

**Amicus: Standing**

May 21, 2015

USCIS Administrative Appeals Office  
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave. N.W., MS 2090  
Washington, DC 20529-2090

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2015 MAY 22 PM 12:00

**Subject:** Amicus: Standing on allow beneficiary as “affected party” to the Immigrant Visa Petition (I-140)

Dear Sir/Madam,

Immigration Voice hereby submits its Amicus Curiae Brief on the proposal to make the beneficiary of the I-140 petition an *affected party* to their I-140 petition. Formed in 2005, Immigration Voice is a national grassroots, nonprofit organization of high skilled immigrants and future Americans who reside in almost every State in the union. These high skilled immigrants legally immigrated to the United States to take part in the American Dream and build stronger communities in this nation. Almost all of our 100,000 members are beneficiaries (or dependents) of approved or pending I-140 petitions.

Immigration Voice humbly request USCIS Administrative Appeals Office to consider making changes to allow the beneficiaries of certain immigrant visa petitions have standing to participate in the administrative adjudication process, including standing to appeal to the AAO. Such a change would be consistent with the clear Congressional intent to allow beneficiaries with approved immigrant visa petition to change jobs under the American Competitiveness in the Twenty-First Century Act of 2000 ("AC21").

The Congress specifically identifies and allows two conditions under which an immigrant with approved immigrant visa petition is allowed to change employer:

- 1.) When an immigrant visa petition is approved but the applicant (and their dependents) has not yet already filed for Adjustment of Status (I-485).

In such situation, section 106(b) of American Competitiveness in the Twenty-First Century Act of 2000 ("AC21") allows the employee and the beneficiary with approved immigrant visa petition to extend H-1B status under section 101(a)(15)(H)(i)(b) in three (3) years increment beyond the 6<sup>th</sup> year on H-1B visa either with the same employer or with a different employer. If the employee and



the beneficiary of immigrant visa petition decide to change employer and file H-1B with a different employer, the Statute allows that employee (and the beneficiary of immigrant visa petition) to port their priority date with the new employer if the new employer decides to file for Employment Based permanent visa petition on behalf of that employee. The Congressional intent and the Statute are clear. However, under the current unfair implementation of the existing law, if the immigrant employee is not considered as the “affected party” then the employer is not obligated to provide the proof of approved immigrant visa petition or the proof of the priority date of the employee’s employment based immigrant visa petition. Immigration Voice members know this first hand that for unfairly discouraging employees (with approved immigrant visa petition) to change jobs and to use immigration system as a long term employee retention insurance policy, a lot of employers are willingly denying their employees the proof of approval of immigrant visa petition and proof of the priority date of the employee’s employment based petition.

Because the immigrant employee is not considered as the “affected party”, the current system makes immigrant employees with approved immigrant application more dependent on employers for a long time, often exceeding many years. This makes immigrant employees stuck in long backlogs as probationary as a summer intern and as capable as an accomplished veteran. This combination of a bonded but highly productive immigrant employee is so attractive to employers that it makes the native born talent uncompetitive in the job market. So in the best interest of US citizens, it's important to level the playing field and have no one in American labor force be indebted to one employer for a long time.

To prevent irreparable direct harm to the immigrant worker and to prevent indirect harm to the U.S. worker, Immigration Voice respectfully request Administrative Appeals Office (AAO) to make changes such that beneficiary of an immigrant visa petition be treated as “affected party” for the purpose of immigrant visa petition (I-140).

2.) When an immigrant visa petition is approved and the applicant (and possibly their dependents) has already filed for Adjustment of Status (I-485).

In such situation, section 106(c) of American Competitiveness in the Twenty-First Century Act of 2000 (“AC21”) identifies applicants with pending unadjudicated Adjustment of Status application for 180 days or more as “Long delayed applicants for Adjustment of Status to permanent residence”. Section 106(c) grants job flexibility to such applicants for changing to “same or similar occupation classification”, whose Adjustment of Status application is pending for over 180 days or more. However, because the immigrant employee is not considered as the “affected party” and only “petitioning employer” is treated as “affected party”, under the current system, the employer can withdraw approved immigrant visa petition of the employee (beneficiary) under 8 CFR Sec. 205.1 (a) (3) (iii)(C). This regulation is unfair as it gives nuclear option to bad employers



who punish employees by revoking immigrant visa petition whenever the employee changes employer. This aspect of the system is being excessively abused by bad employers in marketplace to coerce and threaten immigrant employees from changing jobs, resulting in employee exploitation and preventing labor mobility. System can be improved by making the immigrant employee and the beneficiary of the immigrant visa petition as “affected party” to the petition so that the employer can no longer revoke once the immigrant visa petition is approved. This will allow the employee (and their family members) with pending Adjustment of Status to continue with the on-going employment based petition even after changing employer and subsequently adjust status when the priority date becomes current, as Congress intended under Section 106(c).

