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May 20, 2015

VIA FEDERAL EXPRESS

ENCL: AMICUS
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

**RE: Request for Amicus Curiae Briefs: Standing of I-140 Beneficiary**

Dear Sir/Madam:

In reference to April 7, 2015, Request for Amicus Curiae Briefs by the Administrative Appeals Office on Standing of the I-140 Beneficiary, please find enclosed the Amicus Curiae Brief of the Murthy Law Firm.

Should you have any questions or require any additional information, please do not hesitate to contact me directly.

Respectfully yours,

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# Amicus: Standing

The Murthy Law Firm (MLF) respectfully submits this brief as Amicus Curiae at the request of the Administrative Appeals Office (AAO), pursuant to AAO Practice Manual § 3.8(e).

## INTEREST OF AMICI CURIAE

Amici MLF is a nationally renowned law firm practicing exclusively in the area of U.S. immigration law with substantial experience representing individual aliens with substantial interest in the AAO's resolution of this case.

Amicus MLF has 20 lawyers who believe that immigration representation and a deep commitment to humanity go hand in hand. Amicus MLF has been representing clients in matters related to American Competitiveness of the Twenty-First Century Act of 2000 (AC21) § 106(c) since its enactment. MLF has also litigated AC21 § 106(c) in the U.S. District Court for D.C. and argued for I-140 Beneficiaries' right to standing in AC21 situations before U.S. Citizenship and Immigration Services and the AAO. Amicus has a significant interest in the fair, uniform and just administration of federal immigration laws. The decision by the AAO will significantly impact the many individuals who are both beneficiaries of Form I-140, Immigrant Petitions and applicants for a Form I-485, Application to Adjust Status. Amicus seeks to present its unique experience and knowledge to address the question of law posed by the AAO.

## SUMMARY OF ARGUMENT

INA § 204 is the statutory provision that lays out the "Procedure for Granting Immigrant Status." The enactment of AC21 § 106(c), amending INA § 204, in October 2000 changed the nature of the relationship between the I-140 petitioner and its beneficiary. Despite this Congressional decision to change the nature of the "[p]rocedure," USCIS has issued no regulations or even guidance to address the shift in relationship from the more passive alien who becomes a Lawful Permanent Resident (LPR) in less than 180 days to the alien who is to benefit from AC21 § 106(c), and the I-140 Petition, *i.e.*, a more active role involving notice regarding new employment. 8 CFR § 103.3(a)(iii)(B), pre-dating AC21 § 106(c), defines an "affected party" to "not include the beneficiary of a visa petition." **By establishing that the I-140 and underlying Labor Certification would continue to provide the I-140 beneficiary with a lawful basis for Adjustment of Status to LPR even if employed by a different employer, Congress imbued the I-140 beneficiary with a valuable and more active interest allowing for certain employment flexibility**. Once an I-140 beneficiary satisfies the pre-requisites for benefiting from AC21 § 106(c), the law should recognize that the sponsored alien is now the principal "affected party" who can be "represented by an attorney" and have "legal standing in a [I-140 Petition] proceeding." To hold otherwise would defeat the clear intent of Congress in enacting AC21 § 106(c).

AC21 § 106(c) in its most basic form provides that an alien must be the beneficiary of a valid I-140 Petition, an I-485 Application pending for at least 180 days, and a new, accepted, job offer in the "same or . . . similar" occupational classification:

> (j) 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."

A number of relevant Precedent Decisions already exist to address AC21 § 106(c) along with agency policy guidance. Matter of Marcal Neto, 25 I. & N. Dec. 169 (BIA 2010), 25 I. & N. Dec. 169 (AAO 2010), Matter of Al Wazzan, 25 I. & N. Dec. 359 (AAO 2010), and USCIS Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313), originally issued by USCIS Associate Director for Operations William R. Yates (May 12, 2005), and re-issued by Acting Director of Domestic Operations Michael Aytes (Dec. 27, 2005) (2005 Aytes Memo).

In the 2005 Aytes Memo, USCIS interpreted AC21 § 106(c) to allow an I-140 beneficiary to qualify for AC21 Green Card Portability when the I-140 Petition is still pending if it was approvable when it was filed. *See*, Section I, Question 1, in the 2005 Aytes Memo. This policy guidance has been read to "effectively eliminate[] the distinction between petitions that have been 'approved' and petitions that are 'approvable'," with USCIS responsible for adjudicating and then approving approvable petitions. Ravulapalli v. Napolitano, 773 F. Supp. 2d 41, 53 (D.D.C. 2011). The problem, however, is that under Section I, Question 2, the I-140 beneficiary who is also an I-485 applicant (hereinafter beneficiary/applicant) is denied the opportunity to address any deficiencies in the I-140 Petition if s/he chooses to "port" the I-485 Application to the new employer.

