UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

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In Re **MARCAL NETO**, Jose, et al	) Case No.: **A095-861-144**
	) Case No.: **A095-861-145**
Respondent.	) Case No.: **A095-861-146**
	)
	) REMOVAL PROCEEDINGS
	)
	)

BRIEF OF THE AMERICAN IMMIGRATION LAW FOUNDATION AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

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I. INTRODUCTION AND STATEMENT OF AMICI

Amici Curiae the American Immigration Law Foundation (AILF) and the American Immigration Lawyers Association (AILA) submit this brief to assist the Board in its consideration of whether to vacate *Matter of Perez-Vargas*, 23 I&N Dec. 829 (BIA 2005), which held that an immigration judge does not have jurisdiction to determine whether an adjustment applicant satisfies INA § 204(j) (added by § 106(c)(1) of the American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-260, 114 Stat. 1251, 1254 (Oct. 17, 2000) (AC21)). AILF and AILA applaud the Board for undertaking this reconsideration.

To date, three courts of appeals have rejected the Board's interpretation of § 204(j). *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007); *Matovski v. Gonzales*, 492 F.3d 722 (6th Cir. 2007); and *Sung v. Keisler*, 505 F.3d 372 (5th Cir. 2007).[1] These three courts unanimously held that an immigration judge has jurisdiction to determine whether § 204(j) is satisfied as an integral part of his or her jurisdiction over the adjustment of status application. The Board's decision to the contrary violates Congress's clear intent behind § 204(j), leaves an adjustment applicant in removal proceedings with no forum in which to have the § 204(j) determination assessed, nullifies his statutory right to change jobs or employers while the long delayed adjustment application is pending, and ultimately denies him the opportunity to be adjusted to lawful permanent residence.

[1] *Amici* are aware of three additional cases currently pending in other circuits: *Ahmad Mushtaq v. Mukasey*, No. 08-4081 (2d Cir.) (oral argument held on August 6, 2009); *Guedes v. Holder*, No. 09-1263 (1st Cir.); and *Smethurst v. Holder*, No. 06-75211 (9th Cir.).

AILF is a non-profit organization established to advance fundamental fairness, due process, and constitutional and human rights in immigration law. AILF has a direct interest in ensuring that INA §204(j) is fairly and accurately interpreted to achieve Congress's intent. AILF addressed this issue as *amicus curiae* in *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007), and *Ahmad Mushtaq v. Mukasey*, No. 08-4081 (2d Cir.).

AILA is a national association with more than 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review (immigration courts), as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States.

II. OVERVIEW OF THE EMPLOYMENT-BASED ADJUSTMENT OF STATUS PROCESS, AC21 AND RELEVANT CASES.

The Immigration and Nationality Act (INA) provides for the allocation of immigrant visas to certain preference categories of alien beneficiaries based on their employment. INA § 203(b)(1)-(5). Generally, there is a three step process for a noncitizen in the U.S. who wants to become a legal permanent resident: 1) labor certification; 2) immigrant visa petition; and 3) adjustment of status application.

Labor Certification

At the first step, an employer must obtain a "labor certification" from the United States Department of Labor (DOL) on behalf of the designated noncitizen beneficiary. INA § 203(b)(3)(C). In this process, DOL certifies that following a test of the market, there are no qualified U.S. workers willing, available, and ready to accept the position and that employment of a foreign worker will not adversely affect wages and working conditions of similarly employed U.S. workers. INA § 212(a)(5)(A). Additionally, the employer must certify that the beneficiary meets the requirements for the offered position. Only DOL has the authority to issue a labor certification.

Visa Petition

Next, the employer files an immigrant visa petition on behalf of the noncitizen worker with United States Citizenship and Immigration Services (USCIS). INA § 204(a)(1)(F). To adjudicate the employer's petition, USCIS must determine if the beneficiary meets the required qualifications set forth in the labor certification and if the employer has demonstrated its ability to pay the offered wage, and must assign the appropriate preference classification pursuant to section 203(b). An approved visa petition constitutes USCIS' determination that the beneficiary is "eligible for preference" under the requested employment-based visa classifications, INA § 204(b), and is a prerequisite to obtaining lawful permanent residency.

USCIS has exclusive jurisdiction to adjudicate a visa petition. INA § 204(b). An approved petition remains valid indefinitely unless DOL invalidates the labor certification, the employer or beneficiary dies, the employer withdraws the petition, the employer's business terminates, or there is another ground to revoke the petition. 8 C.F.R. § 205.1.

Adjustment of Status

Congress authorized certain noncitizens who are present in the United States, including those employed by American employers pursuant to valid nonimmigrant status, to apply to adjust their status to that of lawful permanent residents. INA §§ 245, 214. One requirement for adjustment is that the applicant must be "eligible to receive an immigrant visa." INA § 245(a)(2). A noncitizen is "eligible to receive an immigrant visa" if he or she is the beneficiary of an approved visa petition that remains valid.

Another requirement is that a visa must be immediately available to the applicant at the time the application is filed. This requirement is met if the person (1) has an approved visa petition and (2) the priority date assigned to the petition is current at the time the adjustment application is filed. When a priority date is current depends on employment preference category and nationality. 8 C.F.R. § 1245.1(g). The Department of State publishes the Visa Bulletin each month to announce the current priority dates. *See* http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html.

An adjustment application is filed with USCIS if the person is not in removal proceedings. 8 C.F.R. §§ 245.2(a)(1); 1245.2(a)(1). In removal proceedings, the immigration judge has exclusive jurisdiction over an adjustment application. *Id.*[2] *See also* 8 C.F.R. § 1240.1(a) (providing that immigration judges have the sole authority to adjudicate all applications for relief in proceedings). Whomever decides the adjustment application – an immigration judge or a USCIS officer - must determine whether the applicant meets the statutory requirements of INA § 245, including the requirement that the person be eligible to receive a visa.

[2] The limited exception to this rule regarding certain "arriving aliens" is not relevant here. *Id.*

AC21 and long delayed adjustment applicants

Through AC21, Congress enacted several changes to employment-based immigration to enhance the vitality of the American economy. For example: § 102 temporarily increased the available number of nonimmigrant visa numbers; § 103 exempts employees of certain higher education and research institutions from a visa number cap; § 104 permits disregarding nationality and quota restrictions for employment-based visa availability in certain circumstances; and § 105 provides job flexibility for a category of nonimmigrant visa holders.

Consistent with these provisions, § 106 provides foreign workers whose adjustment of status applications the government has delayed deciding, the right to change jobs or employers to further their careers, while still remaining eligible to adjust under the pending application. Entitled "Special Provisions in Cases of Lengthy Adjudications," § 106(c) added the following to the INA:

> JOB FLEXIBILITY FOR LONG DELAYED APPLICANTS FOR ADJUSTMENT OF STATUS TO PERMANENT RESIDENCE- A petition under subsection (a)(1)(D) [sic][3] 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.

INA § 204(j). A parallel provision achieves the same result with respect to the continuing validity of labor certifications underlying delayed adjustment applications. INA § 212(a)(5)(A)(iv).

[3] As this Board noted in *Matter of Perez-Vargas*, 23 I&N Dec. at 830 n.3, § 204(j)'s reference to § 204(a)(1)(D) appears to be a drafting error; the reference instead should be to § 204(a)(1)(F).

When AC21 was enacted in October 2000, the adjudication of a labor certification and visa petition could take years. Some USCIS offices were taking as long as one and a half years to adjudicate employment-based adjustment applications. Processing time for applications filed in immigration court varied depending on scheduling issues.

To satisfy Congress's intent to promote job flexibility for skilled workers, § 204(j) permits applicants to remain eligible for adjustment despite a change in job or employer if two factual predicates are met: (1) the adjustment application was pending for 180 days or more; and (2) the new job is "in the same or similar occupational classification as the job for which the immigrant petition was filed." *Id.* In the eight years since § 204(j) was enacted, neither the Department of Homeland Security (DHS) nor the Department of Justice (DOJ) have promulgated regulations to implement it.

It is undisputed that, as an integral part of the adjustment decision, an immigration judge has jurisdiction to assess the first of the two factual predicates for adjustment: whether an adjustment application has been pending for 180 days. The only dispute is whether the immigration judge also has jurisdiction to assess the second factual predicate: whether the new job is "the same or similar" to the applicant's previous job.

