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

In the Matter of		
Jose MARCAL NETO	**File Nos.**	**A095 861 144**
Ana Nubia Alves Marcal		**A095 861 145**
Vitoria Roberta Alve Marcal		**A095 861 146**
In Removal Proceedings		

DEPARTMENT OF HOMELAND SECURITY
SUPPLEMENTAL BRIEF

Elena M. Albamonte
Appellate Counsel
Appellate and Protection Law Division
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
5201 Leesburg Pike, Suite 1300
Falls Church, VA 20598-5901
703-820-3184

INTRODUCTION

On April 20, 2007, the respondent[1] filed an appeal of the Immigration Judge's March 23, 2007, decision, finding that he had no jurisdiction to determine the portability of an alien's change of job or employer under INA § 204(j) for the purpose of adjudicating a pending application for adjustment of status. On July 21, 2009, the Board of Immigration Appeals (Board) scheduled oral argument and asked the parties to be prepared to discuss the following issues:

> Whether the Board should adopt the United States Court of Appeals for the Fourth Circuit's reasoning in *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007), vacating the Board's decision in *Matter of Perez-Vargas*, 23 I&N Dec. 829 (BIA 2006), and find that Immigration Judges have the authority to determine the portability of a change of job or employer and, therefore, whether the alien retains his or her employment-based visa petition under section 204(j) of the Immigration and Nationality Act.
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> Whether or not the Board determines that the Immigration Judges have jurisdiction over portability issues under section 204(j) of the Act, under what circumstances should Immigration Judges grant a continuance to allow the Department of Homeland Security (DHS) an opportunity to resolve that question, and alternatively, (for the DHS) is the DHS amenable to administrative closure of such cases in lieu of a continuance pending adjudication of the portability issue. The DHS should also describe how portability determinations are adjudicated by its Office of Citizenship and Immigration Services and the Appeals process, if any.

To facilitate the adjudication of the case and the discussion of the issues at oral argument, the U.S. Department of Homeland Security ("DHS") submits this supplemental brief.

SUMMARY OF ARGUMENT

The Department of Labor (DOL) has exclusive jurisdiction over the issuance of a labor certification. DHS has exclusive jurisdiction over the adjudication and approval of employment-

based visa petitions. Once granted, a visa petition remains valid unless the DOL invalidates the labor certification, or it is revoked by DHS pursuant to INA § 205 and 8 C.F.R. § 205.2, or pursuant to the automatic revocation provisions outlined in 8 C.F.R. § 205.1(a)(3)(iii). Once an alien is the beneficiary of an approved employment-based visa petition, DHS has jurisdiction over any application for adjustment of status if the applicant is not in proceedings. The U.S. Department of Justice (DOJ), through Immigration Judges (IJs) located in the Executive Office for Immigration Review (EOIR) immigration courts, has jurisdiction over an application for adjustment of status by a person who is in removal proceedings. Accordingly, an Immigration Judge has jurisdiction over any issue related to adjudication of an application for adjustment of status in removal proceedings, including the issue of whether an alien who is the subject of an approved employment-based visa petition, and who has obtained a new job or employer while an application for adjustment of status is pending, has established that the new job or employer is the "same or similar" as the job or employer for which the alien received labor certification and for which the original employment-based visa petition was approved. This is a proper and appropriate finding of fact by an Immigration Judge in the normal course of adjudicating an application for adjustment of status for an alien in removal proceedings who has an approved visa petition.[2]

FACTUAL AND PROCEDURAL BACKGROUND

The respondent, a native and citizen of Brazil, entered the United States as a nonimmigrant tourist at Miami, Florida, on or about January 20, 2001. On April 9, 2001, the respondent's previous employer, Harry's Linoleum Tile and Carpet, filed an Application for

[1] Although the respondent's spouse and child also are the subject of these removal proceedings, their potential status is derivative of the adult male respondent's status. Accordingly, for clarity this brief will refer only to the adult male respondent.

Alien Employment Certification (Labor Certification). On August 30, 2002, the Application for Employment Certification was certified by the DOL, which listed the Occupational Code as 86/38/054 and the Occupational Title as Tile Setter. *See* Immigration Court Exhibit 4, and Attachment. The same employer filed an I-140 visa petition, and on December 3, 2002, the respondent concurrently filed an application with DHS to adjust his status based on the approved labor certification. The visa petition was approved by DHS on February 25, 2003.

The respondent applied for adjustment of status under the provisions of section INA § 245(i), which allows for adjustment of status for applicants on whose behalf a labor certification or visa petition was filed prior to April 30, 2001. However, in order to be eligible to apply for adjustment of status under INA § 245(i), an applicant must demonstrate that he or she was physically present in the United States on December 21, 2000.

