Business Immigration, Workforce and Compliance Law

Benjamin N. Cardozo School of Law

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Supplemental Materials

Class #10

United States Court of Appeals,Tenth Circuit.

LEE v. MUKASEY

Bo Hae LEE, Petitioner, v. Michael B. MUKASEY, United States Attorney General,Respondent.

No. 06-9594.

-- June 03, 2008

Before KELLY, McKAY, and HARTZ, Circuit Judges.

David M. Cook, Kenneth Y. Geman & Associates, Chicago, IL, for Petitioner.Joanne E. Johnson, Attorney, (Anh-Thu P. Mai, Senior Litigation Counsel, with her on the brief), U.S. Department of Justice, Washington, D.C., for Respondent.

Petitioner Bo Hae Lee seeks judicial review to determine whether an agency's statutory construction of one of its operating statutes is legally permissible. Ms. Lee is a citizen of South Korea. She came to the United States as a twelve-year-old in 1999 with her parents on a B-2 nonimmigrant visitor visa. She subsequently applied for and received a change in visa status to the F-1 nonimmigrant student category, allowing her to attend a private school approved by the Attorney General of the United States.

The last approved private school Ms. Lee attended was Riverview Christian Academy in Colorado. After her sophomore year, when Ms. Lee was sixteen, the school ceased operations. The school's closure required Ms. Lee to seek an alternative for schooling. Riverview Christian Academy attempted to assist Ms. Lee in applying to another private school, but the other private schools were too far from her residence, and Ms. Lee understood it would be difficult for her to achieve admittance. Therefore, Ms. Lee attended a local public high school, graduating in May 2005.

In September of 2003, a few months after Ms. Lee's private school closed, she filed for a status adjustment, which was denied. The following year, on July 14, 2004, the Immigration and Naturalization Service issued a Notice to Appear charging Ms. Lee with being subject to removal because of her remaining in the United States longer than permitted and being in violation of her nonimmigrant status. Ms. Lee again asked for a

status adjustment, but the government attorney argued against the adjustment. He explained Ms. Lee could not obtain a status adjustment[2] because she could not meet her burden of showing admissibility due to her no longer attending the private school for which she had been approved and attending a public school without reimbursing it for her education.

Even though the Immigration Judge stated that "[m]aybe [Ms. Lee] was not at fault for terminating her studies at the school, and I do think she ended her studies there because she had to," he ultimately refused to adjust Ms. Lee's status from nonimmigrant to permanent resident because he found Ms. Lee had not met her burden of proving she was admissible. (R. at 35-36.) His findings and legal conclusions included determining Ms. Lee was a student visa abuser under 8 U.S.C. § 1184(m)[3] for terminating her course of study at her private school and undertaking a course of study at a public school. In a cursory decision, the Board of Immigration Appeals affirmed the IJ's findings on the merits, without reviewing an untimely brief filed by Ms. Lee's attorney on her behalf.

We review de novo questions of law raised upon petition for review, and we review the agency's findings of fact under the substantial evidence standard. See Elzour v. Ashcroft, 378 F.3d 1143, 1150 (10th Cir.2004); Rubio-Rubio v. INS, 23 F.3d 273, 276 (10th Cir.1994); see also 8 U.S.C. § 1252(a)(2)(D).

The crux of this appeal is a question of law: whether the IJ's statutory construction of 8 U.S.C. § 1184(m)(2) is correct in concluding Ms. Lee's actions constituted a termination of her course of study. Ms. Lee argues that the IJ's statutory construction of § 1184(m)(2) and the BIA's upholding of that construction are impermissible under the plain language of the statute.[4] We agree.

According to § 1255(a), an alien may receive an status adjustment from nonimmigrant to permanent resident if the alien meets the three requirements listed therein. To meet the second requirement, an alien must prove she is admissible. In Ms. Lee's case, the IJ found she had not met that burden because she was inadmissible under § 1182(a)(6)(G)[5] as a student visa abuser. The IJ determined Ms. Lee abused her student visa status because she violated a term or condition of her status under § 1184(m)(2) by terminating her attendance at Riverview Christian Academy, even though he acknowledged that termination may not have been her fault.

Section 1184(m)(2) provides:

An alien who obtains the status of a nonimmigrant under clause (i) or (iii) of section 1101(a)(15)(F) of this title in order to pursue a course of study at a private elementary or secondary school or in a language training program that is not publicly funded shall be considered to have violated such status, and the alien's visa under section 1101(a)(15)(F) of this title shall be void, if the alien terminates or abandons such course of study at such a school and undertakes a course of study at a public elementary school, in a publicly funded adult education program, in a publicly funded adult education language training program, or at a public secondary school (unless the requirements of paragraph (1)(B) are met).

§ 1184(m)(2) (emphasis added). Thus, in order to violate her status, Ms. Lee had to "terminate or abandon" her studies at "such a school."

"The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n. 9, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). We begin by analyzing the plain language employed by Congress, and we "must give words their ordinary or natural meaning." Leocal v. Ashcroft, 543 U.S. 1, 8-9, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004) (internal quotation marks omitted); Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68, 102 S.Ct. 1534, 71 L.Ed.2d 748 (1982). Importantly, "we assume that the legislative purpose is expressed by the ordinary meaning of the words used." Am. Tobacco Co., 456 U.S. at 68, 102 S.Ct. 1534 (internal quotation marks omitted).