Following enactment of § 204(j), both USCIS and immigration judges decided whether an adjustment applicant's new job was in the "same or similar" job classification. For its part, legacy INS (and now USCIS) issued several guidance memoranda on how to make "same or similar" job determinations for adjustment eligibility.[4] Even though USCIS has no particular expertise in this area, the guidance

[4] Memo from Michael A. Pearson, Executive INS Associate Commissioner (June 19, 2001) (Pearson Memo), http://www.uscis.gov/files/pressrelease/ac21guide.pdf; Memo from William R.

authorizes adjudicators to make the determination by: (1) comparing the job duties on the labor certification application or immigrant visa petition; (2) comparing the Dictionary of Occupational Title (DOT) code or Standard Occupational Classification (SOC) code which was listed, or could have been listed, on the immigrant visa petition with those the adjudicator finds appropriate for the new job; and (3) comparing the previous and new wages. *See* Yates Memo II.

Simultaneously, *for more than five years* prior to *Matter of Perez-Vargas*, immigration judges also interpreted §204(j)'s "same or similar" job classification as a condition of adjustment eligibility. Even the BIA, in an unpublished decision, concluded that jurisdiction to make this determination was inherent in an immigration judge's jurisdiction over adjustment applications. *See Matter of Perez-Vargas,* 23 I&N Dec. at 831 (referencing unpublished BIA decision finding immigration judge jurisdiction over continuing validity of a visa petition under § 204(j)).

Matter of Perez-Vargas and subsequent federal court cases

In *Matter of Perez-Vargas,* the BIA held that immigration judges lack jurisdiction to determine whether an adjustment applicant whose application has been pending for 180 days and who has since changed jobs or employers is performing the "same or similar" job as that in the visa petition. 23 I&N Dec. at 834. The BIA reasoned that immigration judges do not have jurisdiction over the 204(j) decision because they lack

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Yates, USCIS Acting Associate Director for Operations (Aug. 4, 2003) (Yates Memo I), http://www.uscis.gov/files/pressrelease/I140_AC21_8403.pdf; Memo from William R. Yates, USCIS Associate Director for Operations (May 12, 2005) (Yates Memo II) http://www.uscis.gov/files/pressrelease/AC21intrm051205.pdf.

jurisdiction to initially determine a visa petition and because they allegedly lack expertise in comparing employment responsibilities. *Id.* at 831-33.

To date, three courts of appeals have unanimously held that jurisdiction to decide the § 204(j) criteria exists as an integral part of the immigration judge's jurisdiction over the adjustment application. *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007); *Matovski v. Gonzales*, 492 F.3d 722 (6th Cir. 2007); and *Sung v. Keisler*, 505 F.3d 372 (5th Cir. 2007). All three courts also agreed that otherwise, a noncitizen could be denied adjustment simply because he or she was in removal proceedings, an untenable situation.[5] Congress did not distinguish between applicants who are in proceedings and those who are not. *Perez-Vargas v. Gonzales*, 478 F.3d at 195; *Sung*, 505 F.3d at 376; *Matovski*, 492 F.3d at 736.

Subsequent to these three circuit court decisions, the Board has remanded cases in these circuits with instructions that immigration judges determine whether the adjustment applicant satisfies § 204(j). *See, e.g., In re Coulibaly*, 2008 WL 2401133 (BIA May 15, 2008) (unpublished); *In re Sultan*, 2008 WL 243739 (BIA Jan. 11, 2008) (unpublished); *In re Marin del Moral*, 2008 WL 655907 (BIA Feb. 15, 2008) (unpublished).

III. ARGUMENT

A. IMMIGRATION JUDGES HAVE THE AUTHORITY TO MAKE § 204(j) DETERMINATIONS

[5] In fact, it appears from unpublished BIA decisions that some respondents have been denied the opportunity to apply for adjustment simply because they are in removal proceedings. In these cases, after upholding immigration judge decisions that pretermitted adjustment applications under *Matter of Perez-Vargas*, the BIA failed to remand the case for the respondent to seek a § 204(j) determination from USCIS. *See, e.g., In re Lama*, 2008 WL 2783123 (BIA June 16, 2008) (unpublished); *In re Oquendo*, 2006 WL 448161 (BIA Jan. 18, 2006) (unpublished). In other cases, however, the BIA remanded for this purpose. *See, e.g., In re Ghanem*, 2007 WL 416870 (BIA Jan. 29, 2007) (unpublished).

1. The Board Should Vacate *Matter of Perez-Vargas* to Ensure a Nationally Uniform Interpretation and Application of § 204(j).

As a federal statute, the INA should be administered consistently throughout the United States. Currently, § 204(j) is applied differently in different jurisdictions. In the 11 states within the jurisdictions of the Fourth, Fifth and Sixth Circuits, immigration judges are required to make all portability-related determinations. In all other states, *Matter of Perez-Vargas* prohibits such determinations by immigration judges. Only by vacating *Matter of Perez-Vargas* and following the decisions of the courts of appeals can the Board ensure the uniform administration of § 204(j).

A "principal mission" of the BIA "is to ensure as uniform an interpretation and application of this country's immigration laws as is possible." *Matter of Cerna*, 20 I&N Dec. 399, 405 (BIA 1991); *see also id.* at 409 ("[T]o the greatest extent possible our immigration laws should be applied in a uniform manner nationwide"); *Matter of Burbano*, 20 I&N Dec. 872, 873-74 (BIA 1994) (reaffirming the importance of the BIA's role in the uniform application of immigration law). As long ago as 1956, the BIA amended its interpretation of an INA provision to avoid a conflict with a federal court interpretation. *Matter of U*, 7 I&N Dec. 380, 381 (BIA 1956) (noting that "a uniform interpretation of th[e] provision … can best be served" by adopting a federal court interpretation); *see also Matter of G*, 8 I&N Dec. 315, 316 (BIA 1959) (interpreting a federal law to ensure consistency for immigration purposes). The Board should do the same here to end the present conflict.

Perez-Vargas v. Gonzales, *Matovski* and *Sung* all found that Congress clearly intended that an immigration judge have jurisdiction to determine portability under INA §

204(j) as part of the immigration judge's determination of the adjustment of status application. *Perez-Vargas*, 478 F.3d at 195 (holding that the BIA's decision is "contrary to the plain language of the statute"); *Sung*, 505 F.3d at 376 (same); *Matovski*, 492 F.3d at 735 (holding that the BIA's decision "contradicts Congress's intent"). As such, each of these decisions rested on step-one of the analysis set forth in *Chevron U.S.A. v. Natural Resources Defense Council*, 461 U.S. 837 (1984).

At *Chevron* step-one, a court determines whether Congress's intent is expressed in the statute's plain language; if so, that intent must be given effect. *Chevron*, 467 U.S. at 843-44. Congress's intent is discerned by using "traditional tools of statutory construction." *Succar v. Ashcroft*, 394 F.3d 8, 22 (1st Cir. 2005) (quoting *Cardosa v. Fonseca*, 480 U.S. 421, 447-48 (1987)). If the intent is ambiguous, the *Chevron* step-two inquiry is whether the agency's interpretation is reasonable and thus subject to controlling weight. *Chevron*, 467 U.S. at 843-44.

In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), the Supreme Court applied the *Chevron* test to a case in which an agency interpretation of a statute differed from a pre-existing court interpretation. The Court instructed that in such a situation, a "court's prior judicial construction of a statute trumps an agency construction" only if the court holds that the statute is "unambiguous … and thus leaves no room for agency discretion." *Brand X*, 545 U.S. at 982. Consequently, where a court finds a statute unambiguous, an agency is bound and cannot interpret it differently in that jurisdiction.

This Board has applied these principles and either deferred to or rejected federal court precedents depending upon whether the court found the relevant statute ambiguous.

See e.g., Matter of Armendarez-Mendez, 24 I&N Dec. 646 (BIA 2008) (refusing to follow a Ninth Circuit interpretation that found a regulation ambiguous, but acknowledging it was bound by Fourth Circuit precedent addressing the same issue because the Fourth Circuit had found the statute was unambiguous); *Matter of Velasquez-Herrera*, 24 I&N Dec. 503, 514 (BIA 2008) (holding that it is bound by Ninth Circuit precedent in cases arising within that circuit because the court found no ambiguity in the relevant statute).

Under the *Chevron* and *Brand X* framework, the circuit courts' *Chevron* step-one decisions in *Perez-Vargas v. Gonzales*, *Matovski*, and *Sung* each foreclose the BIA from applying a different interpretation of § 204(j) in cases arising within those jurisdictions. In accord with *Brand X*, in unpublished decisions, the Board has followed *Perez-Vargas v. Gonzales* and *Matovski*, remanding cases within the Fourth and Sixth Circuits with instructions that the immigration judges apply § 204(j) and determine whether the new job is the "same or similar" as the original job. *See In re Coulibaly*, 2008 WL 2401133 (BIA May 15, 2008); *In re Sultan*, 2008 WL 243739 (BIA Jan. 11, 2008); *In re Marin del Moral*, 2008 WL 655907 (BIA Feb. 15, 2008).