DHS ultimately denied the application for adjustment of status on October 27, 2005, based on the District Director's determination that the respondent was inadmissible pursuant to INA § 212(a)(6)(C) because of a fraudulent misrepresentation at entry. The District Director noted in his decision that the respondent's claim under oath that he last entered the United States on January 20, 2001, as a B-2 visitor for pleasure, conflicted with a statement in his Form I-485 (Application to Register Permanent Residence or Adjust Status), which stated that he had last entered the United States on March 15, 2000. *See* Immigration Court Exhibit 8, "Notice of Denial of Application for Permanent Residence," at 1. The District Director noted that there was no evidence to support the respondent's claim that he had departed the United States on December 26, 2000, and returned on January 20, 2001. On the contrary, DHS records indicated that the respondent had actually departed the United States in October 2000, and returned on

[2] We acknowledge at the outset that this posture represents a departure from our previous posture in this case, and before the Board in *Matter of Perez-Vargas*, 23 I&N Dec. 829 (BIA 2005).

January 20, 2001, which meant that he could not demonstrate that he was physically present in the United States on December 21, 2000, and thus could not qualify to adjust his status under INA § 245(i). The District Director specifically determined that the respondent had lied under oath and attempted to conceal the truth about his absence from the United States on December 21, 2000, and stated, "[c]onsidering your sworn testimony, it is determined that the time sheet you provided is either altered to indicate your name at the top or is outright fraudulent" (DDD at 2). Based on the respondent's representations, as well as evidence that the respondent had been "continually entering the United States as a B-2 visitor since 1999 although [he had] been employed by Harry's Carpet One since May of 1998," the District Director found that the respondent was ineligible to receive a visa, ineligible for admission to the United States, ineligible for a waiver of inadmissibility, and statutorily ineligible for adjustment of status (DD at 3). At that time, the District Director also rescinded employment authorization.[3] As the application was denied on other grounds, DHS did not consider the issue of whether the respondent's new employment with Sudbury Granite was the same or similar as his employment at Harry's Carpet, for the purpose of determining INA § 204(j) portability. DHS also did not revoke approval of the employment based visa petition.[4]

On October 27, 2005, the respondent was served with a Notice to Appeal (NTA), charging him with removability under INA § 237(a)(1)(B) as a nonimmigrant overstay, and under INA § 237(a)(1)(A) as an alien who was inadmissible at entry based on fraud. [5] The

[3] An alien with a pending application for adjustment of status under INA § 245(i) may be granted an employment authorization document (EAD) under 8 C.F.R. § 274a.12(c)(9), allowing him or her to work while the application is pending. It was this authorization, rather than the approval of the visa petition or labor certification, that was rescinded.

[4] The visa petition also did not meet any of the requirements for automatic revocation outlined in 8 C.F.R. § 205.1(a)(3)(iii).

[5] The respondent testified at his removal proceeding that he initially entered the United States in 1984, and began working here (Tr. at 24). The Form G-325A, Biographic Information, indicates that he did not begin working in the United States until May 1998, when he was employed by Harry's Carpet One. *See* Exhibit 5, Form G-325A. He

respondent conceded removability under INA § 237(a)(1)(B), but denied the fraud charge. On October 18, 2006, the respondent renewed his application for adjustment of status before the Immigration Judge, asserting that, although he had changed jobs, he was still eligible to adjust his status because of the portability provisions of INA § 204(j). In support of that claim, he submitted a letter from Graziela Trabach, General Manager, Sudbury Granite & Marble, dated November 2006. That letter states simply:

> This letter is to inform you that Mr. Jose Marcal Neto is employed here as a full time granite and marble templator and setter. He has proven to be a valued employee and we expect to keep him here well into the future. Mr. Jose Marcal Neto earns approximately $850.00 per week. We are happy to have such a person in our employ. If you need further clarification, please call immediately.

The Immigration Judge found the respondent to be removable on March 23, 2007, based on the overstay charge. He concluded, however, based on the government's failure to present the respondent's passports at the time of the hearing, that DHS had "abandoned the prosecution of the fraud portion of this case" (I.J. at 6-7).[6] Although the respondent had renewed his application for adjustment of status based on the unrevoked I-140 employment-based visa petition, and although the fraud charge which had resulted in the District Director's denial of the prior application for adjustment of status had not been sustained, the Immigration Judge pretermitted the application for adjustment of status.[7] The Immigration Judge noted the

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acknowledged that he subsequently departed and reentered the United States, stating on reentry in 1995 that he was coming only for a visit; in reality, he planned to remain indefinitely and continue his employment.

[6] At the time of the hearing, assigned DHS attorney was unable to locate the file, which contained the respondent's passports. As the passports were evidence of the respondent's dates of departure from and entry into the United States, the Immigration Judge concluded that the fraud charge could not be considered without them. *See* Tr. at 44; 51. Although DHS requested a continuance, the IJ denied the request, finding that no "exigent circumstances or any exceptional circumstances" had been demonstrated to explain DHS's failure to produce the file. *See* I.J. at 56.

