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ADMINISTRATIVE APPEALS OFFICE (AAO)
U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS)
DEPARTMENT OF HOMELAND SECURITY (DHS)

20 Massachusetts Ave., NW, MS 2090
Washington, D.C. 20529-2090

AMICUS BRIEF

ON THE QUESTION OF "STANDING" FOR VISA PETITION BENEFICIARIES

I. INTRODUCTION

AAO seeks *amicus* briefing[1] on whether the beneficiaries of certain employment-based immigrant visa petitions (mainly I-140s but perhaps certain I-360s also) have standing to participate in the administrative adjudication process, including standing to appeal to the AAO (and if so, when, and under what circumstances).[2] Specifically, the AAO seeks briefing on this issue in the context of Form I-140, Immigrant Petitions for Alien Workers, and the effect, if any, of the American Competitiveness in the Twenty-First Century Act of 2000 ("AC21"), Pub. L.

[1] See **USCIS Administrative Appeals Office: Request for Amicus Curiae Briefs** at: http://www.uscis.gov/sites/default/files/USCIS/About%20Us/Directorates%20and%20Program%20Offices/AAO/3-27-15-AAOamicus.pdf

[2] Individuals claiming eligibility under section 203(b)(1)(A) as aliens of extraordinary ability or requesting a National Interest Waiver (NIW) under section 203(b)(2)(B) of the Act are explicitly allowed to self-petition under the statute. In these two classifications, an individual may be considered both the beneficiary and the petitioner.

106-313 on denied I-140 immigrant visa petitions or approved petitions later revoked. Last year, the U.S. Supreme Court issued a decision clarifying its analytical framework to determine whether a statute grants standing to potential plaintiffs who seek redress in the courts. *See* ***Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. , 134 S.Ct. 1377 (2014).** In light of *Lexmark* and other court decisions[3] the question of "...whether a plaintiff comes within the *zone of interests* requires the Court to determine, using traditional statutory-interpretation tools, whether a legislatively conferred cause of action encompasses a particular plaintiff 's claim. *See, e. g.,* ***Steel Co. v. Citizens for Better Environment*, 523 U. S. 83**, 97, and n. 2. Pp. 6–9." *Lexmark* syllabus at 2.

> **Note 2:** Justice Stevens thinks it illogical that a merits question can be given priority over a statutory standing question *(**National Railroad Passenger Corp.**)* and a statutory standing question can be given priority over an Article III question (the cases discussed *post,* at 115-117), but a merits question cannot be given priority over an Article III question. See *post,* at 120, n. 12. It seems to us no more illogical than many other "broken circles" that appear in life and the law: that Executive agreements may displace state law, for example, see ***United States* v. *Belmont*, 301 U. S. 324, 330-331 (1937),** and that unilateral Presidential action (renunciation) may displace Executive agreements, does not produce the "logical" conclusion that unilateral Presidential action may displace state law. The reasons for allowing merits questions to be decided before statutory standing questions do not support allowing merits questions to be decided before Article III questions. As ***National Railroad Passenger Corp.*** points out, the merits inquiry and the statutory standing inquiry often "overlap," **414 U. S., at 456**. The question whether *this* plaintiff has a cause of action under the statute, and the question whether *any* plaintiff has a cause of action under the statute are closely connected—indeed, depending upon the asserted basis for lack of statutory standing, they are sometimes identical, so that it would be exceedingly artificial to draw a

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[3] *See, e.g.,* ***Kurapati v. USCIS*, 775 F.3d 1255 (11th Cir. 2014); *Patel v. USCIS*, 732 F.3d 633 (6th Cir. 2013); *Musunuru v. Holder*, --- F.Supp.3d ----, No. 2:2014cv00088 (E.D. Wis. 2015); *Vemuri v. Napolitano*, 845 F.Supp.2d 125 (D.D.C. 2012)** and cases cited therein

> distinction between the two. The same cannot be said of the Article III requirement of remediable injury in fact, which (except with regard to entirely frivolous claims) has nothing to do with the text of the statute relied upon. Moreover, deciding whether any cause of action exists under a particular statute, rather than whether the particular plaintiff can sue, does not take the court into vast, uncharted realms of judicial opinion giving; whereas the proposition that the court can reach a merits question when there is no Article III jurisdiction opens the door to all sorts of "generalized grievances, " ***Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208, 217 (1974),** that the Constitution leaves for resolution through the political process.

II. The Proper Starting Point!

Since AAO has asked for briefing on the question of standing, *if any*, of a beneficiary of a visa petition, I believe that the correct place to begin this inquiry is the statute that proscribes the visa petitioning process. As the Supreme Court has observed, traditional statutory-interpretation tools are what matter most in this inquiry into the zone-of-interest as per the applicable statute.