Unless this Board vacates *Matter of Perez-Vargas*, the non-uniform application of § 204(j) will continue, with a resulting unequal opportunity for adjustment applicants to benefit from § 204(j) depending on the jurisdiction of the case. The Board can, and should, fulfill its obligation to ensure the uniform application of the law by vacating *Matter of Perez-Vargas* and instead holding that an immigration judge has jurisdiction to decide whether a job is the "same or similar" under § 204(j).

2. Congress Clearly Intended that the § 204(j) Determination Be Made as a Part of the Adjudication of an Adjustment Application and Not a Visa Petition.

Whether an immigration judge has jurisdiction over a § 204(j) determination is a question of pure statutory interpretation, to be resolved under the *Chevron* two-step analysis. Here, the case can be resolved at *Chevron* step-one because Congress's intent is clear. First, both the plain language of § 204(j) and tools of statutory construction demonstrate that Congress intended that all long delayed adjustment applicants be able to change jobs or employers without losing eligibility. Congress did not exclude applicants in removal proceedings from the benefits of § 204(j). Second, Congress specifically related § 204(j) to the adjudication of an adjustment application, not a visa petition; thus, jurisdiction over § 204(j) is commensurate with jurisdiction over the adjustment application. Third, Congress knew that immigration judges have jurisdiction to determine eligibility for adjustment of status, including whether the person "is eligible to receive an immigrant visa" under INA § 245(a)(2). By enacting §204(j), Congress unambiguously determined that an adjustment application who is employed in the "same or similar" occupation remains "eligible to receive an immigrant visa" and, therefore, is within an immigration judge's jurisdiction to determine statutory eligibility for adjustment.

a. The plain and unambiguous terms of § 204(j) demonstrate that it relates to the adjudication of the adjustment application and not the visa petition.

Section 204(j) is not a jurisdictional statute. *Perez-Vargas v. Gonzales*, 478 F.3d at 194; *see also Matovski,* 505 F.3d at 376. Instead, it unambiguously defines the class of persons who may change jobs or employers and remain eligible for adjustment as: 1) beneficiaries of certain employment-based immigrant visa petitions; 2) who have filed adjustment applications; 3) whose adjustment applications have been pending for 180 days; and 4) whose new job is the same or similar occupation as the original job.

As such, § 204(j) is an eligibility statute for adjustment applicants. *Perez-Vargas v. Gonzales*, 478 F.3d at 194. By its plain and explicit language, it pertains to noncitizens "whose adjustment applications have been filed … and remain unadjudicated for 180 days or more." INA § 204(j). Recognizing this, the courts that have addressed the issue have rejected the BIA's conclusion that § 204(j) pertains to the adjudication of a visa petition. For example, the Fifth Circuit held that, "based on the plain language of this statute, [§ 204(j)] pertains to an adjustment of status application, not an employment-based visa petition." *Sung*, 505 F.3d at 376 (citing *Perez-Vargas v. Gonzales*, 478 F.3d at 194); *accord Matovski*, 492 F.3d at 736 ("Congress sought to ensure [through § 204(j)] that bureaucratic delays would not eliminate the possibility of adjustment of status for all aliens with legitimate employment opportunities").

The title of § 204(j), "Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence," also supports this interpretation. It focuses on the application for adjustment of status and not the visa petition. *See Matter of Briones*, 24 I&N Dec. 355, 366 (BIA 2007) (citing *INS v. National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991)) ("The title of a statute or section can aid in resolving an ambiguity in the legislation's text").

b. Congress did not distinguish between adjustment applicants in removal proceedings and those not in proceedings.

By framing § 204(j) as part of an adjudication of a visa petition – over which an immigration judge has no jurisdiction – the BIA in *Matter of Perez-Vargas* endorsed an interpretation that stripped adjustment applicants in proceedings from the benefit of job portability. *Perez-Vargas v. Gonzales*, 478 F.3d at 195 (concluding that the BIA's interpretation "effectively den[ies] the benefits of § 204(j) to aliens in removal

proceedings"); *Sung* 505 F.3d at 376 (same); *Matovski*, 492 F.3d at 735 (finding that the BIA "effectively eliminated Petitioners' capacity to avail themselves of [§ 204(j)]").

Denying this class of adjustment applicants of the benefit of § 204(j) conflicts with the plain language of the statute, which does not distinguish between applicants in removal proceedings and those who are not. *Perez-Vargas v. Gonzales*, 478 F.3d at 195; *Sung* 505 F.3d at 376; *Matovski*, 492 F.3d at 736. As the First Circuit has held, the INA cannot be interpreted to cut-off eligibility for adjustment based on placement in proceedings when Congress did not so provide. *See Succar v. Ashcroft*, 394 F.3d 8, 24-25 (1st Cir. 2005) (striking down agency interpretation precluding arriving aliens from adjusting in proceedings, largely because "[t]he statute has never stated that an alien is ineligible to adjust status if he is in removal proceedings.").

Thus, adjustment applicants in removal proceedings are entitled to change jobs or employers without jeopardizing their eligibility to the same extent as adjustment applicants who are not in removal proceedings.

c. Because Congress is presumed to know that immigration judges have jurisdiction over adjustment eligibility, its choice to not restrict § 204(j) to affirmative adjustment applications must be given meaning.

When § 204(j) was enacted, immigration judges unquestionably had jurisdiction to adjudicate adjustment eligibility for those in removal proceedings, including determining the ongoing validity of labor certifications and visa petitions. Accordingly, Congress is presumed to have enacted § 204(j) knowing that immigration judges would be called on to determine if a job was the "same or similar" when deciding adjustment applications of noncitizens in removal proceedings. *South Dakota v. Yankton Sioux*

Tribe, 522 U.S. 329, 351 (1998) ("[W]e assume that Congress is aware of existing law when it passes legislation.") (citation omitted).

By concluding that immigration judges lack authority to apply § 204(j), the BIA in *Matter of Perez-Vargas* restricted § 204(j)'s applicability to individuals who are not in removal proceedings. Congress could have chosen, but did not, to impose such a restriction. Indeed, Congress knows how to impose restrictions on relief to individuals based on placement in removal proceedings. *See, e.g.*, INA § 240B(a)(2)(A)&(b)(2) (restricting the voluntary departure period to a maximum of 60 days when the application is at the conclusion of removal proceedings); INA § 240(b)(7) (limiting discretionary relief where noncitizen fails to appear at removal hearing).

The Board must give significance to Congress's choice not to exclude adjustment applicants in removal proceedings from § 204(j) benefits. *See Lindh v. Murphy*, 521 U.S. 320, 326-29 (1997) (discerning Congressional intent regarding the temporal reach of a statute by negative implication); *see also Succar*, 394 F.3d at 25 ("[W]hen Congress desired to limit the ability of a noncitizen … to apply for adjustment … it did so explicitly").

d. Legislative history supports interpreting § 204(j) consistent with its plain meaning.

A review of the legislative history of AC21 adds further support that Congress expressed its intent through the plain language of the statute. *See Succar*, 394 F.3d at 32 (considering legislative history to confirm the court's understanding of congressional intent).

Congress's intent in enacting AC21 was to ensure America's ongoing competitiveness through employment of foreign workers and to ameliorate the hardships

caused by adjudicatory delays. *See* Sen. Rep. No. 106-260 (April 11, 2000), available at 2000 WL 622763, *2; H. Ronald Klasko, *American Competiveness in the 21st Century: H-1Bs and Much More*, 77 Interpreter Releases, No. 47, Dec. 11, 2000, at 1689. By permitting adjustment applicants to change jobs or employers, Congress recognized the hardships long adjudicatory delays impose on both employers and employees. Thus, the BIA's interpretation of § 204(j) conflicts with AC21's overall objectives and must be reversed.

e. Immigration judges necessarily determine the ongoing validity of visa petitions in all adjustment cases; review of whether a job is the 'same or similar" falls within such a determination.

In *Matter of Perez-Vargas*, the BIA improperly found that the "same or similar" job classification inquiry focuses on approval of the visa petition. *Matter of Perez-Vargas*, 23 I&N Dec. at 831. The issue under § 204(j), however, is not whether the person is eligible for an employment-based preference classification. Because an approved visa petition is a requirement for adjustment eligibility, an immigration judge will decide an adjustment application only after USCIS has approved the visa petition. Instead, § 204(j) is concerned with – and expressly dictates – when a visa petition "shall" remain valid for adjustment purposes.