[7] The respondent claimed eligibility to adjust his status under INA § 245(i) because he had met the requisite filing date prior to April 30, 2001, based on his claim that he was present in the United States on December 21, 2000. However, the DHS contested that claim, stating that the respondent left the United States on October 8, 2000, and did not return until January 21, 2001; as he was not in the United States on December 21, 2000, he could not benefit from the provisions of INA § 245(i). *See* Tr. at 31. The IJ ultimately did not rule on this issue, or on the issue of whether the respondent would need a waiver of the admitted fraud, concluding that it was unnecessary because of

respondent's assertion that his new job was portable under section 204(j) and his claim that he was eligible to adjust his status despite the fact that he had changed employers. The Immigration Judge concluded, however, that the change in employers meant that the respondent "no longer has a viable offer of employment from Harry's Carpet but instead now has a viable offer of employment from Sudbury Granite"[8] (I.J. at 7; 10). The Immigration Judge concluded, however, citing *Matter of Perez-Vargas*, 23 I&N Dec. 829 (BIA 2005), that he had no "authority to determine whether the validity of his approved employment-based visa petition is preserved under section 204(j)" of the Act (I.J. at 8). The Immigration Judge did, however, grant the respondent the relief of voluntary departure (I.J. at 11). The respondent's subsequent appeal is now pending before the Board.

ARGUMENT

I. JURISDICTION

A. The Plain Language of the Statute Indicates That INA § 204(j) Relates to Adjudications of Applications for Adjustment of Status, not Adjudications of Visa Petitions.

The American Competitiveness in the Twenty-first Century Act (AC-21), which created INA § 204(j) and a companion provision at INA § 212(a)(5)(A)(iv), provides job flexibility for adjustment of status applicants who have been subjected to long processing delays.[9]

INA § 204(j) provides as follows:

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his lack of authority to determine the validity of the approved employment-based visa petition. *See* Tr. at 6-7; Tr. at 67; I.J. at 8.

[8] As the Immigration Judge declined to take jurisdiction over the application for adjustment of status, it is unclear how or when he determined that the respondent's employment offer from Sudbury Granite was "viable."

[9] The Senate Report accompanying AC-21 indicated with respect to the portability of the H-1B visa, that it would allow the visa holder "to change employers at the time a new employer files the initial paperwork, rather than having to wait for the new H-1B application to be approved. This responds to concerns raised about the potential for exploitation of H-1B visa holders as a result of a specific employer's control over the employee's legal status." S. Rep. No. 106-260 (April 11, 2000) at 20, 2000 WL 622763.

> Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence - A petition under subsection (a)(1)(D) 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.[10]

A companion provision exists at INA § 212(a)(5)(A)(iv) with regard to labor certifications, as follows:

> 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 the same or a similar occupational classification as the job for which the certification was issued.[11]

i. The Statute Is Not Restricted to Applications for Adjustment of Status Before DHS.

INA § 204(j) does not distinguish between adjustment applicants in removal proceedings and those not in removal proceedings. It does not mandate jurisdiction, does not refer to a particular agency, and does not refer to, mandate, or suggest a particular process or procedure for determining job portability, or for determining whether the job is in the same or similar occupational classification as the job for which the certification or visa petition was approved. INA § 204(j) requires only that the application for adjustment of status be pending for 180 days or more, and that the new job be in the same or similar occupational classification as the job for which the petition was filed. The companion statute, INA § 212(a)(5)(A)(iv), simply states that a labor certification that was issued pursuant to a particular job remains valid with respect to a new job if the alien is "covered by section 204(j)" and "if the new job is the same or a similar occupational classification as the job for which the certification was issued."

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[10] *See* Act of Oct. 17, 2000 [AC-21], Pub. L. No. 106-313, 114 Stat. 1251, title I, § 106(c)(1).
[11] *See* Act of Oct. 17, 2000 [AC-21], Pub. L. No. 106-313, 114 Stat. 1251, title I, § 106(c)(1).

The language in INA § 204(j) and 212(a)(5)(A)(iv) constitutes a plain expression of congressional intent, which the Board has held is "the touchstone of [its] analysis" of statutory construction. *Matter of Briones*, 24 I&N Dec. 355, 361 (BIA 2007), *citing Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) and *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). The statutes clearly demonstrate, in plain language, congressional intent to allow aliens with delayed adjustment of status applications based on previously approved labor certifications and employment-based visa petitions, to substitute a new job that is the same or similar while the applications for adjustment of status remain pending.

The Board has held, and DHS agrees, that "immigration judges have no jurisdiction to decide visa petitions" and that approval or denial of visa petitions is "solely within the authority of the district director." *Matter of Aurelio*, 19 I&N Dec. 460 (BIA 1987). However, when an alien has been placed into removal proceedings, an Immigration Judge has "exclusive jurisdiction to adjudicate any application for adjustment of status the alien may file." 8 C.F.R. § 1245.2(a). As we can assume that Congress "'says in a statute what it means and means in a statute what it says there,'" and as the U.S. Supreme Court has indicated repeatedly that there is an assumption that "Congress is aware of existing law when it passes legislation," it is reasonable to assume that Congress was aware that Immigration Judges have jurisdiction over applications for adjustment of status in removal proceedings. *Miles v. Apex Marine Corp.* 498 U.S. 19, 32 (1990); *Matter of Briones*, 24 I&N Dec. at 361, *citing Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) and *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992).

ii. The Statute's Title Evidences Statutory Intent.