"When a court reviews an agency's construction of the statute which it administers," it must first answer "whether Congress has directly spoken to the precise question at issue." Chevron, 467 U.S. at 842, 104 S.Ct. 2778. If congressional intent is clear from the statutory language, the inquiry is over, and both the court and the agency "must give effect to the unambiguously expressed intent of Congress." See id. at 842-43, 104 S.Ct. 2778. However,

[i]n making the threshold determination under Chevron, "a reviewing court should not confine itself to examining a particular statutory provision in isolation." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). Rather, "[t]he meaning-or ambiguity-of certain words or phrases may only become evident when placed in context. It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" Id. at 132-33, 120 S.Ct. 1291.

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551U.S. 644, 127 S.Ct. 2518, 2534, 168 L.Ed.2d 467 (2007) (second alteration in original) (explaining the Court would not construe the statute in that case to "implicitly abrogate or repeal" the operation of many mandatory agency directives and thereby create differing mandates).

We discuss first the school to which the statute refers. In the plain language of the statute, the antecedent of the term "such a school" is "a private . secondary school," § 1184(m)(2), specifically described in the reference statute, 8 U.S.C. § 1101(a)(15)(F), as "an established . academic high school . particularly designated by the immigrant and approved by the Attorney General after consultation with the Secretary of Education." The relevant regulation describing the duration of an alien's nonimmigrant status on an F-1 visa links the status duration specifically to "an educational institution approved by the Service for attendance by foreign students." 8 C.F.R. § 214.2(f)(5)(i); see also United States v. Atandi, 376 F.3d 1186, 1187 n. 1 (10th Cir.2004).

Because § 1184(m)(2) refers specifically to "such" a school rather than to "a" or "any" private school, and because its internal statutory references and the regulations regarding F

-1 student visa duration point only to a school specifically selected by the immigrant and approved by the government, we hold that the school to which the statute refers in this case is Riverview Christian Academy, the school selected specifically by Ms. Lee and approved by the government. Having established that the school in question is Riverview Christian Academy, we now scrutinize whether Ms. Lee terminated or abandoned her course of study at this school.

Beginning with the plain language of the statute, we note that "terminate" is defined as: "1. To put an end to; to bring to an end. 2. To end; to conclude." Black's Law Dictionary 1511 (8th ed.2004). To abandon means:

To desert, surrender, forsake, or cede. To relinquish or give up with intent of never again resuming one's right or interest. To give up or to cease to use. To give up absolutely; to forsake entirely; to renounce utterly; to relinquish all connection with or concern in; to desert. It includes the intention, and also the external act by which it is carried into effect.

Black's Law Dictionary 2 (6th ed.1990) (internal citations omitted) (providing the last included definition of the word "abandon," which was omitted in subsequent editions). Thus the ordinary meaning of both these words requires the alien to act, not to be acted upon.

Because we must first assume congressional intent is indicated by the ordinary meaning of the words used, we hold that Congress intended to penalize only an alien who acts affirmatively to terminate or to abandon such course of study at such a school. This statutory construction does not create a conflict with the root of the statutory scheme. It merely clarifies Congress's intent that an alien must affirmatively act to become a student visa abuser under § 1184(m)(2). That status may not be thrust upon her.

Because the reason Ms. Lee no longer attended Riverview Christian Academy was that it ceased operating, Ms. Lee took no affirmative action to terminate or to abandon her course of study at the school.[6] Instead, the school acted, and Ms. Lee reacted. It is obvious the IJ did not take into account the affirmative action required of Ms. Lee by the statute when he found she "ended her studies there because she had to, but that would be a termination of her studies at that particular school." (R. at 35-36 (emphasis added).) In reviewing the IJ's statutory interpretation, we hold that he erred in concluding Ms. Lee terminated or abandoned her course of study at Riverview Christian Academy, was therefore a student visa abuser, and thus could not meet her burden of proving she was admissible for a status adjustment under § 1255(a).

Finally, Ms. Lee's termination or abandonment of her course of studies is explicitly listed in the conjunctive with the second part of the statute proscribing her attendance at a publicly funded school. Therefore, because Ms. Lee did not terminate or abandon her course of studies under the plain language of § 1184(m)(2), we need not reach the second prong of the statute to determine if her attendance at a public high school placed her in violation of her student visa status.

We REVERSE and REMAND this case for further proceedings consistent with this opinion.

I respectfully dissent. Although the majority's interpretation of the statutory language is a plausible one, I think that the government's interpretation is more reasonable. In any event, because the language is ambiguous, we should remand to the Board of Immigration Appeals (BIA) for an authoritative construction.

Under 8 U.S.C. § 1101(a)(15)(F)(i) an alien can qualify for nonimmigrant student status if she wishes to pursue a full course of study at an educational institution approved by the federal government and then return home. Such an alien is termed an F-1 student. Approval for the institution must be withdrawn if the institution does not promptly report "the termination of attendance of each nonimmigrant student." 8 U.S.C. § 1101(a)(15)(F)(i).