> **8 U.S.C. §1154.[4] Procedure for granting immigrant status**
>
> **(a) Petitioning procedure**
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> * * * * *
>
> **(1)....**
>
> **(D)**
>
> **(i)**
>
> **(I)** Any child who attains 21 years of age who has filed a petition under clause (iv) of subsection (a)(1)(A) of this section or subsection (a)(1)(B)(iii) of this section that was filed or approved before the date on which the child attained 21 years of age shall be considered (if the child has not been admitted or approved for lawful permanent residence by the date the child attained 21 years of age) a petitioner for preference status under paragraph (1), (2), or (3) of section 1153(a) of this title, whichever paragraph is applicable, with the same priority date assigned to the self-petition filed under clause (iv) of subsection

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[4] 8 U.S.C. § 1101 = INA § 101; 8 U.S.C. § 1153 = INA § 203; & 8 U.S.C. § 1154 = INA § 204.

(a)(1)(A) of this section or subsection (a)(1)(B)(iii) of this section. No new petition shall be required to be filed.

(II) Any individual described in subclause (I) is eligible for deferred action and work authorization.

(III) Any derivative child who attains 21 years of age who is included in a petition described in clause (ii) that was filed or approved before the date on which the child attained 21 years of age shall be considered (if the child has not been admitted or approved for lawful permanent residence by the date the child attained 21 years of age) a VAWA self-petitioner with the same priority date as that assigned to the petitioner in any petition described in clause (ii). No new petition shall be required to be filed.

(IV) Any individual described in subclause (III) and any derivative child of a petition described in clause (ii) is eligible for deferred action and work authorization.

(ii) The petition referred to in clause (i)(III) is a petition filed by an alien under subparagraph (A)(iii), (A)(iv), (B)(ii) or (B)(iii) in which the child is included as a derivative beneficiary.

(iii) Nothing in the amendments made by the **Child Status Protection Act** shall be construed to limit or deny any right or benefit provided under this subparagraph.

(iv) Any alien who benefits from this subparagraph may adjust status in accordance with subsections (a) and (c) of section 1255 of this title as an alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii).

(v) For purposes of this paragraph, an individual who is not less than 21 years of age, who qualified to file a petition under subparagraph (A)(iv) or (B)(iii) as of the day before the date on which the individual attained 21 years of age, and who did not file such a petition before such day, shall be treated as having filed a petition under such subparagraph as of such day if a petition is filed for the status described in such subparagraph before the individual attains 25 years of age and the individual shows that the abuse was at least one central reason for the filing delay. Clauses (i) through (iv) of this subparagraph shall apply to an individual described in this clause in the same manner as an individual filing a petition under subparagraph (A)(iv) or (B)(iii).

(E) Any alien desiring to be classified under section 1153(b)(1)(A) of this title, or any person on behalf of such an alien, may file a petition with the ~~Attorney General~~ [*Secretary of DHS who has delegated this to USCIS*] for such classification.

(F) Any employer desiring and intending to employ within the United States an alien entitled to classification under section 1153(b)(1)(B), 1153(b)(1)(C), 1153(b)(2), or 1153(b)(3) of this title may file a petition with the ~~Attorney General~~ [*Secretary of DHS who has delegated this to USCIS*] for such classification.

(G) **(i)** Any alien (other than a special immigrant under section 1101(a)(27)(D) of this title)[5] desiring to be classified under section 1153(b)(4) of this title, or any person on behalf of such an alien, may file a petition with the ~~Attorney General~~ [*Secretary of DHS who has delegated this to USCIS*] for such classification.

(ii) Aliens claiming status as a special immigrant under section 1101(a)(27)(D) of this title may file a petition only with the Secretary of State and only after notification by the Secretary [of State] that such status has been recommended and approved pursuant to such section.

(H) Any alien desiring to be classified under section 1153(b)(5) of this title may file a petition with the ~~Attorney General~~ [*Secretary of DHS who has delegated this to USCIS*] for such classification.

* * * * *

(b) Investigation; consultation; approval; authorization to grant preference status

After an investigation of the facts in each case, and after consultation with the Secretary of Labor with respect to petitions to accord a status under section 1153(b)(2) or 1153(b)(3) of this title, the ~~Attorney General~~ [*Secretary of DHS who has delegated this to USCIS*] shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is an immediate relative specified in section 1151(b) of this title or is eligible for preference under subsection (a) or (b) of section 1153 of this title, approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.