Moreover, "'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute." *Almendarez-Torres v. United States*, 523 U.S. 224, 277 (1998). Had Congress intended for DHS to exclusive jurisdiction over INA § 204(j) determinations, the statute would either have specifically provided such jurisdiction, or the statute would have been enacted to apply only to pending long delayed applications for employment-based visa petitions. The title, "Job Flexibility for Long Delayed Applicants for Adjustment of Status," clearly and unambiguously applies to aliens who are applying for adjustment of status, not to aliens whose visa petitions are pending. To the extent the statutory language could be considered ambiguous, the statute's title, clearly resolves any ambiguity. *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"). *See also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984) (requiring that a court to first evaluate whether Congress has made its intent clear in the statute, and only if not clear, to evaluate whether the agency's interpretation is a permissible one).

iii. The Board's Prior Interpretation Does Not Best Reflect Congressional Intent.

To the extent the Board believes that the statute is not plain on its face, a review of the legislative history indicates Congress's intent to ameliorate the hardships caused by delays in adjudications of applications for adjustment of status based on employment-based visas. *See* S. Rep. No. 106-260 (April 11, 2000), 2000 WL 622763. The Board's interpretation of INA § 204(j) would essentially exclude aliens with approved employment-based visa petitions, who have changed jobs, and who are in removal proceedings, from having their applications for

adjustment of status adjudicated before the Immigration Judge. As the Board's proposed solution would add additional processing time for aliens who have already been subjected to lengthy processing times, such interpretation could not have been congressional intent.

B. Determination of INA § 204(j) Eligibility Does Not Require the Immigration Judge to Have a Particular Expertise

The fact that an Immigration Judge has no expertise in labor law or labor certifications does not mean that he or she would be incapable of considering the issue of INA § 204(j) portability in the course of an adjustment of status adjudication. An Immigration Judge is called on to conduct fact finding determinations and render legal determinations on numerous issues on which a typical Immigration Judge cannot possibly be expert.

For example, an Immigration Judge may have heard hundreds of asylum applications from a particular country; this fact, however, would not make him or her an "expert" on the country conditions in that country. It simply makes him or her experienced in considering asylum applications from that country. An Immigration Judge obtains actual information about country conditions from country reports and other documentation prepared by actual experts and submitted by the parties in the course of the application procedure. On occasion, an Immigration Judge may hear testimony from actual experts on country conditions in a particular country. The Immigration Judge takes testimony and evidence, and uses the information acquired during such fact-finding to make a determination in a particular case as to whether a person is or is not eligible for asylum. The Immigration Judge is not required to have an expertise in global country conditions to render a decision in an asylum application.

In the adjustment of status arena, Immigration Judges are called upon every day to consider, for example, whether a marriage continues to exist for the purpose of adjudicating an adjustment of status application based on an approved I-130 family-based visa petition. An

Immigration Judge is not called upon, nor is he or she expected or required to be, an expert in family law, or an expert on the marriage or divorce laws in any state or foreign entity. Evidence on those issues is presented at the removal proceeding in the form of expert testimony, consular reports, or Department of State or Library of Congress opinions.

Moreover, the Board in the past has rendered factual findings[12] regarding job responsibilities in cases involving labor certifications. *See Matter of Kuo*, 15 I&N Dec. 650 (BIA 1976) (finding that a respondent who "entered the United States as a non-preference immigrant based in part on a blanket labor certification she received as a nurse under 29 CFR 60.2 and 60.7, Schedule A . . . never worked as a nurse in the United States and since her arrival over 2 1/2 years ago ha[d] been engaged in work totally unrelated to her profession"). The Board in *Matter of Kuo* considered the alien's job description and made a determination that she "engaged in work totally unrelated to her profession." It does not appear that any particular expertise was required to make that determination.

Likewise, the Board in *Matter of Ortega*, 13 I&N Dec. 606 (BIA 1970), quoted from the "Dictionary of Occupational Titles (1965), U.S. Department of Labor, Manpower Administration, Bureau of Employment Security" for the purpose of determining that an alien had "no intention of working in the field of animal husbandry, or [had] reasonable prospects of doing so"). This is the same type of evidentiary analysis that an Immigration Judge would undertake in determining whether an alien seeking to "port" from one job to another under INA § 204(j) has met his or her burden of proving that the new job is the "same or similar" as the old job.

[12] We acknowledge that this occurred prior to the promulgation of the current regulations at 8 § C.F.R. 1003.1(d)(3)(i), which has limited the Board's fact-finding ability. We offer the cases cited above as examples to demonstrate that the determinations of job duties requires no particular expertise, and that the Board has engaged in employment-related fact-finding in the past.

In addition, a review of the numerous memoranda produced by DHS and the legacy Immigration and Naturalization Service concerning the processing of INA § 204(j) portability requests, makes it is clear that adjudicators considering the issue of portability are not required to have a particular expertise, but merely are required to make findings of fact and apply the immigration law to the facts. For example, the Memorandum from Michael A. Pearson to Service Center Directors *et al.*, dated June 19, 2001, states under "Procedures for Processing Benefits Under AC21 106(c)," that the adjudicator should:

> request a letter of employment from the new employer. The letter from the new employer verifying that the job officer exists should contain the new job title, job description, and salary. This information is necessary to determine whether the new job is in the same or similar occupation . . . . To determine whether a new job is in the same or similar occupational classification as the original job for which the certification of approval was initially made, the adjudicating officer *may* consult the Department of Labor's Dictionary of Occupational titles or its online O'NET classification system or similar publications

See www.uscis.gov/files/pressrelease/ac21guide.pdf (emphasis added). There is no indication that DHS adjudicators require a particular expertise to render those determinations.