We think that beneficiaries of immigrant visa petition (I-140) should have standing as “affected parties” with AAO regarding the denial of an I-140 because they are, in fact, affected parties, especially if the reason for the denial has anything to do with the beneficiary’s qualifications, training, or suitability for the job. More so, beneficiaries of immigrant visa petition (I-140) should have standing as “affected parties” with AAO if the denial of immigrant visa petition has something related to the employer, the employer’s recruitment efforts under PERM, the employer’s ability to pay their employees, or any other possible illegal activity that the employer might be engaged in.

In addition, by including “job portability” benefits in the AC-21 Act, Congress clearly intended for beneficiaries to be able to enjoy job portability while waiting for their green cards. Keeping the beneficiary a “non *affected party*” goes against Congress’s clearly established Statute and intent regarding job portability for employees with approved immigrant visa petition and waiting to adjust status.

The current situation of keeping the beneficiary of immigrant visa petition as a “non *affected party*” has clear negative consequences and irreparable harm to the beneficiary, their families, U.S. Workers and the larger US economy. Some examples of the real damages caused are below:

**Negative Impact to the Beneficiary:**

a) If the company cancels the I-140, it could damage the beneficiaries (legally recognized under dual intent) ability to immigrate.

b) If the company handles the I-140 application improperly, it could again damage the employee's ability to immigrate. An example of this would be failing to respond to an RFE in an appropriate manner.

c) One side effect of having the beneficiary as a non-affected party is the beneficiary is not sent their own I-140. The beneficiary could be unknowingly



violating terms of their visa/status since they have no visibility into their status in the first place. This could be the result of either a malicious employer or one with a less than competent hr/legal department.

d) Canceling I-140 after 6th year of H1 will result in employee losing ability to renew H1 and work in the U.S. This results in a de-facto lack of job mobility and economic opportunity since the employee is scared of leaving their employer during periods when they will need H1 status renewal in the near future. This lack of job mobility runs counter to Congress's demonstrated preference for job mobility as can be seen by the job mobility provisions in the AC-21 act.

e) Keeping the beneficiary as a non-affected party keeps the beneficiary from having legally guaranteed rights to their paper work which opens the door to coercive behavior. The Department of State has chronicled this very type of coercive behavior in its "*SAUDI ARABIA 2013 HUMAN RIGHTS REPORT*" (page 25 on <http://www.state.gov/documents/organization/220586.pdf>). The Code of Federal Regulations should not be condoning the same behavior.

f) Creates mental anguish among beneficiaries since they could lose a hard earned career and immigration status at the whim of a capricious employer. This can be viewed as a form of torture - a violation of the UN convention against torture, signed by the President of the United States on 18th of April 1988 and ratified by Congress on the 21st of October 1994. Again the CFR should not be enabling this.

g) Congress never intended for a person's immigration status to be an employee retention tool. However if the beneficiary of the immigration visa petition is treated as non-affected party with limited job mobility it results in precisely this situation. This causes the beneficiary economic harm since her/his leverage to negotiate the compensation is limited.

h) Congress has demonstrated a clear intent for guest worker job portability by, creating the AC-21 portability provision for when employees are waiting for Adjustment of Status process to complete and making the H1 transferable. The current situation of employers having unhealthy leverage over employees (by way of employees not being considered affected parties in their own immigration status) flies in the face on Congressional intent. It harms the employees economic prospects in otherwise free labor market and creates unnecessary stress in the employee's life which could be construed as torture as described above in #e and #f.

i) There will be consequences to the beneficiary's family some of whom could be US citizens (like children born in the US). By being party to an I-140 filing, the beneficiary clearly has demonstrated intent to immigrate and has likely made decisions accordingly by putting roots down (for eg buying property investing in small businesses). Keeping the beneficiaries fate tied up with one employer for a long time is very risky in these dynamic economic times with companies rising and failing frequently. It represents an outmoded 19th century outlook towards the economy in dire need of modernization - as per president Obama's directive.