Immigration judges' jurisdiction to review the ongoing validity of a visa petition falls under their jurisdiction to assess the applicant's "eligibility to receive an immigrant visa" under INA § 245(a)(2). In fact, the regulations mandate that an immigration judge determine the continuing validity of a visa petition because an applicant who is not the beneficiary of a "valid unexpired visa petition" is ineligible for adjustment of status. 8

C.F.R. § 1245.1(c)(4). Thus, a necessary part of every adjustment decision is review of the ongoing validity of the visa petition.

Under 204(j), the immigration judge must determine if the adjustment applicant satisfies the provision's two factual predicates: that the new job is in a "same or similar" job classification and that the adjustment application has been pending 180 days or more. If so, the change in job or employer does not interfere with the adjustment applicant's eligibility; the applicant remains immediately "eligible to receive an immigrant visa" under § 245(a). As such, the two factual predicates of § 204(j) pertain entirely to eligibility for adjustment.

Since at least 1955, immigration judges have been reviewing the ongoing validity of immigrant visa petitions and the BIA has upheld the jurisdiction of immigration judges to carry out this review. For example, an immigration judge has jurisdiction to determine whether an employment-based immigrant visa remains valid where, absent evidence of fraud or misrepresentation, the employment offer on which the visa was based is no longer available. *Matter of R-D-*, 6 I&N Dec. 581 (BIA 1955). Similarly, an immigration judge has jurisdiction to determine the ongoing validity of a family-based visa petition when there is a claim that it has been revoked. *See, e.g., Matter of Salazar,* 17 I&N Dec. 167 (BIA 1979); *see also Matter of Alarcon,* 17 I&N Dec. 574 (BIA 1980) (finding that an immigration judge can examine a visa and the relationship upon which its validity rests to determine inadmissibility under former statute). If immigration judges have jurisdiction to determine whether circumstances exist to find an approved visa petition is no longer valid, it logically follows that they

have jurisdiction to follow Congress's statutory instructions to determine whether the circumstances exists to find that an approved visa petition remains valid under § 204(j).

Similarly, with respect to review of the continuing validity of labor certifications, the BIA has considered "whether the labor certification the respondent presented …. was invalid under the Labor Department's regulation." *Matter of Welcome*, 13 I&N Dec. 352, 354 (BIA 1969). In doing so, the BIA had to decide whether the representations set forth in the labor certification were correct. The BIA found it "unnecessary to refer the question to [DOL], as requested." *Id.* Instead, it found jurisdiction over the question under former INA § 103(a) (1969), which provided that the Attorney General's determinations regarding all questions of law are controlling. *Id. See also Matter of Ortega*, 17 I&N Dec. 167 (BIA 1970) (BIA affirmed immigration judge factual finding that respondent's actual job responsibilities were not the same as those for the profession identified in the labor certification); *Matter of Stevens*, 12 I&N Dec. 694 (BIA 1968) (BIA exercised jurisdiction to determine, as part of a review of an adjustment application, that the labor certification was no longer valid).

The above cases demonstrate that immigration judges have in fact reviewed the ongoing validity of employment-based visa petitions and labor certifications to assess eligibility for adjustment of status, as well as for other reasons. Here, the question of whether a current job is the same or similar to the job listed in the visa petition is for the sole purpose of determining the continuing validity of the visa petition, as a requirement for adjustment of status. Thus, this review falls squarely within the body of cases in which the BIA has endorsed immigration judge jurisdiction over the determination of whether a visa petition or a labor certification remains valid.

f. Regulations support the interpretation of § 204(j) as integral to the adjudication of an adjustment application.

Regulations support the conclusion that the authority of immigration judges to make § 204(j) determinations is inherent in their authority to adjudicate relief applications and removal charges. The immigration court regulations at 8 C.F.R. § 1240.1(a)(1)(ii) provide that, "[i]n any removal proceeding…, the immigration judge shall have authority to determine applications under…245 [adjustment of status]…." Additionally, both the immigration court and USCIS regulations make clear that an immigration judge has jurisdiction over an adjustment application once the applicant is in removal proceedings. 8 C.F.R. §§ 245.2(a)(1) and 1245.2(a)(1).

In *Matter of Artigas*, 23 I&N Dec. 99, 106 (BIA 2001), the Board held that immigration judges have jurisdiction to adjudicate an adjustment application filed by an arriving alien in removal proceedings pursuant to the Cuban Refugee Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966). The Board rejected the government's contention that immigration judges lacked jurisdiction over the application, stating:

> Where the regulations provide for the filing of an application for relief, to hold that jurisdiction does not result from such a delegation would render the provision nugatory and without meaning.

Artigas, 23 I&N Dec. at 103; and at 104 ("…to preclude [such] applications [ ] would be contrary both the express language of the regulations and to the remedial purpose of the relief that Congress established and deliberately retained….").

The rationale of *Artigas* is equally applicable here. The regulations at 8 C.F.R. § 1240.1(a)(1)(ii) and 8 C.F.R. §§ 245.2(a)(1) and 1245.2(a)(1) specifically provide for the filing of adjustment of status applications before an immigration judge. Thus, divesting immigration judges of jurisdiction to review an integral part of the application is contrary

to both the express language of the regulations and INA § 204(j)'s purpose of remedying the labor shortage concerns caused by delayed adjustment applications.

In addition, immigration judges are vested with the authority to adjudicate cases, including determining whether a respondent is removable as charged. INA § 240(a), (b) & (c)(1)(A); 8 C.F.R. § 1003.10(b). Often, such charges implicate review of a visa petition. *See, e.g., Matter of Ortega*, 13 I&N Dec. 606 (BIA 1970) (reviewing labor certification underlying respondent's immigrant visa to determine inadmissibility); *Matter of Salazar*, 17 I&N Dec. 167 (BIA 1979) (reviewing whether respondent knew that he lacked a valid visa at entry because the visa petition had been withdrawn). Thus, an immigration judge's authority to determine the continuing validity of a visa petition is supported by his or her authority to adjudicate the removal charges against the respondent.

g. Immigration Judges possess the requisite "expertise" for making § 204(j) determinations.

Contrary to the Board's finding in *Matter of Perez-Vargas*, an alleged "lack of expertise" does not strip an immigration judge of jurisdiction, and thus is not relevant to the jurisdiction question. *Matter of Perez-Vargas*, 23 I&N Dec. at 831-33. Moreover, immigration judges, as administrative judges regularly engaged in fact-finding, have the necessary expertise and possess the same – if not more – expertise than USCIS adjudicators to make the § 204(j) determination.

First, comparing one job to another to determine whether § 204(j) applies requires no particular expertise. It is the type of routine factual determination that immigration judges make daily. *See Perez-Vargas v. Gonzales*, 478 F.3d at 194 ("[A] § 204(j) determination … is simply an act of factfinding incidental to the adjustment of status

process"); *Sung*, 505 F.3d at 376 (same); *Matovski*, 492 F.3d at 736 n.5 (noting, without disagreeing with, the Fourth Circuit's finding on this point). All that is required is a simple assessment of whether the prior job is the "same or similar" to the person's new job. For five years after AC21 was enacted, immigration judges routinely made this decision. More recently, immigration judges within the Fourth, Fifth and Sixth Circuits again have been required to make the § 204(j) determination. *See, e.g., In re Coulibaly*, 2008 WL 2401133; *In re Sultan*, 2008 WL 243739; *In re Marin del Moral*, 2008 WL 655907.

Second, USCIS officers are not more qualified or competent to make this determination than immigration judges. Like immigration judges, USCIS has no particular authority or expertise to assess and compare one job to another as that role generally falls within the expertise of the DOL. Indeed, all USCIS requires to assess the "same or similar" job requirement is a comparison of job duties, job codes, and wages from a DOL manual. *See* Yates Memo II. Thus, contrary to the BIA's conclusion, no expertise is needed to carry out this factual determination.

Given that the approval of a visa petition is premised on the approved labor certification issued by DOL, it is DOL that arguably has the most expertise to make a § 204(j) adjudication. Yet, Congress clearly did not want to further delay the portability benefits of § 204(j) by requiring DOL to make that assessment; at the time it enacted § 204(j), Congress simultaneously provided that an approved labor certification remains valid during the adjustment delay if the applicant's new job is in the "same or similar occupational classification for which the certification was issued." *See* INA § 212(a)(5)(A)(iv) enacted by AC21 § 106(c)(2).