In addition to the requirements of § 1101(a)(15)(F)(i), further restrictions are imposed by 8 U.S.C. § 1184(m) with respect to those who wish to pursue studies at an elementary or secondary school or an adult education program. Under § 1184(m), nonimmigrant status is not available to pursue studies at a public elementary school or a publicly funded adult education program, and is available to pursue studies at a public secondary school only if the course of study is 12 months or less and the alien pays the cost of the education. See 8 U.S.C. § 1184(m)(1). Once an alien is admitted as an F-1 student under § 1101(a)(15)(F)(i), regulations of the Department of Homeland Security (DHS) provide that the alien remains admitted so long as she "is pursuing a full course of study at an educational institution approved by the [government]," except that one admitted for attendance at a public high school is restricted to 12 months of study at such a school. 8 C.F.R. § 214.2(F)(5)(i). The DHS regulations permit a student to transfer between educational institutions if certain paperwork is executed, see id. § 214.2(f)(8); and the regulations accommodate medical conditions that require reduced or no study for less than 12 months, see id. § 214.2(f)(6)(iii)(B). A student may request reinstatement to nonimmigrant status if "[t]he violation of status resulted from circumstances beyond the student's control." Id. § 214.2(f)(16)(F)(1) "Such circumstances might include . closure of the institution,." Id.

An alien admitted to this country as an F-1 student may lose that status in a number of ways by violating the terms of the governing statutes and regulations. But one particular course of conduct is singled out as a violation by § 1184(m)(2), which states:

An alien who obtains the status of a nonimmigrant under clause (i) or (iii) of section 1101(a)(15)(F) of this title in order to pursue a course of study at a private elementary or secondary school or in a language training program that is not publicly funded shall be considered to have violated such status, and the alien's visa under section 1101(a)(15)(F) of this title shall be void, if the alien terminates or abandons such course of study at such a school and undertakes a course of study at a public elementary school, in a publicly funded adult education program, in a publicly funded adult education language training program, or at a public secondary school (unless the requirements of paragraph (1)(B) [which

require paying the costs of the secondary-school education and limit the term of study to 12 months] are met).

U.S.C. § 1184(m)(2). Such a violation is more than just a failure to satisfy the conditions of F-1 status. To commit a violation under § 1184(m)(2), it is not enough simply to terminate a course of study at a private school and take a job or a vacation; the alien must, for example, also enroll in a public secondary school without paying the required cost. A violation under § 1184(m)(2) is so serious that its commission renders the alien inadmissible, as a student visa abuser, until the alien has been outside the United States for at least five years. See 8 U.S.C. § 1182(a)(6)(G).[1] This is a harsh sanction, and it is apparent that Congress reserved it for what it considered the worst type of abuse of F-1 status-coming to the United States to pursue a privately funded education but then taking advantage of the free public education provided by this country.

The issue before us is whether Ms. Lee has "violate[d] a term or condition of [F-1] status under [§ 1184(m)]." § 1182(a)(6)(G). As relevant to this case, there are three elements to such a violation. First, the alien must have obtained F-1 nonimmigrant status "in order to pursue a course of study at a private elementary or secondary school." § 1184(m)(2). Second, the alien must "terminate[ ] or abandon[ ] such course of study at such a school." Id. Third, the alien must not attend public secondary school, unless the alien pays the cost of the education and the term of study is no more than 12 months. See id. The first and third elements are not in dispute. The only question is whether Ms. Lee "terminate[d] or abandon[ed] such course of study at such a school." Id.

The majority opinion concludes that "such a school" must be the Riverview Christian Academy. I agree that this is a possible interpretation of the statutory language. Section 1184(m)(2) relates to "[a]n alien who obtains [F-1] status . in order to pursue a course of study at a private elementary or secondary school." One could infer that "such course of study at such a school" refers specifically to elementary (or secondary) education at the school identified by the alien when she obtained F-1 status. But if "such course of study at such a school" is a reference only to the alien's original course of study and school (because her F-1 status was obtained specifically to pursue that course of study at that school), one arrives at a strange result. As mentioned above, and as Congress surely anticipated, the governing regulations permit an alien to retain F-1 status by transferring from one private school to another. Yet apparently "abandoning" the second school would not be a violation of 1184(m), because only abandonment of the course of study at the first school is covered by the provision; after all, the alien did not obtain her F-1 status on the basis that she wished to pursue studies at the second school.

In any event, even if the majority opinion's interpretation is reasonable, it is surely also reasonable to interpret "such a school" as the type of school described earlier in the sentence: namely, "a private elementary or secondary school or . a language training program that is not publicly funded." Id. The use of the word such makes it unnecessary to repeat this quoted language. A common definition of such is "having a quality already or just specified-used to avoid repetition of a descriptive term." Webster's Third New Int'l Dictionary 2283 (2002). Applying this definition, Ms. Lee violated § 1184(m).

She decided that she would no longer pursue a course of study at a school of the type that she had been attending-a private secondary school. That decision was an abandonment of "such course of study at such a school." § 1184(m)(2).

This construction of the statutory language apparently comports with the practice of the immigration authorities, which seem to care about the type of institution attended by the F-1 student, rather than the specific school. The record in this case reflects that Ms. Lee was first notified that she had been granted F-1 status on April 14, 2000. At that time she was attending private school in Michigan. The notice of F-1 status contains no reference to the school she was attending. It says merely that the notice is "Valid for Duration of Status." R. at 108. No new notice of F-1 status was necessary when Ms. Lee transferred to Riverview.