* * * * *

(e) Subsequent finding of non-entitlement to preference classification

Nothing in this section shall be construed to entitle an immigrant[6], in behalf of whom a petition under this section is approved, to be admitted [to] the United States as an immigrant under subsection (a), **(b)**, or (c) of section **1153** of this **title [8]** or as an immediate relative under section 1151(b) of this title if upon his arrival at a port of entry in the United States he is found not to be entitled to such classification.

Emphasis added.

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[5] 1101(a)(27)(D) an immigrant who is an employee, or an honorably retired former employee, of the United States Government abroad, or of the American Institute in Taiwan, and who has performed faithful service for a total of fifteen years, or more, and his accompanying spouse and children: *Provided*, That the principal officer of a Foreign Service establishment (or, in the case of the American Institute in Taiwan, the Director thereof), in his discretion, shall have recommended the granting of special immigrant status to such alien in exceptional circumstances and the Secretary of State approves such recommendation and finds that it is in the national interest to grant such status;

[6] This would more appropriately be read as "alien" instead of "immigrant".

(j) Job flexibility for long delayed applicants for adjustment of status to permanent residence ***[AC21]***

A petition under subsection (a)(1)(D)[7] of this section for an individual whose application for adjustment of status pursuant to section 1255 of this title 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.

We must also examine the statutory visa category definitions for clues.

8 U.S.C. §1153. Allocation of immigrant visas

* * * * *

(b) Preference allocation for employment-based immigrants

Aliens subject to the worldwide level specified in section 1151(d) of this title for employment-based immigrants in a fiscal year shall be allotted visas as follows:

* * * * *

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability

(A) In general

Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraph (1), to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are *sought by an employer in the United States*.

* * * * *

(3) Skilled workers, professionals, and other workers

(A) In general

Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (1) and (2), to the following classes of aliens who are not described in paragraph (2):

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[7] This appears to be an instance of the statutory self-references not keeping up with changes to the law, this should be (F) instead of (D).

(i) Skilled workers

Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(ii) Professionals

Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

(iii) Other workers

Other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(B) Limitation on other workers

Not more than 10,000 of the visas made available under this paragraph in any fiscal year may be available for qualified immigrants described in subparagraph (A)(iii).

(C) Labor certification required

An immigrant visa may not be issued to an immigrant under subparagraph (A) until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 1182(a)(5)(A) of this title.

III. CLARIFICATIONS

Immediately above are the statutory descriptions of the EB-2 professional with an advanced degree, as well as the three EB-3 categories. The EB-1A and EB-2/NIW already acknowledge the concept of a *self-petitioner*; the EB-1B requires a specific job offer from a *specific type of employer* but no labor certification; and the EB-1C is restricted to a specific situation involving a *pre-existing employer-employee relationship;* so are excluded from this discussion as irrelevant to the concept being examined. The remaining employment-based categories are the ones that could conceivably include a real-life situation whereby a beneficiary might be compelled, out of frustration, to file a petition for judicial review under the Administrative Procedures Act (APA) [5 U.S.C. *esp.* §§ 701-706]. Further above is the applicable statutory scheme lain down by

Congress as to the petitioning process. These statutes must be examined and reconciled in accord with the approach most recently presented by the U.S. Supreme Court.

IV. The *Lexmark* Analytical Principles

The approach stated by the Supreme Court in 2014, which is most appropriately applied to the current issue is basically summed up as follows. Further discussion and clarification will follow.

> "Although Static Control's claim thus presents a case or controversy that is properly within federal courts' Article III jurisdiction, Lexmark urges that we should decline to adjudicate Static Control's claim on grounds that are "prudential," rather than constitutional. That request is in some tension with our recent reaffirmation of the principle that "a federal court's 'obligation' to hear and decide" cases within its jurisdiction "is 'virtually unflagging.'" ***Sprint Communications, Inc. v. Jacobs*, 571 U. S. , (2013)** (slip op., at 6) (quoting ***Colorado River Water Conservation Dist. v. United States*, 424 U. S. 800, 817 (1976)**). In recent decades, however, we have adverted to a "prudential" branch of standing, a doctrine not derived from Article III and "not exhaustively defined" but encompassing (we have said) at least three broad principles: "'the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff 's complaint fall within the zone of interests protected by the law invoked.'" ***Elk Grove Unified School Dist. v. Newdow*, 542 U. S. 1, 12 (2004)** *(quoting **Allen v. Wright*, 468 U. S. 737, 751 (1984)**)." *Lexmark, Slip Op.* at 6-7

As presently constituted and recognized there are at least three broad principles in play:

- the general prohibition on a litigant's raising **another person's legal rights**;
- the rule barring adjudication of **generalized grievances** *more appropriately addressed in the representative branches*; and
- the requirement that a plaintiff 's complaint fall *within the* **zone of interests** *protected by the law invoked.*

Firstly, it can also be argued that a non-self-petitioning "true beneficiary" would be infringing upon the legal rights of the petitioning employer. Next, if there was an issue that was related to a request to change the implementing regulations, that again is unnecessarily protracted and out of context (out of order) for a beneficiary to seek redress through an APA review of an agency's final action; or through an administrative appeal. Such a general grievance is best handled through a *Petition for Rulemaking* under the APA, **5 U.S.C. § 553**(e) "*Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule*". *See* **here** and **here**. Having ruled out the first two factors, it is left to the "*zone of interests*"

analysis to provide the answer. We must primarily ask who has a right to a benefit under the particular statute at issue but the lower courts far too often go beyond this to ask who has been affected by the adjudication decision.

V. *Zone of Interests* as to Third Party Beneficiaries of Visa Petitions

The *beneficiary* of an employment-based visa petition (I-140 or certain I-360s) filed by an employer *has no standing* under the implementing regulations or statute to bring an administrative appeal (I-290B) before AAO or to file a *Petition for Judicial Review* under the APA in District Court. As the Court observed in *Lexmark*, ""'prudential standing' is a misnomer" as applied to the zone-of-interests analysis, which asks whether "this particular class of persons ha[s] a right to sue under this substantive statute."" *Id.* at 8 (internal citations omitted). The two relevant background principles involved in the analysis are (1) zone of interests and (2) proximate causality.

A. ZONE OF INTERESTS

1. ""We have made clear, however, that the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the "'generous review provisions"' of the APA may not do so for other purposes." *Bennett*, *supra,* at 163 (quoting *Clarke*, 479 U. S., at 400, n. 16, in turn quoting *Data Processing*, *supra,* at 156)." *Id.* at 11-12
2. The statute allowing an employer to file an *employment-based* immigrant visa petition is 8 U.S.C. § 1154(A)(1)(F) {and (G)[8] for special immigrant religious workers}.

[8] (G)(i) will not be discussed in-depth but could be susceptible to a "beneficiary-driven" court challenge.

B. PROXIMATE CAUSALITY

"Proximate cause analysis is controlled by the nature of the statutory cause of action. The question it presents is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits." *Id.* at 14.

C. THE PROVISIONS OF LAW AT ISSUE

The provisions of law at issue in an ***employer-driven*** immigrant visa petition are:

8 U.S.C. §1154. Procedure for granting immigrant status

(a) Petitioning procedure

(1)....

(F) Any employer desiring and intending to employ within the United States an alien entitled to classification under section 1153(b)(1)(B), 1153(b)(1)(C), 1153(b)(2), or 1153(b)(3) of this title may file a petition with the Attorney General for such classification.

(G)(i) Any alien (other than a special immigrant under section 1101(a)(27)(D) of this title) desiring to be classified under section 1153(b)(4) of this title, or any person on behalf of such an alien, may file a petition with the Attorney General for such classification.

VI. Key Points in an Immigrant Petition for a Permanent Worker

As to the *employment-based* immigrant visa categories under consideration here, the first step is for the employer to document efforts made to find an available, willing, and able authorized U.S. worker. If that proves unsuccessful, then the employer may file for a Permanent Labor Certification with the Department of Labor (DOL). Once the DOL approves a request, then, an I-140 petition may be filed with USCIS. In the course of the adjudication of that I-140 petition, *USCIS must render judgment upon the following three central issues*.

- Is the **petitioner** an authorized employer in the United States; in possession of an approved labor certification; and with the ability to pay the proffered wage?
- Does the labor certification describe a **position** that supports and qualifies for the visa category requested in the visa petition?
- Does the **beneficiary** qualify for the position and classification as described in the statutory definition?

VII. Marginal *or* Inconsistent

"In … [the APA] … context … [the Supreme Court has] … often "conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff," and … [has] … said that the test "forecloses suit only when a plaintiff 's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that'" Congress authorized that plaintiff to sue. *Id.,* at ___ (*slip op*., at 15–16)." *Id.* at 11.

We will need to assess 8 U.S.C. § 1154 against 5 U.S.C § 701 through § 706. Some fundamental questions will need to be satisfactorily answered for there to be standing for the beneficiary. Although there have been District Court and Circuit Court Decisions that dance around the outer edges of this issue, they only nitpick on proper adherence to binding regulatory procedures. In **most** I-140 visa petitions, the beneficiary is deprived of standing as to the *merits determination* by the agency.