However, under the BIA's analysis (linking jurisdiction over the § 204(j) determination to USCIS because of its jurisdiction over visa petitions), then USCIS should lack jurisdiction over the § 204(j) determination until the DOL determines that the labor certification (on which the visa petition is based) is portable under § 212(a)(5)(A)(iv). In other words, a § 204(j) determination is predicated on the presumption of validity of the labor certification pursuant to § 212(a)(5)(A)(iv). Both § 204(j) and § 212(a)(5)(A)(iv) contain the identical portability standard ("same or similar occupational classification"). Accordingly, because DOL is the agency with the expertise over occupational classifications, DOL would be required to conduct this assessment before the labor certification on which the visa petition is premised could be "portable." Congress simply could not have intended to cause such further delay by requiring all agencies to participate in the portability review. Yet, the BIA's analysis, by extension to § 212(a)(5)(A)(iv), would create such delay.

B. THE ONLY WORKABLE SOLUTION IS TO INTERPRET § 204(j) AS GRANTING IMMIGRATION JUDGES EXCLUSIVE AUTHORITY TO MAKE PORTABILITY DETERMINATIONS FOR ADJUSTMENT APPLICANTS IN REMOVAL PROCEEDINGS.

1. USCIS Lacks Jurisdiction to Adjudicate § 204(j) Claims for Adjustment Applications in Removal Proceedings.

Other than in Fourth, Fifth and Sixth Circuits, adjustment applicants in proceedings presently have no forum in which to have the "same or similar" job classification assessed. The BIA holds that immigration judges lack jurisdiction. Regulations provide that DHS lacks jurisdiction. 8 C.F.R. §1245.2(a)(1). Therefore, the ability to change jobs or employers while an adjustment application is pending is nullified for these individuals. Such a result is absurd because affording adjustment

applicants flexibility to change jobs or employers is the very objective of INA § 204(j). *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (rejecting government's reading of statutory provision that "would produce an absurd and unjust result which Congress could not have intended.") (citation omitted).

2. The Board Cannot Confer Jurisdiction on USCIS to Make § 204(j) Determinations.

Importantly, the Board's contention that "it is incumbent upon the DHS to determine whether the respondent's visa petition remains valid pursuant to section 204(j) of the Act" does *not* confer jurisdiction on DHS to make the "same or similar" assessment, nor can it. *Matter of Perez-Vargas*, 23 I&N Dec. at 834, n.7. First, the Board, as part of DOJ, is in a separate executive agency and thus cannot determine the jurisdiction of a branch of DHS. *Accord Matter of Roussis*, 18 I&N Dec. 256, 258 (BIA 1982) (where immigration service does not agree, immigration judges have no authority to remand adjustment application to the service). Second, the BIA's suggestion is contrary to the prohibition on DHS review of adjustment applications after the commencement of proceedings. 8 C.F.R. §1245.2(a)(1). Third, assuming *arguendo* DHS should make this assessment, the BIA ignores the simple fact that DHS routinely does <u>not</u> make this assessment as illustrated here and the cases of the petitioners in the *Perez-Vargas v. Gonzales, Matovski and Sung* cases.

3. Efforts to Have USCIS Make § 204(j) Determinations Have Proven Unworkable and Inefficient and Have Unduly Delayed Removal Proceedings.

Since the *Matter of Perez-Vargas* decision, overall efforts to get USCIS to adjudicate § 204(j) claims have been unsuccessful. USCIS does not have any procedural mechanism which would allow respondents to obtain a § 204(j) determination from

USCIS. Moreover, any such mechanism would be purely advisory in nature and non-binding. As demonstrated above, immigration judges have exclusive jurisdiction over the adjustment applications of noncitizens in proceedings and thus have jurisdiction over the § 204(j) determinations. Thus, an immigration judge would not be bound to accept the advisory opinion of DHS.

Although USCIS claims that guidance on this issue is forthcoming, its claims are undermined by the fact that it has been saying this since September 2007.[6] Thus, issuance of any such guidance is purely speculative. More importantly, however, this issue is an appropriate one for this Board to decide as it involves basic questions of the jurisdiction and authority of immigration judges.

Perhaps more significantly, however, the agency has demonstrated that it is not equipped to make § 204(j) determinations in a timely manner. Indeed, based on reports received by *Amici*, any success in getting a determination has been sporadic at best. For example, in cases where the immigration judge administratively closes the case for the sole purpose of obtaining a § 204(j) determination from USCIS, attorney practitioners have had no guidance on how to go about obtaining such a ruling. In two such cases brought to the attention of USCIS Chief Counsel's Office, the files were sent to the local USCIS; one case is presently languishing, while in the other case, the underlying adjustment application is being re-reviewed (despite the fact that the only purpose of

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[6] *See* Answers to AILA Questions, at 5 (Sept. 25, 2007), http://www.uscis.gov/files/nativedocuments/AILAQandASept2007.pdf; AILA/USCIS Liaison Committee Agenda, at 8 (April 2, 2008), http://www.uscis.gov/files/nativedocuments/AILA_2Apr08.pdf; AILA/USCIS Liaison Minutes from October 28, 2008 Meeting, at 8, http://www.uscis.gov/files/nativedocuments/AILA_28oct08.pdf.

administrative closure was for a § 204(j) determination). *See* Declaration of Dan Cashman (attached).

In addition, in a response to a question posed by AILA's Nebraska Service Center (NSC) Liaison Committee, the NSC stated that only immigration judges or ICE counsel may request an advisory opinion on the "same or similar" assessment. AILA Liaison NSC Minutes from May 7, 2009 Meeting at 5 (attached). (Notably, in the case in question, the immigration judge specifically instructed the respondent's attorney to obtain NSC's assessment). Significantly, however, attorney efforts to convince ICE counsel to request the assessment have been unsuccessful and time-consuming.

For example, one attorney made repeat requests for a § 204(j) determination from the Nebraska Service Center (NSC) without success. During this time, the immigration judge patiently granted continuances based on the evidence of the attorney's efforts to get NSC to act. When the attorney asked for the assistance from the ICE Office of Chief Counsel, the requests were ignored. At one point, one DHS attorney told him that ICE wouldn't do his job for him. After engaging the assistance of AILA liaison, the attorney recently was informed that NSC has made the § 204(j) determination in his case. To date, however, and more than a year and four months since he first requested such a determination, he has not received a copy. *See*, Declaration of Scott Pollock. Such extended delays in adjudication of the adjustment application are contrary to Congress's purpose behind § 204(j).

In sum, USCIS efforts to make § 204(j) determinations have proven to be not only duplicative and a waste of resources, but also unsuccessful. Because immigration judges possess both the authority and the expertise to make § 204(j) determinations related to

applications for adjustment of status, alternative measures, including continuing or administratively closing removal proceedings, are not necessary.[7] Moreover, they are not an efficient or an expedient way of making § 204(j) determinations. Instead, the only workable solution is to allow immigration judges to make § 204(j) determinations during the course of removal proceedings.

IV. CONCLUSION

For all of the reasons stated above, *amici* urge the Board to vacate its decision in *Matter of Perez-Vargas*, and instead hold, consistent with the Courts of Appeals, that an immigration does have jurisdiction to decide whether an adjustment applicant in removal proceedings satisfies § 204(j).

Respectfully submitted,

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[7] In the event that the Board is inclined to uphold the ban on immigration judge jurisdiction, the Board should, at a minimum, instruct immigration judges to grant continuances to allow for the determination to be made based on a *prima facie* showing that the person would qualify for adjustment of status under § 204(j). *See, e.g., Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009) (immigration judges generally should grant unopposed continuances to await visa petition adjudication if person makes *prima facie* showing of eligibility for adjustment of status).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In Re MARCAL NETO, Jose, et al.	) Case No.:	A095 861 144
	)	A095 861 145
	)	A095 861 146
Respondents.	) REMOVAL PROCEEDINGS	

DECLARATION OF DANIEL F. CASHMAN

I, Daniel F. Cashman, hereby declare:

1. I make this declaration for submission with the Brief of Amici Curiae being filed by the American Immigration Law Foundation and American Immigration Lawyers' Association in the case of Marcel NETO et. al., A095 861 144, presently under consideration by the Board of Immigration Appeals.

2. I am an attorney in good standing licensed in the Commonwealth of Massachussets. My business address is Cashman & Lovely, P.C., 60 Austin Street, Suite 210, Newtonville, MA 02460.

3. I have been representing noncitizens before the immigration and federal courts and the Department of Homeland Security for many years.