In Vemuri v. Napolitano, 845 F. Supp. 2d 125 (D.D.C. 2012), the District Court contemplated the beneficiary/applicant's standing under AC21 § 106(c). The Vemuri Court ruled against standing because the beneficiary/applicant did not claim an injury, *i.e.*, that USCIS interfered with her ability to port under AC21 § 106(c), and because the beneficiary/applicant's interests in porting allegedly did not satisfy prudential standing requirements prior to Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. __, 134 S.Ct. 1377, 1387 (2014). Under Lexmark, the Vemuri Court would have ruled – and the AAO should now rule – that the beneficiary/applicant falls squarely within the zone of interests protected by constitutional standards for standing. The Lexmark Court phrased the standing question thus: "Whether a plaintiff comes within the zone of interests is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." Id. at 1387 (internal quotations omitted). AC21 § 106(c) was enacted to protect the I-140 beneficiary even though Congress decided to place it in INA § 204 instead of INA § 245.

In Matter of Al Wazzan, 25 I. & N. Dec. 359, the AAO ruled that validity is established when the I-140 Petition is approved. However, Al Wazzan does not preclude AAO from upholding the Ravulapalli Court's treatment of the 2005 Aytes Memo. The I-140 beneficiary can be granted standing - if the I-140 Petition and I-485 Application are pending at least 180 days - to address any deficiencies alleged by USCIS. The beneficiary/applicant would thus have the opportunity to demonstrate that he or she is "entitled to the requested classification," allowing USCIS to approve it. Al Wazzan, 25 I. & N. Dec. at 367. Similarly, an approved I-140 Petition subject to revocation does not deprive the beneficiary of AC21 "Green Card Portability" eligibility. The argument, made by USCIS in its administrative decisions, elsewhere, that revocation deprives the alien of eligibility for AC21 § 106(c) when its effect is retroactive to the date of the initial I-140 approval has been

and should remain rejected. *See*, Mawalla v. Chertoff, 468 F. Supp. 2d 177, 182 (D.D.C. 2007) ("That is, no alien whose I-140 petition is revoked under 8 C.F.R. § 205.1 could ever satisfy the 180-day requirement. This reading is contrary to Congress's intent in passing AC21.") The purpose of AC21 § 106(c), recognized even by the Mawalla Court ruling against the plaintiff, is to give the beneficiary/applicant the "flexibility" to find a new job and still continue with her Green Card case despite the delays caused by USCIS processing. Id. Congress was quite clear that it expects immigration benefit requests to be adjudicated within 180 days. *See*, 8 USC § 1571(b), Immigration Services and Infrastructure Improvements Act of 2000 (adjudication "should be completed not later than 180 days after the initial filing of the application....").

Nothing in the INA precludes USCIS ***either*** from taking more than 180 days to adjudicate an I-140 Petition or from revoking an approved I-140 at any time prior to the beneficiary/applicant's adjustment to LPR status. Absent a recognition of the beneficiary's standing, the consequence of USCIS's re-adjudication of I-140 eligibility includes the denial of valid I-140 petitions and the related adjustment of status applications. When such re-adjudications occur long after the employment relationship with the I-140 Petitioner has ended is that the employer that filed the I-140 no longer has any interest in the outcome of the case. However, such a change in the employer's intent or interest after the passage of 180 days does not reflect the absence of a bona fide intent of the petitioner and beneficiary during that initial 180 day period when Congress expected USCIS to finally adjudicate the request for Adjustment of Status. Similarly, the change in the employer's interest in the outcome of the I-140 case, and a failure to address post-approval re-adjudication notices, does not reflect the validity of the I-140 petition at the time of filing. Consequently, AC21 § 106(c) is wholly vitiated if the alien is denied the right to protect their essential interest in the I-140 petition which is the underlying basis of their application for permanent residence in the United States of America.

## ARGUMENT

### I. Agency Precedent Decision in *Matter of Marcal Neto*, 25 I. & N. Dec. 169 (BIA 2010), Recognizes Protected Interest of Alien to Defend Eligibility Under AC21 § 106(c).