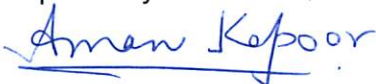
**Negative Impact to the Economy:**

a) The current system damages healthy US companies that are willing to play by rules since it deprives them of free market talent. Conversely it rewards companies that abuse immigration rules as an employee retention tool since they are able to retain employees often at sub-market wages.

b) Having employees bound to an employer by way of their immigration status for extended periods of time damages the U.S. job market (and U.S workers) because it creates perverse incentives for bad employers to hire foreign workers for wrong reasons.

Therefore, Immigration Voice respectfully request Administrative Appeals Office (AAO) to make changes such that beneficiary of a immigrant visa petition be treated as "affected party" for the purpose of immigrant visa petition (I-140).

Respectfully submitted,



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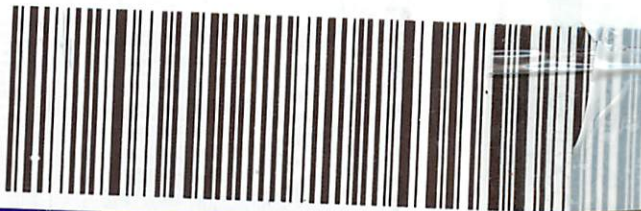
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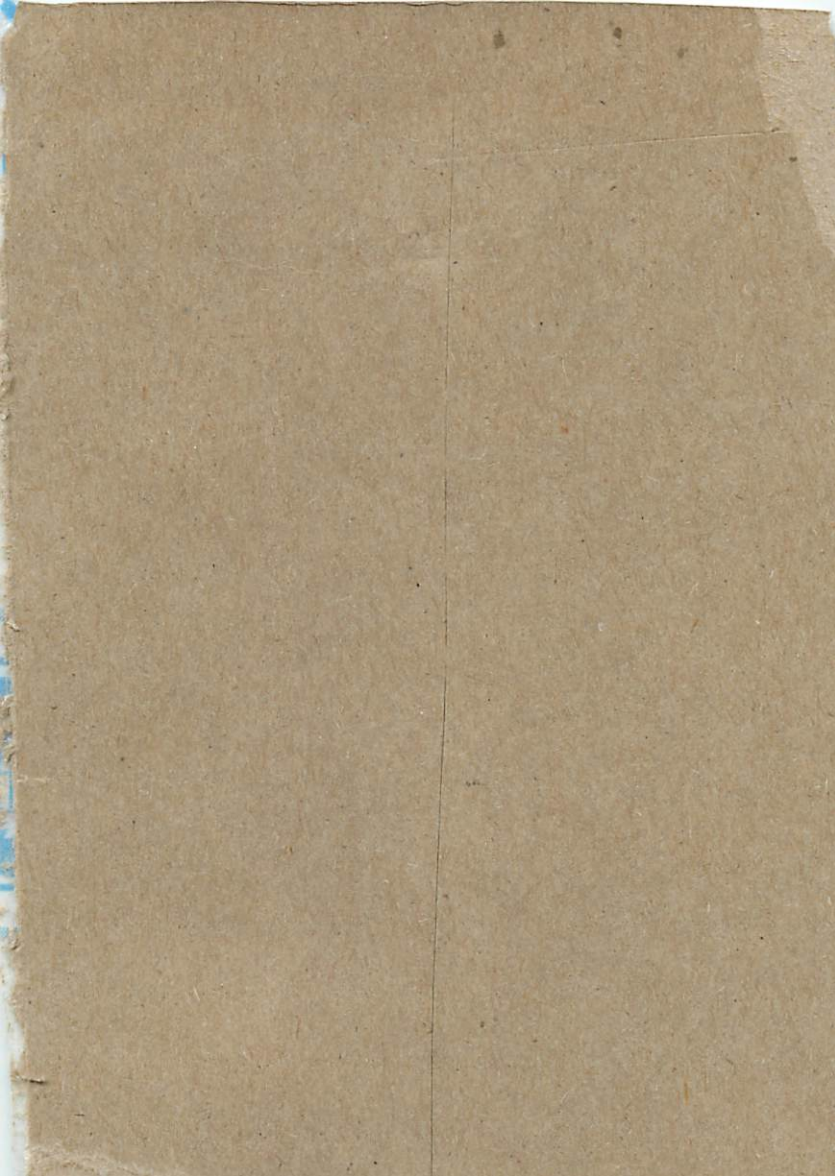
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