In the case at issue here, the alien received labor certification as a tile setter. However, an adjudicator would not need to be an experienced tile setter in order to determine whether a tile setter employed by Harry's Carpets and a tile setter employed by Sudbury Granite would engage in employment that is the "same or similar."[13] Any adjustment of status adjudicator would simply determine whether an alien making a claim of INA § 204(j) eligibility has submitted sufficient evidence in support of the claim that the new job has the "same or similar" title, job duties, and salary, and thus would support the granting of adjustment of status – the same type of review an Immigration Judge is required to make on a daily basis.

[13] We offer this as an example. For the purposes of this supplemental brief, we do not address whether the respondent has satisfied the requirements for INA § 204(j) portability.

II. MATTER OF PEREZ-VARGAS SHOULD BE VACATED.

The Board held in *Matter of Perez-Vargas*, 23 I&N Dec. at 832, that "[o]riginal jurisdiction over employment-based visa petitions lies with the DHS following issuance of a labor certification by the Department of Labor (DOL)." "It therefore follows that any redetermination of the visa petition's validity would also lie with these government entities, and not with the Immigration Judge." *Id.* The Board noted that "an inquiry into the merits of a visa petition would 'constitute a substantial and unwarranted intrusion into the district director's authority over the adjudication of visa petitions." *Id.*, *Matter of Arthur*, 20 I&N Dec. 475, 479 (BIA 1992). In support of that position, the Board cited a Memorandum from James A. Puleo, Acting Executive Associate Commissioner, Office of Operations, to Immigration and Naturalization officials (Dec. 10, 1993), *reprinted in* 70 Interpreter Releases, No. 48, Dec. 20, 1993, Appendix III, at 1692.[14]

As we discussed above, however, it is DHS's position that an Immigration Judge would not be called on to consider the American workforce and whether alien labor would adversely affect such workforce, but would merely have to compare the job title, duties, and salary of the old job to the new job. INA § 204(j) does not require a "redetermination of the visa petition's validity," nor would it constitute "a substantial and unwarranted intrusion into the district director's authority over the adjudication of visa petitions." *See Matter of Perez-Vargas*, 23 I&N Dec. at 832.

[14] We note, however, that the December 10, 1993, Puleo Memorandum, entitled "Amendment of Labor Certifications in I-140 Petitions," outlined an agreement between the legacy Immigration and Naturalization Service (INS) and DOL "on how to handle changes on amendments to *labor certifications* once they are issued." The Memorandum concluded that, in some situations, a new I-140 needed to be filed. In other situations, such as when the petitioning employer moved outside of the Standard Metropolitan Statistical Area (SMSA), the labor certification would no longer be valid and could no longer support the I-140. Likewise, in cases where there was a change in "the wage offered, the job title and job description, and job requirements," an amendment to the I-140 was not appropriate because "they involve[d] matters which related to the test of the job market." In such cases, a new

As the Board has acknowledged, INA § 204(j) was enacted "in order to **avoid** a recertification of the alien's labor certification by the DOL." *Id.* (emphasis added) *citing* Memorandum from Michael D. Cronin, Acting Executive Associate Commissioner, Officer of Programs, to Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations (June 19, 2001), www.uscis.gov/files/pressrelease/ac21guide.pdf. An analysis of the statute and related memoranda does not support the Board's determination that "whether the alien's new job is in the 'same or similar' classification is tied to the original requirement for labor certification by the DOL." *Matter of Perez-Vargas*, 23 I&N Dec. at 833. In fact, as the Board has recognized, "[t]he labor certification process involves an analysis to determine whether there are sufficient workers available who are willing to accept the job in question and whether the alien's employment will adversely affect the wages and working conditions of United States workers." *Id.* It is DHS's position that an approved visa petition remains valid unless revoked, and that an Immigration Judge would not be required to re-adjudicate the visa petition, but would be required only to determine whether a valid, unrevoked visa petition exists, and in the case of INA § 204(j), whether the relationship between the alien and a "same or similar" U.S. job or employer exists. If so, an Immigration Judge can grant the application for adjustment of status. If not, an Immigration Judge can deny the application for adjustment of status. Under no circumstances under INA § 204(j) is the Immigration Judge expected to or required to determine or re-determine the validity of an approved visa petition.

III. DHS PROCEDURES FOR INA § 204(J) PORTABILITY DETERMINATIONS

DHS procedures for making INA § 204(j) portability determinations reinforce the propriety of Immigration Judges making such determinations in removal proceedings.

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labor certification needed to be filed. Puleo Memorandum at 2, *reprinted at* 70 No. 48 Interpreter Releases Appendix III, at 1693.