The AAO now raises the question for briefing as to whether an alien who is an I-140 beneficiary and I-485 applicant should be recognized under the law as having standing to contest substantive issues of eligibility in the adjudication of an I-140 prior to approval or during revocation proceedings. A related question has been decided by Matter of Marcal Neto, 25 I. & N. Dec. 169, 173 (BIA 2010), the Board of Immigration Appeals (the Board) ruled that aliens can present evidence that the I-140 Petition underlying their I-485 Application is valid and that the new job is the "same . . . or similar" as AC21 § 106(c) requires. The Department of Homeland Security (DHS) argued that the question of AC21 § 106(c) eligibility is a component of the I-485 Application adjudication and therefore the adjudication of questions of fact and law in connection with this provision of law were ones historically within the jurisdiction of an Immigration Judge and the Board. However, the Board explicitly disagreed with the DHS rationale as reflected in its Marcal Neto decision. The Marcal Neto Board agreed to adjudicate AC21 § 106(c) questions. However, the Board did not do so as argued by DHS, *i.e.*, that AC21 § 106(c) is an I-485 adjudicatory question. Marcal Neto ruled that "Immigration Judges may determine whether an approved employment-related visa petition, a Form I-140 (Immigrant

Petition for Alien Worker), remains valid when an alien changes his or her job but alleges that the new job is similar to the original position." Id. at 170. The law demands though that to protect the interests of the alien beneficiary/applicant under AC21 § 106(c), treatment of the I-140 beneficiary under 8 CFR § 103.3(a)(1)(iii)(B) and 8 CFR § 103.2(a)(3) must change. Marcal Neto recognized that this means that an alien – notwithstanding being in removal proceedings – has standing under the INA to contest the validity of his I-140 Petition, *i.e.*, an affected party.

Under the constitutional test for a party's standing, the question is whether the statute was enacted to protect the interests of the specific claimant. *See*, Lexmark, 134 S.Ct. at 1387. Marcal Neto recognized that AC21 § 106(c) exists **for the interests of the sponsored worker**, not the sponsoring employer. "The purpose of § 1154(j) is to give aliens with approved I-140s the flexibility to change jobs if USCIS takes more than 180 days to process their applications for adjusted status." Mawalla, 468 F. Supp. 2d at 182. The Marcal Neto Board very plainly stated that when there is a question about I-140 validity, the question can and should be posed to the alien who is the beneficiary/applicant. This decision plainly establishes that the Beneficiary is an interested party on questions regarding the validity of the I-140 Petition.

The decision for the AAO is now whether to extend Marcal Neto and give standing as an "affected party" to the beneficiary/applicant who has both an I-140 Petition pending or approved with an I-485 Application pending for at least 180 days **for the purpose of defending the approvability of the I-140 before USCIS.** If the purpose of AC21 § 106(c), recognized by multiple courts besides Congress, is to provide the alien with "flexibility" and not to constrain her, then standing is a necessity. The Marcal Neto Board sought to avoid frustrating either the alien or Congress.

> We certainly agree with the parties that the respondent should be able to obtain a decision on the portability of the new employment under section 204(j). That was Congress's intent in enacting section 204(j), and not making such a determination frustrates the adjustment process for these aliens. Since the DHS is not going to make the section 204(j) determination when it lacks jurisdiction over the adjustment application, we agree that the Immigration Judge must do it. Any other conclusion would result in unfairness.
>
> ....
>
> As a final matter, we believe that allowing Immigration Judges to make section 204(j) determinations is more in line with the legislative purpose of the American Competitiveness in the Twenty-First Century Act, which appears to be intended to free aliens from the need to file new employment visa petitions, or to obtain formal reapproval of prior petitions, when they change jobs after a significant delay in the adjudication process.

Id. at 173-74 and 176. The only conclusion by the AAO that will also not "frustrate[]" either Congress or the alien is to give the beneficiary/applicant the standing to defend the I-140 Petition.

## II. Standing of the I-140 Beneficiary is Also Required for Pending Petition Based on Agency Guidance and *Matter of Al Wazzan*, 25 I. & N. Dec. 369 (AAO 2010).