It is probably more productive to compare the question of standing with the question of ineffective assistance of counsel claims as per ***Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988)**, *aff'd*, **857 F.2d 10 (1st Cir. 1988)** within the benefits request realm. *Lozada* sets forth a set of required steps to be followed in order to make a claim of ineffective assistance of counsel (IAC) but it really applies best within the *Removal Proceedings* context rather than *Affirmative Benefits Request* context. See **here**, **here**, **here**, and **here**. Such claims are only effective when there is a **legally enforceable right** to which someone has been improperly or incorrectly denied. The only party entitled to a visa petition approval is the petitioner, unless approval is prohibited for some particular articulable reason. *See* **8 U.S.C. § 1154**(e) (*Nothing in this section shall be construed to* ***entitle*** *an immigrant, in behalf of whom a petition under this section is approved, to be admitted [to] the United States as an immigrant. ...*).

Another point of interest comes from ***Matter of Polidoro*, 12 I&N Dec. 353 (BIA 1967)**, which concluded thus:

> "In the instant case the adoption took place on May 20, 1960. The adopted person, the petitioner, was at that time 35 years old. It is concluded that the adoption is invalid for immigration purposes and that **the petitioner is not eligible to seek immediate relative status on behalf of the beneficiary** as her adoptive parent.
>
> The argument of counsel has been noted. **The issue in visa petition proceedings is not one of discretion but of eligibility**. The appeal will be dismissed.
>
> **ORDER**: It is ordered that the appeal be and the same is hereby dismissed."

Id. at 354. [**Emphasis Added**.]

VIII. Concrete *and* Particularized Injury

Plaintiffs need to demonstrate a concrete and particularized injury in order to give them standing to bring suit. Fed. R. Civ. P. 12(b) (1)[9] pertaining to a *Motion to Dismiss*, provides a Defendant with an avenue for asserting, *inter alia*, that Plaintiffs lack standing to bring a particular challenge. *Specifically*, Defendants can claim that Plaintiffs have not alleged an adequate *injury-in-fact* that can be redressed by a favorable ruling, and in *that* there is thereby a *lack of subject matter jurisdiction*. ***Christopher Crane, et al v. Jeh Johnson, et al.,*** **F.3d (5th Cir. 2015) No. 14-10049-CV0 April 7, 2015**. More precisely, "[t]o establish constitutional standing, the plaintiff must (1) have an injury-in-fact; (2) that is fairly traceable to the challenged conduct of the defendant; and (3) can likely be redressed with a favorable decision. ***Lujan v. Defenders of Wildlife*****, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 2136 (1992)**." ***Kurapati*** at 1190.

As the various courts have observed, Article III of the Constitution controls this issue. Under the Constitution, the federal courts must first deal with the threshold issue of jurisdiction which includes the question of standing to bring the particular suit. In short there must an actual case and controversy under federal court jurisdiction. When an employment-based immigrant visa petition is filed by an employer, that employer is the petitioner. When that petition is denied, it is the petitioning employer who is deprived of the opportunity to employ the desired alien who possesses the desired knowledge, skills, and abilities (KSAs). Such petitioner is the obvious and

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Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing...

(b) HOW TO PRESENT DEFENSES. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;
(2) lack of personal jurisdiction;
(3) improper venue;
(4) insufficient process;
(5) insufficient service of process;
(6) failure to state a claim upon which relief can be granted; and
(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

correct party who may feel that (s)he has suffered an "injury-in-fact" and therefore, has standing with no questions asked. Under *normal and routine circumstances*, the alien who will thereby not be employed will have no standing because (s)he has filed nothing to protest as having been denied to him or her. When a visa petition is denied (or revoked), the beneficiary may feel like (s)he has suffered an "*injury-in-fact*" but in reality, (s)he has not.

IX. APA –Judicial Review Provisions

5 U.S.C. —Government Organization And Employees
PART I—THE AGENCIES GENERALLY
CHAPTER 7—JUDICIAL REVIEW

§701. Application; definitions

(a) This chapter applies, according to the provisions thereof, **except** to the extent that-

(1) **statutes preclude** judicial review; **or**

(2) agency action is committed to agency **discretion** by law.

(b) For the purpose of this chapter-

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does **not** include-
(A) the Congress;
(B) the courts of the United States;
(C) the governments of the territories or possessions of the United States;
(D) the government of the District of Columbia;
(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
(F) courts martial and military commissions;
(G) military authority exercised in the field in time of war or in occupied territory; or
(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392 ; Pub. L. 103–272, §5(a), July 5, 1994, 108 Stat. 1373 ; Pub. L. 111–350, §5(a)(3), Jan. 4, 2011, 124 Stat. 3841 .)