This construction of the statutory language also is fully consistent with the apparent purpose of § 1184(m). The majority opinion emphasizes that Ms. Lee's departure from Riverview Christian Academy was hardly her fault-the school closed. But there was nothing involuntary about her failure to choose an alternative. If attending a private high school was too difficult at that time (because, for example, there was no similar school close to home), she could transfer to a public school (as she did) and pay the cost of her education (which she did not do). It seems to me quite possible that Congress would have considered the course taken by Ms. Lee (and her family) as sufficiently culpable to be worthy of the inadmissibility sanction of § 1182(a)(6)(G), even if it might have been still more culpable to quit an operational school and then attend a public high school without paying the cost of the education.

More importantly, though, it should not be our task in the first instance to resolve this ambiguity. That should be accomplished by either a DHS regulation or a decision by the Board of Immigration Appeals (BIA). The BIA has had no real opportunity to address the matter in this case. It decided the case based only on Ms. Lee's notice of appeal because her brief was untimely. The Attorney General has requested that if we find it necessary to construe § 1184(m), we should remand to the BIA on the issue. See Aplee. Br. at 16 n. 6. I would honor that request. We would then defer to the BIA's interpretation. See Niang v. Gonzales, 422 F.3d 1187, 1199 (10th Cir.2005).

FOOTNOTES

2. To obtain a status adjustment, Ms. Lee had to: (1) apply for an adjustment, (2) prove she was "eligible to receive an immigrant visa and [was] admissible to the United States for permanent residence," and (3) have "an immigrant visa immediately available to [her] at the time [her] application [was] filed." 8 U.S.C. § 1255(a). The Government argued Ms. Lee failed under the second step of proving admissibility.

3. Although 8 U.S.C. § 1182(a)(6)(G) refers to 8 U.S.C. § 1184(l) as the section under which an alien may violate her status, the parties agree there is a typographical error in the referring statute and that the correct section is § 1184(m).

4. Section 8 U.S.C. § 1252(a)(2)(B)(I) precludes judicial review of agency decisions under § 1255(a), the section in which a nonimmigrant may obtain a status adjustment. See 8 U.S.C. § 1252(a)(2)(B)(I). However, 8 U.S.C. § 1252(a)(2)(D) states:Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.Even though the agency made a decision under § 1255(a), that decision is reviewable for a question of law. See Lorenzo v. Mukasey, 508 F.3d 1278, 1282 (10th Cir.2007). Petitioner presents a question of law: whether the IJ's statutory construction of § 1184(m)(2) is permissible. Therefore, this court has jurisdiction under § 1252(a)(2)(D).

5. This section provides:An alien who obtains the status of a nonimmigrant under section 1101(a)(15)(F)(i) of this title and who violates a term or condition of such status under section 1184(l) of this title is inadmissible until the alien has been outside the United States for a continuous period of 5 years after the date of the violation.§ 1182(a)(6)(G).

6. Even though the government argues that Ms. Lee's actions make her a student visa abuser and that she falls within the scope of Congress's overall intent to prevent aliens from educating themselves at the taxpayers' expense, we conclude we cannot interpret the plain language in § 1184(m)(2) to mean that a private school's closing constitutes an alien's affirmative action to terminate or to abandon her course of study at that school.

1. Section 1182(a)(6)(G) states:An alien who obtains the status of a nonimmigrant under section 1101(a)(15)(F)(i) of this title and who violates a term or condition of such status under section 1184(l) of this title is admissible until the alien has been outside the United States for a continuous period of 5 years after the date of the violation.(All agree that the reference to 8 U.S.C. § 1184(l) should be to § 1184(m), which was originally enacted as § 1184(l).)

McKAY, Circuit Judge.

622 F.3d 357 (2010)

Syed Talha BOKHARI, Petitioner,

v.

Eric H. HOLDER, Jr., U.S. Attorney General, Respondent.

No. 09-60538.

United States Court of Appeals, Fifth Circuit.

September 29, 2010.

358 *358 Mary Nicole Morrison (argued), Morrison Law Firm, P.C., Houston, TX, for Petitioner.

Jessica Renee Cusick Malloy (argued), Tangerlia Cox, U.S. Dept. of Justice, OIL, Washington, DC, for Respondent.

Before JOLLY, DeMOSS and DENNIS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

On December 29, 2006, the Department of Homeland Security ("DHS") commenced removal proceedings against Syed Talha **Bokhari**, a native and citizen of Pakistan who entered the United States as a nonimmigrant visitor. **Bokhari** conceded his removability, but sought adjustment of his status from a nonimmigrant worker to a permanent resident. The Immigration Judge ("IJ") determined that **Bokhari** was ineligible for adjustment of status, because he had failed to maintain lawful status in this country for more than 180 days. **Bokhari** appealed to the Board of Immigration Appeals ("BIA"), and the BIA affirmed the IJ. **Bokhari** now petitions this court for a review of the BIA's decision. **Bokhari** argues that, because he was authorized to work in the United States, it necessarily follows that he was authorized to be in the United States, and he thus was not in unlawful status for more than 180 days. He therefore contends that he is eligible for an adjustment of status, and that the BIA and IJ erred by not reaching the merits of his application to adjust to permanent resident status. We disagree. Finding no error, we DENY **Bokhari's** petition for review of the BIA's decision.

I.