The zone of interests protected by AC21 § 106(c) are not diminished by the fact that an I-140 Petition is pending. The agency recognized this interest of the alien with an I-485 Application

pending on a not-yet-approved I-140 in both iterations of the 2005 Aytes Memo. "Congress acted with the intent to regulate or protect immigrants' interests." Kurapati v. USCIS, 767 F.3d 1185 (11th Cir. 2014). A change to the law, giving an alien standing, will have a significant impact given that under 8 CFR § 103.3(a)(2)(v)(B)(2), all such individuals will instantly become eligible to file untimely appeals of their denied I-140 Petitions on a showing that at the time of denial, they were also an applicant for Adjustment of Status. The 2005 Aytes Memo recognized that AC21 § 106(c) required the agency to act differently towards an I-140 Petition where the beneficiary had a claim to this new benefit from Congress.

The 2005 Aytes Memo implementing AC21, slightly modifying the previous version of this memorandum, specifically addressed the situation where the I-140 Petition remains pending after the I-485 Application was pending for 180 days. In this situation, USCIS required the I-140 Petition to be adjudicated and approved if it would have been "approvable" had it been adjudicated when filed or within 180 days thereafter. The Ravulapalli Court referred to this as the "Yates Review," because it first comes up in the 2005 Yates Memo. Ravulapalli, 773 F. Supp. 2d at 53-54. While the Ravulapalli Court notes that this interpretation was not compelled by the text of AC21 § 106(c) it is consistent with the agency regulation allowing concurrent filing of an I-485 with an I-140. Id. at 51-53. This agency guidance is consistent with the Precedent Decision in Al Wazzan, 25 I. & N. Dec. 369. While Al Wazzan demands an approved I-140 Petition, nothing in that decision compels the approval to be issued prior to the porting or to the filing of the I-485. Furthermore, a beneficiary/applicant with a pending I-140 has no less of an interest in the approval of the petition.

## III. I-140 Beneficiaries Should be Given the Right to Defend an I-140 Petition Against Revocation when the I-485 has Been Pending for 180 Days.

The principle of protecting the alien's interest is even more essential when USCIS pursues revocation of an I-140 Petition under 8 CFR § 205.2, *i.e.*, for cause. USCIS's position, under Al Wazzan, is that the beneficiary/applicant is ineligible for the AC21 § 106(c) benefit if "this petition cannot be deemed to have been valid for purposes of section 106(c) of AC21." Id. at 367 (internal quotations omitted). Under the 2005 Aytes Memo, the alien loses the benefit of AC21 § 106(c) as soon as the I-140 approval is revoked for cause. Yet, as the Murthy Law Firm has seen, often time the final revocation occurs **not because of a failure by the I-140 petitioner to overcome a deficiency but because the alien has left its employment and the petitioner has no remaining interest in the outcome of the petition.** There is a foundational disconnect in a system that vests sole legal interest in the petitioner, even after the point at which, due to AC21 § 106(c), the petitioner no longer has any stake in the matter.

USCIS application of Section I, Question 11 in tandem with Al Wazzan, produces a result where the petitioner **ignores** a USCIS Notice of Intent to Revoke for no reason other than no longer having any legal interest in the case. When the I-140 is approved by USCIS, there is no warning given to discourage the beneficiary from porting based on the pending I-485. In fact, Al Wazzan's plain language encourages beneficiary/applicants to leave their I-140 petitioner employers if the I-140 is approved – and thus "valid" as a matter of law – but USCIS has not approved the I-485. It is not just unfair but arguably a violation of AC21 § 106(c) for USCIS to ignore reality and revoke approved I-140 Petitions when the employer no longer has any interest in defending the approval because the employee no longer works with the I-140 petitioner/

employer. What employer will expend money or time to protect an I-140 approval for an employee who has left its employment and likely taken a job with a competitor?

The statute (for which USCIS has never issued an implementing regulation) demands that AAO issue a decision allowing beneficiaries/applicants to defend their I-140 Petitions. Such a change to a binding rule has already been recognized as possible by USCIS in its implementation of INA § 204(l). On December 16, 2010, USCIS issued a policy memorandum entitled, Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act, (2010 204(l) Memo), giving instructions to immigration officers faced with the situation of a withdrawn I-140 and I-130 visa petition and derivative beneficiary who may qualify under INA § 204(l). Under Matter of Cintron, 16 I. & N. Dec. 9 (BIA 1976), a Service officer is prohibited to ignore the withdrawal and no further adjudication is permitted. However, the 2010 204(l) Memo recognizes that the enactment of a new INA provision has the effect of changing the scope of existing rules.

> Pursuant to section 204(l) of the Act, whether an employment-based petitioner is able to withdraw the petition and possibly affect the ability of principal beneficiary's alien widow(e) or children to immigrate on the employment-based visa, depends on when that petitioner is attempting to withdraw the petition.