A DHS adjustment of status adjudication requires a determination of whether the alien is eligible to receive an immigrant visa. *See* INA § 245(a)(2). Just as an adjustment of status adjudicator must determine whether an I-130 remains valid by determining if the underlying familial relationship continues to exist at the time the application for adjustment of status is made, one adjudicating an I-140 application for employment-based adjustment of status must determine whether a valid job offer continues to exist, as well as whether the I-140 remains valid for all other purposes.[15] INA § 204(j) simply requires the adjudicator to determine whether, as a matter of fact, the alien's new job qualifies as the "same or similar" job to that in the underlying petition. 8 C.F.R. § 1240.1(a). "[I]f an alien is the beneficiary of an approved Form I-140 and is also the beneficiary of a Form I-485 that has been pending 180 days or longer, then the approved Form I-140 remains valid with respect to a new offer of employment under the flexibility provisions of . . . AC21."[16] December 27, 2005, Memorandum of Michael Aytes, at 3, www.uscis.gov/files/pressrelease/AC21Intrm122705.pdf. DHS does not view an INA § 204(j) portability determination as a separate adjudication from the adjudication of the application for

[15] *Matter of Al Wassan* (Jan. 12, 2005), is a USCIS adopted decision, that established that a visa petition that is 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 the basis for approval of an adjustment of status application that requires an INA § 204(j) portability determination. It can be found at imminfo.com/Library/AC21_issues/20051018_case.pdf.

[16] Unlike Immigration Judges, DHS has the authority to consider INA § 204(j) portability in unapproved I-140 petitions. Memorandum from William R. Yates, Associate Director for Operations, USCIS, to Regional and Service Center Directors, dated May 12, 2005, at 3. *See* www.uscis.gov/files/pressrelease/AC21intrm051205.pdf. It is DHS's position that an alien requesting an Immigration Judge to determine INA § 204(j) portability when adjudicating an application for adjustment of status in removal proceedings must have an approved, unrevoked visa petition to successfully "port" the new job to the approved I-140 visa petition. As an Immigration Judge has no jurisdiction to approve or disapprove a visa petition, an alien's submission of an unapproved visa petition in conjunction with a request to "port" under INA § 204(j) would not be amenable to Immigration Judge adjudication. *Cf.* American Immigration Law Foundation Practice Advisory, dated January 9, 2008, at 3. Although DHS has issued memoranda providing that an applicant seeking to "port" off an unapproved visa petition may do so if the adjudicator first adjudicates the unapproved visa petition, and then the adjustment of status application, these memoranda apply only to aliens applying for adjustment of status before DHS, which is charged with exclusive jurisdiction to approve or disapprove visa petitions. *See Matter of Aurelio*, 19 I&N Dec. at 460. *See, e.g.*, May 12, 2005, Memorandum from William R. Yates, at 3, www.uscis.gov/files/pressrelease/AC21intrm051205.pdf. This Memorandum is not applicable to Immigration Judges.

adjustment of status. Accordingly, determination of INA § 204(j) eligibility does not require re-adjudication of the I-140 visa petition.[17]

Although DHS has not promulgated regulations or instituted a formal procedure, a DHS adjudicator generally would engage in a straight-forward factual determination, namely whether the alien is employed in a new job that is in the same or a similar occupational classification as the job for which the petition was filed. An alien seeking to demonstrate that a new job offer is in the same or similar occupational classification as the job offer for which the petition was filed should support such claim with evidence such as: (1) A description of the job duties contained in the labor certification or the initial I-140; (2) A description of the job duties of the new employment; (3) A description of the wage being offered for the new position.[18] If the adjudicator cannot make a determination despite being offered the previous three types of documentation, he or she can look to the Directory of Occupational Titles (DOT) or the Standard Occupational Code (SOC) for a determination of whether a particular position is the "same or

[17] In the case of an approved I-140, DHS has already determined that the applicant qualifies for an employment-based classification. In recognizing that Immigration Judges have the authority to make INA § 204(j) determinations in connection with an alien's application for adjudication of adjustment of status, DHS in no way cedes its authority to adjudicate I-140 petitions. DHS has exclusive jurisdiction over the adjudication of an underlying I-140 petition based on an approved labor certification. 8 C.F.R. § 204(b). Once an I-140 petition has been adjudicated and approved by DHS, it remains valid indefinitely and can be used as the basis for an application for adjustment of status as long as it remains viable. 8 C.F.R. § 205.1. Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, USCIS, File No. HQ 70/6.2, "Supplemental Guidance Relating to Processing Forms I-140 Employment-Based Immigrant Petitions and I-129 H-1B Petitions, and Form I-485 Adjustment Applications Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC-21) (Public Law 106-313), as amended, and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), title IV of Div. C of Public Law 105-277 (May 30, 2008), which can be found at www.uscis.gov/files/nativedocuments/AC21_30May08.pdf.