4. I represent two individuals within the jurisdiction of the First Circuit who have had their removal proceedings administratively closed solely to provide them with a reasonable time to obtain a determination from DHS

regarding their ability to adjust status pursuant to § 204(j) of the Immigration & Nationality Act. In both cases, removal proceedings were administratively close in December 2008.

5. As there is no procedural mechanism for obtaining such a determination from DHS/USCIS, I, along with another attorney at my office, struggled with how to obtain it. Ultimately, I contacted the Office of the Chief Counsel in Washington, D.C. by letter asking for guidance or assistance in obtaining the ruling. As a result of my contact, my clients' files were forward to our local USCIS Office. At present, one case remains pending and, in the other case, the local office has issued a request for further information (despite the fact that the sole purpose of administrative closure was for a § 204(j) determination).

I declare, under the penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 24th day of August 2009 at Newtonville, MA.

Daniel F. Cashman

QUESTIONS FOR AILA/NSC SPRING MEETING, MAY 7, 2009

General update from NSC

- Net overall backlog at the end of first quarter FY2009 was 250,000 cases; reduce d to 87,500 cases by the end of the 2nd quarter. NSC expects no backlog by end of June 2009.
- I-140 backlog was 40,000 October, now down to 10,000.
- Receipts have dropped off; Oct '08 80,000 receipts issued in October 2008; less than 40,000 receipts issued in January 2009, now back up to 50,000.
- Receipts for I-140s and I-485s for this FY have been around 2,500 a month for each form type. 13 of 19 form types are within stated goals for processing.
- Completed 84,000 cases in March. Issued 423 NTAs. Business product line – 10,378 completions on I-140s and I-360s. All product lines exceeded their processing goals.
- Since receipts have declined significantly, this means that adjudicators are able to catch up. NSC is receiving unripe I-130s from CSC, and is receiving a one-time transfer of standalone I-140 cases from TSC (a little over 2,000 cases) to help reduce the I-140 backlog nationwide.
- EB-485 team is "pre-adjudicating" cases to try and have them done "but for" the priority date being current.
- NSC is seeing an increase in numbers for refugee processing, as well as military naturalizations. They've asked for some appropriations money to work on that.

I-140

1. I-290B Processing - How long does NSC typically hold onto a case for which an appeal has been filed prior to transferring the case to the AAO? How long after filing an appeal should attorneys wait before submitting an inquiry through liaison?

Answer: Generally, appeals receive top priority for review. If NSC is not going to reopen a case on their own motion, then they usually transfer the file to AAO within 30 days. Sometimes, the file goes out to a field office or other office for some other reason, and then NSC cannot make a decision immediately because they need to first retrieve the file. If they decide to reopen on their own motion, then 45-60 days is typical because they need time to prepare the decision. Please wait 60 days before submitting an inquiry.

2. Request for Duplicate Labor Certification - The AILA liaison committee has received several questions from members who have received Notices of Intent to Deny, and in some cases, denials, on I-140 petitions in which a duplicate copy of the labor certification has not been provided by DOL following a request from USCIS. The DOL regulation at 20 CFR 656.30(e) requires a DOL Certifying Officer to issue a duplicate labor certification directly to the USCIS or

the State Department upon (1) request of a USCIS officer, a State Department Consular officer, or (2) at the request of an alien, an employer, or an alien's or employer's attorney. Once a request is made, however, neither the petitioner, the beneficiary, nor counsel have any control over whether or when the DOL acts upon the request.

a. Can NSC confirm that I-140 petitions will not be denied based upon the DOL's failure to timely respond to a request for a duplicate copy?
b. Can NSC provide an update on the status of any discussions between NSC and DOL to resolve these issues?

Answer: There should not be any NOIDs or Denials due to inability of getting a duplicate original from DOL. NSC will deny an I-140 if you cannot even provide a copy of the original or comparable evidence showing that the labor cert was approved by DOL (e.g., a copy of the Form 9089 showing the DOL case number plus a DOL case status screenshot showing that it was certified would be acceptable). As long as there is reasonable evidence that there is a certification, then they will not deny the case. These cases will take longer, though, so you cannot expect it to be processed within the posted processing timeframe. If reasonable evidence is provided and NSC is not successful in obtaining a duplicate labor certification from DOL, NSC will adjudicate the I-140 based on the evidence it has. DOL has not been responsive to NSC's requests for duplicates, and NSC/CIS are still working on it.

3. Ability to Pay for a Sole Proprietor – in cases where the I-140 petitioner is a sole proprietor, the liaison committee has seen a few RFEs issued by NSC requesting documentation of a petitioner's personal monthly expenses in order to establish ability to pay the wage proffered on the I-140.

a. Please explain the basis for requesting personal monthly expense documentation in this situation. [Such requests do not appear to be covered by the Yates Memo.]
b. What standards does NSC apply to determining when to issue a request for personal expense documentation?
c. What standards does NSC apply to determine whether a petitioner's personal expenses prevents a demonstration of ability to pay in this situation?

Answer: Sole proprietors are unique in that their personal income can be used to establish Ability to Pay, therefore in some cases it may be necessary to review a sole proprietor's personal expenses to determine whether the income from the business is actually available to pay the proffered wage rather than cover the sole proprietor's personal expenses. For example, if the federal income tax return Schedule C lists only $50,000 business income and the sole proprietor has a family of 5 and no other income, how do they maintain the family of 5 on $50,000 and then pay an employee an offered wage of say $30,000 on top of it? If the beneficiary was not being paid the proffered wage from the priority date forward, the sole proprietor employer will almost always be RFE'd to provide documentation of their personal monthly expenses. This is laid out in the most recent version of the SOP (Standard Operating Procedure) available to the public.

4. Grounds for Invalidating an Approved Labor Certification – In a recent I-140 case (LIN0725353741), NSC issued an RFE requesting ability to pay documentation, then based on that documentation issued a denial and invalidated the labor certification under 8 CFR 656.30(d) based on a finding that the petitioner had willfully misrepresented a material fact on the labor

certification application. All without offering the petitioner an opportunity to respond to the charge of misrepresentation. This case raises the following questions:

a. What are the standards and procedures referred to in 8 CFR 656.30(d) that are used by NSC to arrive at a finding of fraud or willful misrepresentation of a material fact sufficient to justify invalidating an approved labor certification?
b. Under what circumstances would NSC issue an RFE or NOID to offer the petitioner an opportunity to respond to such a serious charge rather than a denial?

Answer: NSC will consider invalidating the labor certification if the information in the labor certification indicates possible fraud or misrepresentation; however, petitioners should receive a NOID in this situation. A denial without the opportunity to rebut is incorrect and any examples of that should be brought to NSC's attention through liaison. In the example case provided, the NSC made a mistake and has corrected it (and in fact approved the case); but there are situations, for example if the employee has an ownership interest at the time the PERM was filed, but the box on the ETA-9089 was marked "no" for ownership interest. This most often comes up where it is clear that the owner of a company has petitioned for him or herself and marked "no" on Form 9089. In this example, if the petitioner marks "yes" to the ownership question and the DOL certifies it, then there is no issue of fraud or misrepresentation and NSC does not look behind the approved labor certification in this situation. In very rare cases, NSC may ask DOL for verification (but DOL is not responsive to those requests either). The only grounds for NSC to invalidate a labor certification are fraud or misrepresentation at the time the labor cert was filed (e.g., a later acquired ownership interest would not be an issue in this situation).

5. I-140 Processing Delays - It appears that many of the I-140 petitions that have been pending for long periods (e.g., four or five years) are under fraud investigation rather than background security check review. NSC has previously stated that the NSC's Center Fraud Detection Office is not within NSC's management control.

a. What are the criteria for sending an I-140 to the NSC's Fraud Detection Office for investigation?
b. Are officers instructed on cases or criteria for sending a petition to the Fraud Detection Office for review/investigation?
c. Are specific petitioners identified for fraud investigation?
d. How can a petitioner who is suspected of or being investigated for fraud clear itself of suspicion?

Answer: NSC is not able to provide any information on these matters.

Follow up question on NSC policy regarding the 180 day expiration rule for labor certifications: The NSC Liaison Committee has received inquiries from attorneys who have had I-140's rejected or denied based on the DOL's 180 day expiration rule for labor certifications. Please explain NSC's policy in this area.

Answer: The DOL rule is clear and allows no exceptions – NSC has very little discretion. NSC will consider an I-140 filed after the 180 day expiration date only if NSC created the circumstance that prevented timely filing, such as by improperly rejecting an attempt to file the I-140 within the 180 day validity period. In that case, NSC will go back to the receipt date of that rejection to determine whether or not the labor certification has expired. Ambiguous cases should be brought to the attention of liaison and it will be a case-by-case decision based on the facts of the case. If the reason for the late filing is

because the foreign national hired an attorney who neglected to file the I-140 in time, or attempted to file at the last moment but failed to include a filing fee check, that is not a good enough reason for NSC to accept the late filed I-140.