Bokhari entered the United States on April 9, 2001, as a B-2 nonimmigrant visitor. His B-2 status was twice extended, rendering his presence lawful in the United States until October 9, 2002. His status changed on June 11, 2002, to a L-1A nonimmigrant worker for Syed T. Enterprises Inc. ("Syed"). Syed is a subsidiary of Mir Motors, the Pakistan-based company owned by **Bokhari**. **Bokhari's** counsel stated that, at the time of oral argument, **Bokhari** was Syed's sole shareholder, and sole employee.

On June 9, 2003, one day before **Bokhari's** approved L-1A status expired, Syed, on behalf of **Bokhari**, filed form I-129, seeking an extension of **Bokhari's** L-1A status. The I-129 application was denied on March 19, 2004. On April 19, Syed appealed, but the appeal was denied on September 2, 2005.

In the meantime, on June 8, 2004, Syed had filed an I-140 form, seeking permanent residence for **Bokhari**. Simultaneously, **Bokhari**, acting individually, filed an I-485 application for adjustment to permanent resident status. The I-140 application for permanent resident status was approved more than a year later, on July 11, 2005. **Bokhari's** I-485 application, however, was later denied on September 20, because he had failed, for more than 180 days before filing the application, to maintain lawful immigration status. DHS commenced removal proceedings against **Bokhari** on December 29, 2006.

II.

In the proceedings below, **Bokhari** conceded removability, but claimed instead that he was eligible to have his I-485 application renewed. On August 17, 2007, the IJ issued her decision, finding that **Bokhari's** lawful immigration status ended on June 10, 2003, when his one-year term of approved L-1A
359 status ended. She also found that **Bokhari** had not filed his application for adjustment of status until June 8, 2004, nearly one year after his lawful *359 immigration status expired. Accordingly, the IJ pretermitted addressing his application for adjustment for status. **Bokhari** appealed the IJ's decision to the BIA.

The BIA upheld the IJ's decision on June 17, 2009. **Bokhari** argued that the employment authorization accompanying Syed's I-129 application granted him lawful immigration status. The government, while conceding that **Bokhari** had proper authorization to work, argued that work authorization does not itself also provide or determine lawful immigration status. The BIA agreed with the government's position. The BIA further concluded that lawful status derives from a grant or extension of status, and not from a pending application. **Bokhari** filed this petition for review.

III.

Bokhari contends the BIA erred in upholding the IJ's decision to pretermit deciding **Bokhari's** application for adjustment of status.[1] He argues that the BIA erred in its interpretation and application of the relevant regulations and statutes. We have jurisdiction over these claims, as they present "constitutional claims or questions of law." 8 U.S.C. § 1252(a)(2)(D); *see* Mai v. Gonzales, 473 F.3d 162, 164 (5th Cir.2006). When considering a petition for review, we review the BIA's legal conclusions *de novo*. Singh v. Gonzales, 436 F.3d 484, 487 (5th Cir.2006) (footnotes and citations omitted).[2]

Given the narrow nature of the question presented, it is worthwhile to emphasize several issues on which the parties agree: **Bokhari** is removable; was originally granted lawful admission to the country as a nonimmigrant visitor, and remained lawfully present as a nonimmigrant worker until June 10, 2003; and was authorized to work for Syed after June 10, for up to 240 days, during the pendency of Syed's I-129 application. The sole issue before us, therefore, is whether **Bokhari** was in unlawful immigration status for more than 180 days, and is thus ineligible to have his status adjusted. In making this determination, the key question is whether Syed's I-129 application for an extension of **Bokhari's** status gave him lawful immigration status.

Bokhari, relying heavily on *El Badrawi v. DHS,* argues that the automatic employment authorization that, under 8 C.F.R. § 274a.12(b)(20), accompanied his employer's, i.e., Syed's, I-129 application seeking an extension of his nonimmigrant status, logically gave him lawful immigration status. *See* 579 F.Supp.2d 249, 276-77 (D.Conn.2008) (holding that employment authorization under 8 C.F.R. § 274a.12(b)(20) results in lawful status). He thus contends that his status was lawful until March 19, 2004, when DHS denied the I-129 extension request. Thus, he contends, when he sought adjustment of his status on June 4, 2004, he had not been in unlawful status for more than 180 days, qualifying him as eligible for the status adjustment under 8 U.S.C. § 1255(k)(2)(a).

360 DHS argues that **Bokhari** is ineligible to have his status adjusted because he failed *360 to maintain lawful status in this country from June 10, 2003, until June 8, 2004, a period well in excess of 180 days. *See* 8 U.S.C. § 1255(k)(2)(a). DHS acknowledges that, during this period of time, **Bokhari** was permitted to work for Syed under 8 C.F.R. § 274a.12(b)(20), but contends that employment authorization is not a grant of, nor is tantamount to, lawful immigration status for the authorized employee; each is a separate and independent consideration. DHS further contends that *In re Teberen,* 15 I. & N. Dec. 689 (BIA 1976), made clear that an extension application, standing alone, does not confer lawful status.

Although it is true that **Bokhari** meets the three statutory eligibility requirements of 8 U.S.C. § 1255(a),[3] that is not the end of the analysis. Section 1255(c)(2) further provides that **Bokhari** is not entitled to the adjustment of his status if he was "in unlawful immigration status on the date of filing the application for adjustment of status or ... failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States." Section 1255(c)(2)'s requirements are excused, however, if **Bokhari**, following his "lawful admission has not, for an aggregate period exceeding 180 days failed to maintain, continuously, a lawful status." 8 U.S.C. § 1255(k)(2)(a).