[18] *See* May 12, 2005, Memorandum of William R. Yates, at 4-5, Question 4, which can be found at www.uscis.gov/files/pressrelease/AC21intrm051205.pdf. The Memorandum states that "[t]he relevant inquiry is if the new position is the same or similar occupational classification to the alien's I-140 employment when considering the alien's new position and job duties and not the geographic location of the new employment." *See also* Question 5, which states, "[a] difference in the wage offered on the approved labor certification, initial I-140 and the new employment cannot be used as a basis of the denial. However, a substantial discrepancy between the previous and the new wage may be taken into consideration as a factor in determining if the new employment is 'same or similar.'"

similar" as the position for which the labor certification was initially done.[19] *See generally* Interoffice Memorandum, from Michael Aytes, Acting Director of Domestic Operations, to Regional Directors and Service Center Directors, dated December 27, 2005, at 3, Question 3.

B. DHS Responses to Specific Board Questions.

i. Under What Circumstances Should the Immigration Judge Grant a Continuance?

It is DHS's position that an Immigration Judge may grant a continuance to allow either party an opportunity to obtain additional evidence in support of or against a finding that a particular job is the "same or similar" for INA § 204(j) visa portability. It would be inappropriate, however, for an Immigration Judge to grant a continuance to allow an alien to approach DHS for a determination of INA § 204(j) eligibility for an alien in removal proceedings, because the Immigration Judge would retain jurisdiction over the application for adjustment of status. As the Immigration Judge has both the jurisdiction and the requisite expertise to adjudicate the application, DHS would not be in support of a continuance in that instance. The act of granting a continuance would not confer DHS jurisdiction over an alien's application for adjustment of status in removal proceedings.

[19] The DOT can be found online at www.oalj.dol.gov/libdot.htm. An article by Angelo A. Paparelli and Kwang-yi Ger Gale, "Adjusting to the New World of Portability Recruiting: Career-Flexibility for Long-Delayed Immigration Cases," indicates at page 5 that: "The O*NET [http://online.onetcenter.org] may be the most useful in determining whether the portability standard ("the same or a similar occupational classification") has been satisfied. This source provides a code number from the SOC list, a "related occupations" search field and a "crosswalk" of similar occupations offering a pathway by DOT job code number from the O*NET." The article further provides at page 6: "Thus, it may be possible to take the DOT code number . . . or the SOC code . . . and use the O*NET crosswalk to determine job similarity for port. If the advertised and prospective jobs are the same or similar, then the immigration benefit of AOS portability may be available." It appears, therefore, that an alien or his attorney would have little difficulty in presenting the adjudicator with actual evidence in support of a claim that a job is the "same or similar" under INA § 204(j), in the same manner in which asylum applicants submit copies of the relevant Department of State Country Reports to demonstrate claimed country conditions in a particular country.

ii. Under What Circumstances Should the Immigration Judge Grant Administrative Closure?

Administrative closure of a case is used to temporarily remove a case from an Immigration Judge's calendar or from the Board's docket. *Matter of Gutierrez*, 21 I&N Dec. 479, 480 (BIA 1996). Administrative closure would not remove jurisdiction over an alien's application for adjustment of status from the Immigration Judge. Accordingly, even if the Immigration Judge were to propose such an action, DHS would most likely object on the basis that such administrative closure would not automatically vest jurisdiction over the application for adjustment of status with DHS, because the alien would remain in removal proceedings. *Matter of Amico*, 19 I & N Dec. 652, 654 n 1 (BIA 1988) ("The administrative closing of a case does not result in a final order. It is merely an administrative convenience which allows the removal of cases from the calendar in appropriate situations"). If DHS were to object, the Immigration Judge could not successfully close proceedings. *Matter of Lopez-Barrios*, 20 I&N Dec. 203 (BIA 1990) ("A case may not be administratively closed if opposed by either of the parties").

iii. Potential Problems With a Continuance or Administrative Closure.

a. DHS does not have jurisdiction over an application for adjustment of status when an alien is in removal proceedings. *See* 8 C.F.R. §§ 245.2(a)(1) and 1245.2(a)(1).

b. If, on remand, DHS subsequently determines that an employment-based visa petition is no longer valid, then an alien who was otherwise qualified for adjustment of status at the time of the removal proceeding, and who had renewed his or her request for adjustment of status before the Immigration Judge, would be deprived of the statutory right to have

a full and fair opportunity to present the merits of his or her adjustment request.

c. If an Immigration Judge declines jurisdiction, it could present logistical challenges in terms of proper file movement and assignment to the appropriate DHS component (Field Office or Service Center) to make the portability determination.[20]

d. It could re-inject DHS into a process over which it no longer has jurisdiction and could subject the agency to mandamus action if, once the question is passed back to DHS, the agency is unable to make the determination in what an alien may deem to be a "timely" fashion.

vi. Termination of Proceedings and Remand.

If the Board continues to find that Immigration Judges lack jurisdiction to make INA § 204(j) determinations, then the best solution would be for the Immigration Judge to terminate proceedings without prejudice, with the consent of DHS,[21] and remand the entire matter back to DHS for adjudication of the adjustment application under procedures in place for adjustment of an application for adjustment of status for an alien not in removal proceedings.[22]

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[20] *See, e.g.*, Declaration of Daniel F. Cashman, dated August 24, 2009, and Declaration of Scott D. Pollock, dated August 25, 2009, Attachment to "Brief of the American Immigration Law Foundation and the American Immigration Lawyers Association as Amici Curiae in Support of the Respondent."