§702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or

failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance.

Nothing herein

(1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or

(2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392 ; Pub. L. 94–574, §1, Oct. 21, 1976, 90 Stat. 2721 .)

§703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392 ; Pub. L. 94–574, §1, Oct. 21, 1976, 90 Stat. 2721 .)

§704. Actions reviewable

Agency action **made reviewable by statute** and final agency action for which there is **no other adequate remedy in a court** are subject to judicial review. **A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.** Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392 .)

§705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393 .)

§706. Scope of review

To the extent necessary to decision and when presented, **the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.**[10] The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393 .)

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[10] *Fact-finding* is not listed as within the purview of the reviewing court.

X. APA As Applied to Petitioning Provision

8 U.S.C. § 1154(a)(1)(F) allows an **employer** to petition for an alien as a permanent immigrant worker. 8 U.S.C. § 1153 specifies the qualifications necessary for the alien workers. 8 U.S.C. §§ 1153(b)(2) or 1153(b)(3) include descriptions of employment-based immigrant visa categories which require an employer to file a visa petition supported by an approved labor certification and to prove certain facts.

In general, where only the U.S. employer has any **entitlement** to file a petition, (s)he is the only party that may make any APA claim based upon an I-140 petition. The vast majority of such challenges seek a determination that USCIS has made a decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" as per 5 U.S.C. §706 (2)(A). Sometimes, a dissatisfied petitioner will seek other findings such as that the agency decision was "unsupported by substantial evidence" [§706 (2)(E)], or that the agency did not follow proper "procedure" [§706 (2)(D)].

XI. APA Not Applicable to a Beneficiary

In accordance with APA §702 (1) the Court is barred from reviewing a decision where such review is otherwise not allowed by law. Also under APA §702 (2) the Court lacks authority to grant any relief that is forbidden by another statute. In light of these provisions, and in keeping with the spirit and black-letter law of INA § 204 [8 U.S.C. § 1154]; only a United States employer may file a petitioner for the categories under discussion herein and is the only viable plaintiff under the APA.

XII. The Role of the Beneficiary in the Immigration Process

When an immigrant visa petition is filed by a qualified petitioner on behalf of another person; *a beneficiary*, that beneficiary is essentially a "bystander" as far as the law and USCIS are concerned. In this scenario, the beneficiary is a "third party" to the proceeding. The party of the first part is the petitioner, the party of the second part is the government (USCIS and for certain employment-based visas, the Department of Labor (DOL)). The final participant is the alien beneficiary who desires very much to become a legal immigrant to the United States.

In this scenario, since it is the petitioner who actually files the petition, that petitioner is the obvious party with a right to challenge the denial of the petition. The petitioner's first recourse is the administrative appeal to USCIS, for employment-based petitions.[11] If the employer-petitioner is dissatisfied with an Appeal Dismissal, the APA affords an opportunity for Judicial Review under 5 U.S.C. § 706. As was mentioned previously, the vast majority of petitioners will seek a ruling from a U.S. District Court that USCIS and AAO have rendered a decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law". Failing success at that level, the petitioner is free to raise the case to the Circuit Court of Appeals, and even the U.S. Supreme Court.

Congress, however, has thrown a curve-ball into the works by passing AC21 §106(c), codified at 8 U.S.C. § 1154 (j) [INA § 204(j)] *Job flexibility for long delayed applicants for adjustment of status to permanent residence*. This provision is meant to be ameliorative to the beneficiary who has already been waiting a long time. The beneficiary will have already waited long enough for the DOL PERM labor certification process, USCIS' I-140 petition adjudication, and for a visa to become currently available on the Department of State (DOS) Visa Bulletin (published monthly **here**). In order for the flexibility or "portability" provision to become available, an I-485 application for adjustment of status must have been filed and remain unadjudicated for a full 180 days or more (6 months or more). **IF** at such a point, the alien beneficiary has the opportunity to change jobs, **THEN** (s)he may do so without the need for a new I-140 to be filed on his or her behalf. ***Provided that***: the new position is the *same or similar* as the original position on the initial I-140.

Often such a change might involve a promotion-a normal progression on the career ladder; whether with the same employer or a new employer. In the normal course, the request for a determination for "portability" would come during the I-485 adjudication. The I-485 application is filed by the alien beneficiary of the I-140. In the portability scenario, the primary applicant asserting continued visa classification through a new but sustained valid employment position

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[11] The BIA is the appellate authority for most family-based petitions.

is, in fact, the alien applicant for adjustment of status. Under ordinary circumstances an I-485 has no appeal rights and is not amenable to judicial review because it is a purely discretionary decision when adjudicated by USCIS.