"Lawful immigration status," as the term is used in § 1255(c)(2), is granted nonimmigrants "whose initial period of admission has not expired or whose nonimmigrant status has been extended ...." 8 C.F.R. § 1245.1(d)(1)(ii). **Bokhari** was granted L-1A status on June 11, 2002, allowing him to work temporarily in the United States for Syed (a legally related entity of Mir Motors, the international company **Bokhari** owns), "in a capacity that [was] managerial [or] executive." 8 U.S.C. § 1101(a)(15)(L). Thus, he had lawful immigration status through June 10, 2003. *See* 8 C.F.R. § 1245.1(d)(1)(ii). We must decide, however, whether he failed to maintain his lawful status for more than 180 days thereafter; such failure would make him ineligible for the I-145 permanent residence adjustment he sought on June 8, 2004. See 8 U.S.C. §§ 1255(c)(2), (k)(2)(a).

As we have said, it is undisputed that, while waiting for the adjudication of Syed's I-129 extension application, **Bokhari** was automatically authorized to continue his employment with Syed for "a period not to exceed 240 days beginning on the date of the expiration of [his] authorized period of stay." *See* 8 C.F.R. § 274a.12(b)(20). The regulation further provides that such authorization "automatically terminate[s] upon notification of" DHS's decision denying the request, which, in this case, occurred on March 19, 2004, cutting short the 240-day period. *See id.* The sole focus of our review, however, is whether **Bokhari's** employment authorization, which he received automatically upon the filing of Syed's I-129 application for the extension of his status, gave him legal immigration status, as defined in 8 C.F.R. § 1245.1(d)(1)(ii).

As DHS asserts, employment authorization and lawful immigration status are two separate considerations, presenting issues independent of each other.
361 We have recognized this distinction in the context of a direct criminal appeal. *United States v.* *361 *Flores,* 404 F.3d 320, 327-28 (5th Cir.2005). In *Flores,* we held "an alien may be temporarily granted a stay of removal and be permitted to work during that stay, but still be considered illegal[ ]...." *Id.* (internal citations and quotations omitted). Although *Flores* is not precisely our case, we find it persuasive. Moreover, under *In re Teberen,* a *grant* of an extension request confers lawful status, not the filing of the request. 15 I. & N. Dec. 689, 690. *El Badrawi* found *In re Teberen* inapplicable because the latter "was decided in 1976-15 years before the INS adopted" 8 C.F.R. § 274a.12(b)(20). 579 F.Supp.2d at 276-77. We, however, see no basis to refrain from applying *In re Teberen.* Section 274a.12(b)(20), by its plain language, addresses employment authorization only, and thus does not address an employee's immigration status.

IV.

We thus hold that the employment authorization provided to **Bokhari** under 8 C.F.R. § 274a.12(b)(20) did not provide him with lawful immigration status. We further hold **Bokhari** was in unlawful immigration status, as defined in 8 C.F.R. § 1245.1(d)(1)(ii), after June 10, 2003, and he unlawfully remained in the United States for more than 180 days thereafter. We therefore hold that because **Bokhari** failed to maintain lawful status, he was ineligible to have his status adjusted under 8 U.S.C. §§ 1255(c)(2), (k)(2)(a). **Bokhari's** petition for review of the order of the BIA pretermitting the question of **Bokhari's** application and ordering him to depart the United States is therefore

DENIED.

[1] We do not have jurisdiction to review DHS's discretionary decision to deny **Bokhari's** I-485 application to adjust status. *See* 8 U.S.C. § 1252(a)(2)(B)(i).

[2] The parties dispute whether the BIA's interpretation was reasonable, and thus entitled to *Chevron* deference. We do not decide this issue, as the statute is unambiguous, and *Chevron* applies only when a statute is ambiguous. *See Singh,* 436 F.3d at 487. Similarly, we do not determine whether **Bokhari** is entitled to lenity, since lenity is applied only when there are "lingering ambiguities" to be resolved. *INS v. Cardoza-Fonseca,* 480 U.S. 421, 449, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987).

[3] An alien is statutorily eligible for relief from removal through adjustment of status 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." 8 U.S.C. § 1255(a).

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re: Kuwaiti National

Matters of AC 21

TO: *(TEXT OMITTED)*

From. Robert C. Divine Acting Deputy Director

Date: October 18, 2005

RE: *(TEXT OMITTED)*(January 12, 2005)

(TEXT OMITTED)"(January 12, 2005)

As Acting Deputy Director I hereby designate the attached decision Of the Administrative Appeals Office (AAO) in Matter of *(TEXT OMITTED)* a USCIS Adopted Decision. Accordingly, this decision is binding policy guidance on all USCIS personnel. This AAO decision establishes that a petition that is deniable (i.e. not approvable), whether or not the petition is denied 180 days or more after the filing of the adjustment of status application, cannot serve as a basis for approval of adjustment of status to permanent residence, under the portability provision of I.N.A §204(j). I. personnel are directed to follow the reasoning in this decision in similar cases. The holding in this decision is consistent with the policy previously articulated in the answer to Question. 1, Section I, on page 3 of the May 12, 2005 memorandum signed. by William R. Yates entitled "Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and 11-113 Petitions Affected by the American

Apr 24, 2003 Yates Memo
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Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)" which allows the use of INA §204(j) in certain adjustment applications involving an "approvable" petition.