I-485

6. I-485 Processing - NSC has previously mentioned that there is a new internal USCIS procedure for automatically refreshing expired fingerprints without the need for a new biometrics appointment for applicants with pending I-485s. Is this procedure now implemented for all pending I-485s? If it is in effect for some but not all, please describe the criteria for determining which cases receive automatic refreshment of fingerprints.

Answer: NSC is now able to refresh fingerprints internally for about 95% of cases where the initial fingerprints were taken after Jan. 1, 2006. There were system breakdowns for fingerprints taken between late 2007 and early 2008, so in that situation new biometrics appointments will be needed, but should be needed only once. Sometimes fingerprint data are missing from the system so they need to send out an ASC appointment notice. Whenever the prints are expiring, then those fingerprints are either refreshed internally or new biometric appointment notices are sent. Two NSC analysts work full time on keeping these current. Only about 5% of all cases need to be rescheduled for ASC – the rest are refreshed internally by NSC.

7. I-485 RFEs - The NSC frequently sends Requests for Evidence on pending adjustment applications asking the beneficiary to demonstrate that they have employment authorization after the expiration of the last H-1B before the I-485 was filed; in many cases the employer has filed and the beneficiary has been granted extensions of their H-1B status. Do the examiners have access to the H-1B extension records and are these records checked before the RFE is issued?

Answer: Officers do have access to systems to check this information. However, the systems don't always work, there may be data errors or conflicts (e.g., name spelling) and without receipt numbers for H-1Bs filed, it may be difficult to find all historical records in the system so in some cases they will ask for that documentation.

8. I-485 Processing Delays - The AILA NSC Liaison Committee receives information continuously on cases that are delayed due to background checks, and offers the attached list of I-485 cases that have been pending at NSC for significantly longer than 180 days (many for 5 years or more), including at least 18 EB2 cases with current priority dates. We provide separately our current list of long pending I-485 cases and request that NSC provide updates on the status of these cases; if a case is awaiting completion of a background check or investigation, please indicate what type of check is being required but has not yet been performed.

Answer: NSC is using the case lists provided by AILA to cross check its own inventory sweeps. To improve usefulness, NSC requests that AILA provide the case lists organized by product line - separate asylees, I-140s, I-485s, etc.

9. INA 204(j) Portability Advisory Opinions - The Liaison committee recently received an inquiry concerning an attorney's request for an advisory opinion from the NSC regarding portability pursuant to section 204(j) of the Act, as it relates to an individual in removal proceedings. The background on this inquiry requires a review of the issue of whether the Immigration Judge has jurisdiction to determine the issue of portability under this section. In a precedent decision, the Board of Immigration Appeals has held that the Immigration Judge does not have this authority, and the question of eligibility for the benefits of section 204(j) must be determined by the Department of Homeland Security. *Matter of Perez Vargas*, 23 I&N Dec. 829 (BIA 2005). This decision has been challenged in the Courts, and has been reversed in the Fourth, Fifth and Sixth Circuits, thus far the only courts to have considered the issue, including the Fourth Circuit in the *Perez* case itself. *Matovski v. Gonzales*, 492 F.3d 722 (6th Cir. 2007); *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007); *Sung v. Keisler*, 505 F.3d 372 (5th Cir. 2007). The issue is currently pending in cases before the Second and Ninth Circuits. *Ahmad-Mushtaq v. Mukasey*, No. 08-4081 (2nd Circuit), , *Smethurst v. Gonzales*, No. 06-75-211 (9th Circuit). However, the Government still takes the position the remaining circuits that the Department of Homeland Security has jurisdiction to assess the eligibility for portability and the Immigration Judge must defer to the opinion of the USCIS.

Thus, the attorney has requested an opinion from the NSC, which has jurisdiction over cases from Illinois, where this particular applicant/respondent resides. The Seventh Circuit has not yet addressed this issue. AILA suggests that the NSC establish a procedure by which interested parties, either the government or an applicant, can submit the necessary information to the NSC upon which the NSC can issue an advisory opinion that may be submitted to the Immigration Judge in accordance with the BIA decision in *Perez Vargas*. AILA suggests that the NSC establish an address and internal procedure for issuing an opinion upon receipt of the following information:

Name, address, and Alien Registration number of the Applicant.
Copy of Form I-797C, receipt for the application to Adjust Status, Form I-485.
Copy of the approved labor certification
Copy of Form I-797, the I-140 approval notice.
Letter from current employer describing job and duties.

Will the NSC establish a procedure such as this in accordance with the BIA's directive in the *Perez Vargas* decision to assist in the timely adjudication of adjustment applications pending before the Immigration Judge?

Answer: NSC has issued advisory opinions on cases before EOIR; however, *the request must come from the government – either the Immigration Judge or ICE counsel must submit the request and the file to NSC's counsel. NSC will not accept a request for an advisory opinion from a private attorney or individual in removal proceedings.* Let the IJ either make the call, or explain to the IJ and ICE counsel the process by which they must contact NSC to get the opinion. In this particular case, the IJ told the attorney to get the opinion from the NSC. As this is not possible, the attorney must talk to ICE counsel or ask the IJ to provide a written request to NSC.

Are there other additional trends or observations to report?

Answer:

- NSC is seeing many I-693 medical exam forms that are not in compliance with current CDC requirements, so RFEs are being sent out in those cases.
  NSC Liaison Committee Practice Tip: ask the beneficiary to forward a copy of the sealed I-693 and check it for completeness before filing the I-485. It is not unusual for a civil surgeon to fail to fill in the form completely.
- I-485 applications for derivative family members should have complete documentation so that they can "stand alone."
- For employment based I-485s where a derivative spouse has been married to the principal applicant for less than 2 years, NSC will look for documentation of a bona fide marriage and may either issue an RFE or refer the spouse's application for a district office interview where such documentation is absent.
- Correspondence Backlog has been eliminated - NSC is now also caught up with its correspondence backlog (24 hours to process incoming mail, 2-3 days to get the information to the customer service team, and then another few days to get it to the file, unless the file is in transit and hard to locate). Attorneys are welcome to proactively update a pending file (e.g., AOS portability notices) now that NSC is caught up with the correspondence backlog. There is no strategic plan in place to review for portability at certain dates; NSC may issue an RFE to get that information in specific cases.

OTHER

10. EAD applications for Adjustment Applicants whose applications for Adjustment are pending before the Executive Office for Immigration Review ("EOIR") - Please confirm that the following procedure is advisable for individuals residing under the jurisdiction of the Nebraska Service Center, who are applying for Employment Authorization based on their Applications for Adjustment of Status before the EOIR:

    a. File Form I-765, Application for Employment Authorization, and proper fee, with NSC;
    b. Include a copy of the pending I-485 Application for Adjustment of Status *which has been date-stamped by the EOIR*, to confirm that the application is being renewed before the Immigration Judge;
    c. Include a brightly colored cover sheet in the filing, explaining the basis for the request, i.e.: "Application for Employment Authorization is filed based on pending Application for Adjustment of Status before the EOIR";
    d. Appear for biometric appointment as directed.

If I-485 was filed at EOIR, then I-765 should go to Chicago lockbox.

If the I-485 was originally filed at a service center but was denied and the beneficiary was issued an NTA and is now in removal proceedings, then the I-765 should go to the service center, based on jurisdiction. The procedure described by AILA above is correct for this latter situation. For example: If the I-485 was denied by TSC, and the person is now before EOIR in Chicago, then the I-765 should be filed with NSC. NSC needs independent physical evidence that the case is pending with EOIR, as described above.