XIII. ***Matter of Al Wazzan, 25 I&N Dec.*359 (AAO 2010),** held:

> (1) Although section 204(j) of the Immigration and Nationality Act, 8 U.S.C. § 1154(j) (2000), provides that an employment-based immigrant visa petition shall remain valid with respect to a new job if the beneficiary's application for adjustment of status has been filed and remained unadjudicated for 180 days, the petition must have been "valid" to begin with if it is to "remain valid with respect to a new job."
>
> (2) To be considered "valid" in harmony with related provisions and with the statute as a whole, the petition must have been filed for an alien who is "entitled" to the requested classification and that petition must have been "approved" by a U.S. Citizenship and Immigration Services ("USCIS") officer pursuant to his or her authority under the Act.
>
> (3) Congress specifically granted USCIS the sole authority to make eligibility determinations for immigrant visa petitions under section 204(b) of the Act.
>
> (4) An unadjudicated immigrant visa petition is not made "valid" merely through the act of filing the petition with USCIS or through the passage of 180 days.

Congress and USCIS have been aware of wide spread immigration fraud in various categories for many years and have also known that the focus of fraud shifts from time-to-time. For example, in July 2006, USCIS made public one study it had prepared concerning one variety of fraud. *See*: **U.S. CITIZENSHIP AND IMMIGRATION SERVICES; Office of Fraud Detection and National Security; Religious Worker Benefit Fraud Assessment Summary**. With an abundance of caution comes expanded processing timelines. When adding the extra layers dictated by caution to the already long waiting periods for preference visas due to their annual numerical limits, then the waiting can seem unbearable.

In response to extreme delays in processing, Congress passed ameliorative legislation entitled: "[T]he American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No.

106-313, 114 Stat. 1251 ("AC21").[12] Section 106(c) of AC21, 114 Stat. at 1254, amended section 204 of the Act by adding subsection (j), titled "Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence": A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed." *Id.* at 362

XIV. Regulation v. Statute

In ***Kurapati v. USCIS*, 775 F.3d 1255 (11th Cir. 2014)** the 11th Circuit found that the beneficiary and his derivative family had standing. In this poorly decided case, the Court had its cake and ate it, too, so to speak. On the one hand, the Court refused to recognize the regulation that clearly excludes beneficiaries, who are third-parties instead of self-petitioners, from having standing. On the other hand, the Court sought to extend the application of the revocation notice provision to beneficiaries claiming that USCIS may have failed to follow its own notice procedures which actually do not apply to beneficiaries such as Kurapati. In addition, the 11th Circuit ignored the express wishes of Congress by ignoring 8 U.S.C. **§1155. Revocation of approval of petitions; effective date:** (*The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition.)* The statute is hardly ambiguous as to its discretionary character yet the Court ignored Congress' other statutory provision which embodies the discretionary decision bar; found at 8 U.S.C. § 1252(a)(2)(B)(ii) which unambiguously divested the court of jurisdiction.

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[12] 8 C.F.R. §204.5 (e) already allows for the retention of the priority date when the beneficiary is offered a different position amongst EB-1, EB-2, or EB-3 through a new petition.

"... no court shall have jurisdiction to review- .....

* * * * *

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a)[13] of this title.

In ***Patel,*** the 6th Circuit found standing and described its reasoning thus:

"Under the Administrative Procedure Act, a party has prudential standing if he is "adversely affected or aggrieved by agency action[.]" 5 U.S.C. § 702. A party is "adversely affected or aggrieved" if the interest he seeks to protect is "arguably within the zone of interests to be protected or regulated by the statute that he says was violated." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,* ___ U.S. ___, 132 S.Ct. 2199, 2210, 183 L.Ed.2d 211 (2012) (internal quotation marks omitted). In determining a statute's zone of interests, "we do not look at [the provision at issue] in complete isolation." *Fed'n for Am. Immigration Reform v. Reno,* 93 F.3d 897, 903-04 (D.C.Cir.1996) (citing *Clarke v. Sec. Indus. Ass'n,* 479 U.S. 388, 401-02, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987)). Instead, we look at that provision alongside any other provision that has an "integral relationship" with it, in order to "help[] us ... understand Congress' overall purposes[.]" *Air Courier Conference of Am. v. Am. Postal Workers Union AFL-CIO,* 498 U.S. 517, 529-30, 111 S.Ct. 913, 112 L.Ed.2d 1125 (1991) (internal quotation marks omitted).