FOR PUBLICATION

MATTER OF *(TEXT OMITTED)*

In Adjustment of Status Proceedings

(TEXT OMITTED)

Decided by the Director, Administrative Appeals Office,
January 12, 2005

1. Although section 204(j) of the Immigration and Nationality Act (the Act), 8 U.S.C, §1154(j), provides that a petition shall remain valid with respect to a new job if that individual's application for adjustment of status has been filed and remained unadjudicated for 180 days, the petition must be "valid" to begin with if it is to "remain valid with respect to a new job."
2. To be considered "valid" in harmony with 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 U.S. Citizenship and Immigration Services (CIS) officer pursuant to his or her authority under the Act. *See generally*, §204 of the Act, 8 U.S.C. §1154.
3. Congress specifically granted CIS the sole authority to make eligibility determinations for immigrant visa petitions. Section 204(b) of the Act, 8 U.S.C. §1154(b).
4. An unadjudicated immigrant visa petition is not made "valid" merely through the act of filing the petition with CIS or through the passage of 180 days.

ON BEHALF OF PETITIONER: *(TEXT OMITTED)*

DISCUSSION: The Director, California Service Center, denied the Application to Register Permanent Residence or Adjust Status (Form I-485) on October 6, 2004.[1] In a separate action on November 8, 2004, the director certified the decision to the Administrative Appeals Office (AAO) for review. The director's decision will be

affirmed.

The applicant is a native and citizen of Kuwait who seeks to adjust his status to permanent resident, despite never having shown eligibility for the immigrant visa classification on which his adjustment application i based. On two occasions, the director denied the Form I-140 immigrant visa petitions that his employer *(TEXT OMITTED)* dba *(TEXT OMITTED)* filed on his behalf. In accordance with section 245(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1255(a), the applicant is seeking to adjust his status as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Act, 8 U.S.C. §1153(b)(1)(C). Although the director denied the visa petition that was filed by the applicant's actual employer, the applicant states that he has now been offered employment by a second firm and claims that he should be allowed to adjust status based on this job offer.

On notice of certification, counsel for the applicant submits a brief in support of the application for adjustment of status. Citing section 204(j) of the Act, 8 U.S.C. §1154(j), titled "Job Flexibility For Long Delayed Applicants For Adjustment Of Status To Permanent Residence," counsel asserts that CIS may not deny the adjustment application because the application had been pending for more than 180 days at the time it was adjudicated.

This matter has a complex procedural history. The applicant's employer filed an initial Form I-140 immigrant visa petition (WAC 98 245 51887) in 1998, which the director denied on February 2, 2000. The AAO dismissed a subsequent appeal on January 8, 2001, affirming the director's decision to deny, and rejected a late motion to reopen the matter on July 22, 2003. No form I-485 was ever filed in connection with this I-140 petition.

The applicant's employer filed a second Form I-140 immigrant visa petition (WAC 02 266 54969) on August 26, 2002. Additionally, the applicant immediately filed this Form I-485 application for adjustment of status on September 18, 2002 pursuant to the "concurrent filing" process that was implemented by CIS on July 31, 2002. *See* 8 C.F.R. §245.2(a)(2)(i)(B); *see also* 67 Fed. Reg. 49561 (July 31, 2002). After a number of intervening actions, the director ultimately denied the Form I-140 immigrant visa petition on August 3, 2003. Consistent with CIS policy, the director also denied the Form I-485 application for adjustment of status on September 29, 2003 because an immigrant visa was not immediately available to the applicant. See Memorandum from William Yates, Deputy Executive Associate Commissioner, CIS, "Procedures for concurrently filed family-based or employment-based Form I-485 when the underlying visa petition is denied" HQADN 70/23.1 (Feb. 28, 2003) ("Service adjudicators should also deny the concurrently filed Form I-485 when the underlying visa petition is denied because the applicant has lost the claim to adjustment of status.")

Accordingly, at the time that the director denied the Form I-485 application for adjustment of status, the application had been pending for 376 days.[2]

This case presents the AAO with its first opportunity to construe this statutory provision and determine its effect

on an application for adjustment of status if a visa petition is denied after the application is pending for 180 days. In general, an alien may acquire permanent resident status in the United States through two legal mechanisms- the alien may pick up their approved visa packet at an overseas consulate and be "admitted" to the United States for permanent residence; or, if the alien is already in the United States in a lawful nonimmigrant or parolee status, the alien may "adjust status" to that of an alien admitted for permanent residence. Cf. §211 of the Act, 8 U.S.C. §1181 ("Admission of Immigrants into the United States"); §245 of the Act, 8 U.S.C. §1255 ("Adjustment of Status of Nonimmigrant to that of Person Admitted for Permanent Residence").

Governing adjustment of status, section 245(a) of the Act, 8 U.S.C. §1255(a), requires the adjustment applicant to have an "approved" petition:

> The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an *approved* petition for classification 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.

(Emphasis added.)

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; 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.

