereby increasing CIS backlogs, in the hopes that the application might remain unadjudicated for 180 days.

In the present matter, the petition was filed on behalf of an alien who was not "entitled" to the classification. Specifically, the petitioner did not submit the initial evidence required by the regulation at 8 C.F.R. § 204.5(i)(3)(iii), a qualifying job offer. An alien must be eligible as of the date the petition is filed. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Thus, a subsequent job offer from another employer is insufficient. To hold otherwise would allow aliens without a permanent job offer to establish a priority date in the hopes of securing a permanent job offer from another employer at some future date. An unapprovable petition should not become approvable under a new set of facts hinged upon probability and projections at the time of filing. *Matter of Great Wall,* 26 I&N Dec. 142, 145 (Reg. Comm. 1977).

Section 106(c) of AC21 does not repeal or modify section 204(b) or section 245 of the Act, which require CIS to approve a petition prior to granting immigrant status or adjustment of status. Accordingly, as this petition was not approvable when filed, it cannot be deemed to have been "valid" for purposes of section 106(c) of AC21.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.