2010 204(l) Memo, p. 6.[1] USCIS has already recognized that AC21 § 106(c) has such a similar effect. In the August 2003 memorandum, Continuing Validity of Form I-140 Petition in accordance with Section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (AD03-16), from Acting Associate Director for Operations William R. Yates, USCIS states that when an I-140 is approved and the I-485 is pending at least 180 days, the withdrawal of the approved I-140 by the Petitioner will not terminate the I-485 Application. The reason for this change from the requirement of an approved I-140 Petition is that pursuant to AC21 § 106(c), the alien may still qualify for Adjustment of Status based on a new job offer and the I-140 shall remain "valid." This guidance directs that a request to the alien for evidence of such qualifying employment should be issued pursuant to 8 CFR § 103.2(b)(16)(i), which requires the Service to notify the alien of "derogatory information" of which he is unaware.

The body of law governing the process by which USCIS is supposed to adjudicate revocations-for-cause emphasizes the necessity of giving notice and opportunity to rebut to the interested party. **The fact that agency regulations define the beneficiary/applicant as not being an "affected party" does not diminish the fact of reality that the alien is when an I-485 has been pending for 180 days that he or she – and not the employer – is the true interested party**. 8 CFR § 205.2 imposes a requirement that USCIS be specific in its statements of the grounds for considering revocation. 8 CFR § 103.2(b)(16)(i) requires USCIS notify the "petitioner or applicant" of the "derogatory information." In the context of AC21 § 106(c), the petitioner may not care or enough. This is why in cases like Ilyabayev v. Kane, 847 F. Supp. 2d 1168 (D. Ariz. 2012), the District Court held that the beneficiary can be heard on the I-140 when he has filed an I-485. In Matter of Holmes, 14 I. & N. Dec. 647 (BIA 1974), the Legacy INS was ordered to give the beneficiary of an I-130 petition the opportunity to review and address adverse evidence, and in Matter of Arteaga-Godoy, 14 I. & N. Dec. 226 (BIA 1972), the Board ordered the

[1] The 2010 204(l) Memo, at pp. 6-7, explains that due to specific elements of an I-130 Petition-based Green Card, the withdrawal of an I-130, post-enactment of INA § 204(l) does not change the effect of Cintron.

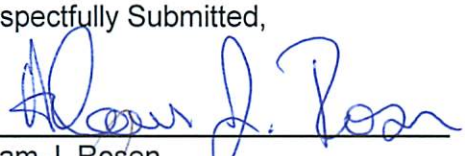
Legacy INS to reverse the denial of I-130 for a petitioner to review and respond to adverse evidence, imposing the same binding mandate on USCIS as 8 CFR § 103.2(b)(16). The Precedent Decisions specific to the revocation process, including Matter of Mata, 15 I. & N. Dec. 524, 525 (BIA 1975), Matter of Tahsir, 16 I. & N. Dec. 56, 57 (BIA 1976), and Matter of Estime, 19 I. & N. Dec. 450, 451 (BIA 1987), consistently rule in favor of making sure the party affected by the decision be informed of the problems and be given an opportunity to respond. "The regulations require that [the Petitioner] be given an opportunity to inspect the record." Tahsir, 16 I. & N. Dec. at 57. With the enactment of AC21 § 106(c) justice is denied and the intent of Congress is disregarded, thereby contradicting the statute, if the alien beneficiary/applicant is denied the right to defend the I-140 already determined to be "valid" against revocation.

## CONCLUSION

Based on all of the above, we respectfully request that the AAO rule that an alien who is the beneficiary of an I-140 and an I-485 application pending at least 180 days qualifies as an "affected party." Such an alien should have the full right – like the petitioner that filed the I-140 – to address deficiencies identified by USCIS in the I-140, in all contexts. Such situations will range from responding to a Request for Evidence, Notice of Intent to Deny, or Notice of Intent to Revoke to filing Motions and Appeals of adverse decisions. This is the only just course of action and it is one that is consistent with existing law, as well as prior agency rules and practices as described herein.

Dated: May 20, 2015

Respectfully Submitted,



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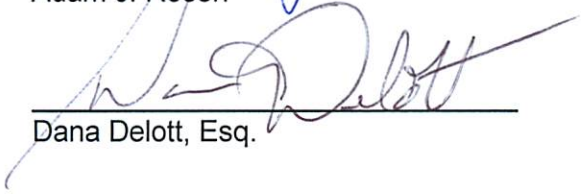

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