[21] For example, DHS would be unlikely to consent in situations in which the alien is detained and/or has committed crimes.

[22] The Board has held that an Immigration Judge's decision to "divest herself of jurisdiction over [an] adjustment application is in clear derogation of the carefully defined jurisdictional scheme set out in the regulations pertaining to section 245." See Matter of Roussis, 18 I&N Dec. 256 (BIA 1982) ("The immigration judge's decision granting the respondent's motion to remand his adjustment of status application to the District Director [despite the District Director's objection] for adjudication is in clear derogation of the carefully defined jurisdictional scheme set out in

v. *Potential Problems With Termination of Proceedings.*

a. If the alien is ultimately denied adjustment of status, DHS will have to re-institute removal proceedings, causing additional delays in removing an alien who is illegally residing in the United States. There may also be an issue with reinstituting proceedings because of *res judicata* in some jurisdictions.[23]

b. If the alien's adjustment of status application is denied by DHS and the alien is again put into removal proceedings, the regulations under 8 C.F.R § 245.2(a)(5)(ii) would permit the alien to renew his or her adjustment of status application in removal proceedings. If the alien makes another INA § 204(j) claim, the alien would not be precluded from changing jobs again and requesting that the Immigration Judge remand proceedings to DHS for another adjudication. There is a risk here of these cases bouncing back and forth without resolution, which could create significant due process, as well as law enforcement, concerns.

c. If the INA § 204(j) determination is found to be a "separate adjudication" by DHS, rather than part of the adjustment of status adjudication, then an appeal of denial of the INA § 245(j) portability

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the Code of Federal Regulations pertaining to section 245 relief and impermissibly impinges upon the District Director's prosecutorial discretion").

[23] *See Al Mutarreb v. Holder*, 561 F.3d 1023 (9th Cir. 2009) and *Bravo-Pedroza v. Gonzales*, 475 F.3d 1358 (9th Cir. 2007).

request may be appealable, even though an appeal of the denial of an application for adjustment of status is not permitted.[24]

DHS has serious concerns with the bifurcation of INA § 204(j) determinations from the adjustment of status adjudications. All of these concerns could easily be eliminated simply by recognizing that Immigration Judges have the authority to make section INA § 204(j) determinations.

vi. What is the Appropriate Immigration Judge response?

The appropriate Immigration Judge response would be to allow the alien in removal proceedings to present evidence on INA § 204(j) eligibility, in the form of evidence of job title, job duties, salary, and if desired, whether the SOC is the same or similar as the one for which the employment based visa petition was approved. Upon receipt of this evidence, the Immigration Judge should render a decision as to the sufficiency of such evidence and whether the alien has met his or her burden of proving eligibility for INA § 204(j) portability and adjustment of status. It is DHS's position that removing the Immigration Judge's authority to adjudicate such applications for adjustment of status in removal proceedings needlessly bifurcates the process and delays final adjudication. The INA § 204(j) portability issue is not an issue that should be adjudicated aside and apart from the adjustment of status application; rather, INA § 204(j) portability is whole and part of the adjustment of status adjudication.

CONCLUSION

As stated in the Senate Report accompanying AC-21, "America faces a serious dilemma when employers find that they cannot grow, innovate, and compete in global markets without

[24]Under DHS's interpretation, as there is no appeal of a denied I-485 application, there also is no appeal of a determination that the job in question is not the "same or similar" to that described in the underlying employment-based visa petition.

increased access to skilled personnel." S. Rep. 106-260 at 1, 2000 WL 622763. "The country needs to increase its access to skilled personnel *immediately* in order to prevent current needs from going unfilled." *Id.* at 2-3 (emphasis added). As the purpose of the AC-21 was to provide skilled labor to the U.S. market in a timely manner, the Board may, and in DHS's view, should, interpret INA § 204(j) as providing Immigration Judges with the authority to adjudicate applications for adjustment of status in removal proceedings where the application has been pending for 180 days or more, and where an alien who has changed jobs after approval of his or her application for an employment-related visa, claims to have a valid job offer that is in "the same or similar occupational classification as the job for which the petition was filed." As the Board does "not look past the unambiguous meaning of statutory language except in those rare circumstances where strict adherence to the text would lead to an absurd or bizarre result that is 'demonstrably at odds with the intentions of its drafters,'" it should not do so in this case, where to do so would ignore the plain meaning and legislative purpose of AC-21.[25]

Respectfully submitted:

Elena M. Albamonte

Elena M. Albamonte
Appellate Counsel

[25] *See Matter of Briones*, 24 I&N Dec. at 361 (*citing Demarest v. Manspeaker*, 498 U.S. 184, 190-91 (1991) and *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)); *see also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

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CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing document and attachments were served on the respondent's attorney by facsimile to 508-370-3300, and by first-class mail, addressed to:

Kevin R. Leeper, Esq.
Lewis Leeper Attorneys at Law
411 Union Avenue
Framingham, MA 01702

Date: Sept. 16, 2009

Elena M Albamonte
Elena M. Albamonte
Appellate Counsel