On certification, counsel claims that the director improperly denied the underlying Form I-140 immigrant visa petition and, regardless of that denial, further argues that section 106(c) of AC21 bars the director from denying the application for adjustment of status because it was pending for more than 180 days.[3] Counsel asserts that Congress enacted section 106(c) in an effort to reduce the backlogs of adjustment of status application and ameliorate the negative consequences that these backlogs have on applicants. Citing *Tcherepnin v. Knight*, 389 U.S. 332 (1967), counsel states that "the familiar canons of statutory construction require that remedial legislation should be construed liberally to effectuate Congress' intent." Counsel maintains that the only reasonable interpretation of section 106(c) is that "Congress in effect gave the USCIS a six-month deadline within which to adjudicate every non-frivolous employment-based immigrant visa petition and associated adjustment application." Accordingly, counsel concludes that after six months has elapsed from the date of filing for adjustment of status, CIS no longer has the authority to deny a "non- frivolous" Form I-485 application and the alien beneficiary has the statutory right to change jobs or employers.[4] Counsel has pointed to no legislative history that would support his assertion, in essence, that CIS should overlook the statutory requirement of an "approved petition" for adjustment of status, in favor of granting permanent residence to those aliens with denied petitions, or even to aliens with unadjudicated I- 140s, if the 180-day time period passes before the adjustment application is adjudicated.

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. 1061048, 2001 WL 67919 (January 2, 2001)(emphasis added). 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 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.[5] 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).

Although counsel relies on Congressional intent and the "familiar canons of statutory construction" to assert that the AAO should construe section 106(c) liberally, counsel does not discuss the actual language of the statute. 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 COLT Independence Joint Venture v. Federal Say. 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). Prior to this date, 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 a denied or 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 assertion would have the AAO construe the term "valid" to include denied or 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 are denied or remain pending after the close of the 180-day period.[6]

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 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*, §204 of the Act, 8 U.S.C. §1154. Contrary to counsel's assertions, 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. Although counsel's assertions rely heavily on the assumed intent of Congress to ameliorate the affects of CIS backlogs, counsel's construction of section 106(c) 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 and the petition was ultimately denied. 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, this petition cannot be deemed to have been "valid" for purposes of section 106(c) of AC21.

Because counsel's assertions are not persuasive and since the denial of the underlying petition still stands, there is no provision to allow the approval of the adjustment application. The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. §1361. Here, that burden has not been met. The application must be denied.

This decision does not bar the applicant's new prospective employer from filing a new I-140 immigrant visa petition, based on an appropriate visa classification, with a new I-485 application for adjustment of status. It is noted that the applicant has a priority date of April 27, 2001, due to a labor certification that was filed on his behalf by a third potential employer, which makes him eligible for benefits under section 245(i) of the Act. See 8 C.F.R. §245.10.

ORDER: The director's decision is affirmed The application is denied.

[1]This decision was originally entered on January 12, 2005. The matter has been reopened on CIS motion for the limited purpose of incorporating revisions for publication. After the director denied the underlying immigrant visa petition, the petitioner filed a complaint for declaratory and injunctive relief in the United States District Court, Central District of California*(TEXT OMITTED)* The complaint remains pending.

[2]There is question as to the actual date of the director's denial of the adjustment of status application; regardless of how it is calculated, the application was pending more than 180 days. The lengthy delay in adjudicating the application for adjustment of status was caused by a CIS error, which in turn was the result of the concurrent filing process and the applicant's multiple visa petitions. The Form I-485 application for adjustment of status was originally denied on October 30, 2002, or 42 days after filing, after the director erroneously matched the Form I-485 with the first denied Form I-140 and not the second pending Form I-140. After counsel noted this error in 2003, the director reopened the matter and denied the application for a second time on September 29, 2003. Since the first denial was predicated on CIS error, the second decision will be considered the effective denial of the application for adjustment of status.

[3]The denied Form I-140 (WAC 02 266 54969) was also certified to the AAO for review. In a separate decision that will be incorporated into the record of proceeding, the AAO upheld the director's decision to deny the immigrant visa petition. Counsel also fails to mention that the director denied the previous Form I140 (WAC 98 245 51887) and that the AAO also dismissed the appeal in that matter.

[4]Counsel's argument implies that the present application is non-frivolous. Counsel does claim that five prior approvals of the beneficiary's nonimmigrant status confirmed the applicant's eligibility. Counsel fails to mention that the INS denied the petitioner's third request for an extension and revoked the approval of the last nonimmigrant petition filed by the applicant's employer. Most significantly, counsel declines to note that prior to filing the current Form I-140 and Form I-485, the applicant's employer filed an initial Form I-140 immigrant visa petition in 1998 which was denied by the director. The AAO affirmed the director's denial on appeal. The issue in the present matter, however, is not whether the beneficiary's application for adjustment of status is frivolous, but whether the visa petition remains "valid" under section 106(c) of AC21.

[5]CIS has not published any regulations governing the application of section 106(c) of AC21. The agency has offered guidance on this provision in the form of two policy memoranda and has amended the Adjudicator Field Manual (AFM) to account for the law. Neither the memoranda nor the AFM define the term "valid" or discuss the

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); Memorandum from Michael A. Pearson, Executive Assoc. Comm., Office of Field Operations, INS (now CIS), *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* §20.2(c) of the AFM.

[6] 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).

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