11. NSC has issued a series of denials on refugee and asylee adjustment applications for derivative applicants where the principal has naturalized and become a US citizen. While some of these individuals can re-file as an immediate relative, the fees and costs for this process approach

$2000 and for the refugee population, this is a significant expense. The other alternative is to file an individual asylum application with the Asylum Office. We have attached one case as an example in which the derivative spouse filed an adjustment application before the principal spouse naturalized, but the application was pending for over 3 years and during this time, the principal naturalized. The application was then denied based because the applicant was no longer the derivative of an asylee. Based upon this particular case, and other similar cases, we have the following questions:

a. The applicant in the attached case was eligible for the adjustment at the time it was filed. The US Government encourages permanent residents to become citizens and participate fully in American society, including the right to vote, as soon as possible. We believe this application, at a minimum, was approvable as of the date it was filed and it was only the Service's delay in adjudication that caused the family members to be processed at such dramatically different times. To later deny the application because the principal has naturalized in this interim period seems unfair.

b. If a refugee or asylee loses that status upon granting of permanent resident status or citizenship, a derivative family member must file and get approval of an adjustment application before the principal can file even an adjustment application. This would be the only way to insure that applications are not adjudicated in an order that leaves a derivative without a principal' to base his/her status upon. The increasing tendency to process family members separately based upon travel and eligibility dates as well as security reviews even when the applications are filed together, has never before been held to deprive the Service of the ability to process derivative applications. It would appear that the better approach is to determine that a refugee or asylum does not loose that status upon adjustment or naturalization. While they may be a permanent resident or US citizen, the well founded fear of persecution in the home country does not disappear as a matter of law upon adjustment or naturalization.

c. Would the NSC reconsider the policy of referring these cases to the Asylum Office and help to facilitate the derivative's asylum determination and mitigate against the additional hardship and expense that this interpretation and policy has upon the refugee population. We note that this population is least able to either understand these technical decisions or afford counsel to help navigate the technical minefield. In the final analysis, the denial of this application did not further any significant policy and indeed, frustrates several policy goals of the Service and the Refugee program.

Answer: Refugee derivatives should not be denied where the principal has naturalized; however, asylee derivatives lose their derivative status according to an unpublished AAO decision from September 2005 [no citation provided], which interpreted INA section 209(b)(3). If the principal asylum applicant naturalizes while adjustment applications are pending for derivatives, then they must deny the derivative applications. If refugee derivatives are denied on this basis please bring such cases to the attention of Evelyn Martin at NSC.

12. Form I-90 Procedure – The recent change in filing procedure for Form I-90 directing applicants to file at the Phoenix Lock Box does not explain where the actual processing of the I-90 will take place – will NSC continue to process I-90 applications? If no, how will this be done and where should questions regarding I-90 processing be directed? If yes, for US permanent residents who

are temporarily residing abroad and who need to file Form I-90 to apply for a replacement green card: (1) can the biometrics appointment scheduling be expedited similar to the procedure for a re-entry permit application? (2) Can a permanent resident who is temporarily residing abroad file form I-90 from outside the US? If so, how can the biometrics requirement be met? (3) Under what circumstances would NSC reopen an I-90 that has been denied due to failure to complete the biometrics requirement?

Answer: New applications are now going to the Missouri Service Center (NBC) to be worked so please direct I-90 filing questions to NBC. NSC is no longer accepting new I-90 applications; however, NSC has 130 I-90 applications still pending and most are in RFE stage awaiting response.

13. Coordination issues between NSC and TSC - NSC has previously stated that if a beneficiary's I-140 is filed at one service center and the I-485 is subsequently filed at another service center, the I-485 would be transferred to the service center handling the I-140; also, if an I-485 is filed at one service center, but the beneficiary changes address to the jurisdiction of the other service center, then the I-765 and/or I-131 should be filed at service center with geographic jurisdiction. The liaison committee has seen several cases in recent months in which different applications for the same person are divided between the Texas and Nebraska Service Centers, creating problems of coordination and therefore adjudication. In some cases, the I-140 is pending at one center, and the I-485 at another. Sometimes, more than one I-140 has been filed, and they are pending at different centers, creating problems in assigning or recapturing the proper priority date, or obtaining the original labor certification for one case or the other. In still others, the I-485 is pending at one Service Center, then the beneficiary changes address and the I-765 or I-131 applications must be filed with the other center.

    a. Please describe the protocols to deal with these problems between the Service Centers.
    b. Does the protocol direct each center to adjudicate the respective parts of the case, or to consolidate a case at one center or the other? If so, how is it decided which center will adjudicate the case?
    c. Are there any steps counsel can take to have the case consolidated at one center to avoid confusion and delays, and potentially lost documents?

Answer: NSC will consolidate files whenever possible. The general policy is that the principal applicant's I-485 is used as the anchor – a standalone I-140 will be transferred to wherever the principal's I-485 is pending; same for derivative I-485s. If the principal files at one service center and a derivative is filing at another, then NSC will send the derivative to be matched to the principal, rather than requesting the A-file for the principal. If a standalone I-140 requests consular notification, then need to highlight where it is a second I-140 and there is another I-140 elsewhere. Make it clear – but also utilize liaison if there are problems later.

14. Misdirected Mail from NSC - At our liaison meeting in Lincoln last Fall, the liaison committee discussed the fact that it is not unusual for attorneys to receive mail from NSC and other USCIS service centers that is addressed to another attorney or a petitioner who is being represented by another attorney. As follow up to that discussion, we attach two examples of misdirected mail from NSC, one postmarked March 3, 2009 (addressed to a petitioner in Bellevue, Washington but delivered to an attorney in Dallas, Texas who does not represent the petitioner)

and the other postmarked March 12, 2009 (addressed to an applicant in Kent, Washington but delivered to an attorney in Columbus, Ohio who does not represent the applicant). In these cases, the documents appear to have been addressed correctly, but somehow ended up being delivered to offices in other parts of the United States. Does NSC presort outgoing mail before it goes to the U.S. postal service?

Answer: NSC appreciates receiving evidence of misdirected mail. NSC does use a contractor to presort outgoing mail and the contractor has been notified to correct the problem. NSC is also aware that sometimes documents intended for one person are inadvertently enclosed behind another document that is sent to another person. This can happen when they change paper stock and have to readjust their sorting machine.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In Re MARCAL NETO, Jose, et al.	) Case No.:	A095 861 144
	)	A095 861 145
	)	A095 861 146
Respondents.	) REMOVAL PROCEEDINGS	

DECLARATION OF SCOTT D. POLLOCK

I, Scott D. Pollock, hereby declare:

1. I make this declaration for submission with the Brief of Amici Curiae being filed by the American Immigration Law Foundation and American Immigration Lawyers' Association in the case of Marcel NETO et. al., A095 861 144, presently under consideration by the Board of Immigration Appeals.

2. I am an attorney in good standing licensed in the States of Illinois and New York. My business address is Scott D. Pollock & Associates, P.C., 105 W. Madison, Suite 2200, Chicago, IL, 60602.

3. I have been representing noncitizens before the immigration and federal courts and the Department of Homeland Security since 1985.

4. I represent a client within the jurisdiction of the Seventh Circuit whose removal proceedings have been continued since January 2009, when the immigration judge questioned his jurisdiction to make a determination under INA § 204(j) pursuant to *Matter of Perez-Vargas*, 23 I&N Dec. 829 (BIA 2005). My

client was placed in removal proceedings in February 2008. On April 23, 2008 I requested a § 204(j) determination directly from the Nebraska Service Center. I did not receive a response, so I submitted a second request on October 14, 2008. I also submitted a request directly to the Chicago Office of Chief Counsel, U.S. Immigration and Customs Enforcement, requesting the same or assistance in requesting a determination from the Nebraska Service Center. In November 2008, the Nebraska Service Center inexplicably informed me that I should file a motion to reopen. I then sent a third request to them on November 20, 2008. Again I received no response. At hearings before Immigration Judge Zerbe in January 2009 and May 2009, he continued the proceedings, in part to provide an opportunity for the USCIS to provide a determination. I eventually brought the case to the attention of Jane S. Carroll, a member of the Nebraska Service Center liaison for the American Immigration Lawyers Association who, in turn, communicated directly with the Nebraska Service Center. As a result, I was encouraged to discuss the case with ICE counsel and ask ICE counsel to make the request directly to NSC.

5. My requests for assistance from the ICE Office of Chief Counsel had previously been ignored. Indeed, at one point, one DHS attorney told me that ICE wouldn't do my job for me. However, I again contacted ICE counsel and requested that ICE send my client's file to NSC for a § 204(j) determination.

6. To date, the immigration judge has granted two continuances based in part on the evidence of my efforts to obtain a § 204(j) determination from NSC. I recently learned through the AILA liaison that ICE counsel presented a request for the determination, and that the Nebraska Service Center issued the determination. I have not received a copy of the determination and have been unsuccessful in contacting ICE counsel to obtain a copy of the determination. The next hearing is scheduled for October 7, 2009.

I declare, under the penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 25th day of August 2009 at Chicago, Illinois.

Scott D. Pollock

CERTIFICATE OF SERVICE

On August 27, 2009, I, Brian Yourish, served a copy of this Amici Curiae Brief in Support of Respondent by overnight Federal Express delivery on the following:

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_____

Brian Yourish
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American Immigration Law Foundation

Date: August 27, 2009