The prudential-standing test "is not meant to be especially demanding." *Patchak,* 132 S.Ct. at 2210 (internal quotation marks omitted). Rather, in enacting the Administrative Procedure Act, Congress intended to "make agency action presumptively reviewable." *Id.* (internal quotation marks omitted). Thus, a plaintiff lacks prudential standing only if his "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* (internal quotation marks omitted). And because the plaintiff only needs to be "arguably" within the statute's zone of interests, "the benefit of any doubt goes to the plaintiff." *Id.*" at 635.

The 6th Circuit, like the 11th Circuit, was inconsistent and acting beyond the spirit as well as the black-letter of the statute. The petitioning provision that permits U.S. employers to file employment-based immigrant visa petitions on behalf of aliens is not ambiguous. Although the Supreme Court would counsel caution and thus encourage giving the *benefit of the doubt* to plaintiffs; I must ask **what doubt** is there to give. These Courts have stretched the meaning of various statutory sections to the breaking point in addition to highly selective readings. The 6th

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[13] Asylum.

Circuit tried to invoke the portability provision even though Patel had never reached the point of filing an I-485!

XV. Statutorily Vested Discretion Is Unreviewable

"The parties contend, and the Court agrees, that [8 U.S.C.] § 1252(a)(2)(B) precludes judicial review of discretionary decisions not at issue in this case, and therefore does not itself preclude the Court from exercising subject matter jurisdiction in this case." ***Vemuri*** at n. 2, p. 1

While it is true that Courts have wide latitude in examining the question of their own subject matter jurisdiction which includes determining plaintiffs' standing, there are limits. In my opinion, the D.C. Circuit correctly observed its limits in *Vemuri*. The D.C. Court observed the following:

> "Plaintiff challenges the denial of the I-140 petition under section 10(a) of the Administrative Procedures Act. The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The Supreme Court explained this section "impose[s] a prudential standing requirement in addition to the requirement, imposed by Article III of the Constitution, that a plaintiff have suffered a sufficient injury in fact." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998). As explained below, although Plaintiff sufficiently alleges a redressable injury as required for constitutional standing, Plaintiff fails to show he has prudential standing to challenge the denial of the I-140 petition." At 7.

XVI. Conclusion

Considering the fact that so many specific *conditions precedent* must be in place before a beneficiary could conceivably have standing in court ***as to the visa petition***, it is very difficult for it to happen. ***At the very least*** the following conditions would have to be in place for some sort of ***combined I-140/I-485 portability case*** to be reviewable upon petition of a beneficiary.

1. The plaintiff or appellant is or was the beneficiary of an approved or *approvable* employment-based immigrant visa petition which has a numeric annual limit; and
2. Petition approval was valid or job offer was *bona fide* from the beginning;
    a. The petitioner was *eligible at time of filing* to file a petition:
        i. the job offer was realistic and *bona fide*,
        ii. petitioner had the ability to pay, and

iii. petitioner was qualified as "United States Employer" as defined;

b. The position qualified as:

i. having met the appropriate statutory definition, and

ii. was supported by a valid Permanent Labor Certification; and

c. The beneficiary was *fully qualified* for the position *at time of filing*;

3. There has been an I-485 application properly filed and accepted by USCIS;
4. The I-485 had been pending for 180 days or more; and
5. The beneficiary has been offered a new position which is the same as, or similar to, the original position with either the same employer or a new employer as allowed by section 204(j) of the Immigration and Nationality Act, 8 U.S.C. § 1154(j) embodying Section 106(c) of AC21.

a. The permutations could be:

i. Same employer offers a similar but different position;

ii. New employer offers virtually the same job; or

iii. New employer offers a similar job.

b. This would normally be accomplished through the filing of a written request and adjudicated as per USCIS policy guidance.

i. ***Interim guidance for processing I-140 employment-based immigrant petitions and I-485 and H-1B petitions affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313).***

ii. ***Matter of Al Wazzan, 25 I&N Dec.359 (AAO 2010)***, or

iii. Any superseding guidance or precedent.

The question raised in a *Petition For Review* under the APA; would need to be as to the correctness of the determination regarding the "same or similar position"; in a portability case that was denied; and with an appeal or certification dismissed by AAO.

Dated this 13th day of April, 2015.

X Digitally signed by Joseph P. Whalen
DN: cn=Joseph P. Whalen, o, ou, email=joseph.whalen774@gmail.com, c=US
Date: 2015.04.13 15:56:31 -04'00'

/s/ Joseph P. Whalen

That's my two-cents, for now!

4/13/15