



November 11, 2017

PM-602-0152

## Policy Memorandum

**SUBJECT:** Guidance on Notice to, and Standing for, AC21 Beneficiaries about I-140 Approvals Being Revoked After *Matter of V-S-G- Inc.*

### Purpose

This Policy Memorandum (PM) adopts and provides guidance on the implementation of the Administrative Appeals Office's (AAO) adopted decision in *Matter of V-S-G- Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017).

### Scope

This memorandum applies to and shall be used to guide determinations by all U.S. Citizenship and Immigration Services (USCIS) employees. The updated guidance that follows is effective immediately, and supersedes any existing guidance on this issue.

### Authorities

- American Competitiveness in the Twenty-first Century Act of 2000 (AC21), Public Law 106-313, *amended by* the Twenty-First Century Department of Justice Appropriations Authorization Act (2002), Public Law 107-273
- Sections 204(j) and 205 of the Immigration and Nationality Act (INA), Title 8, United States Code (U.S.C.), sections 1154(j), and 1155
- Title 8 Code of Federal Regulations (C.F.R.), sections 205.2, and 245.25
- *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. \_\_\_, 134 S. Ct. 1377 (2014)
- *Mantena v. Johnson*, 809 F.3d 721 (2nd Cir. 2015)
- *Kurapati v. USCIS*, 775 F.3d 1255 (11th Cir. 2014)

### Policy

On November 11, 2017, USCIS adopted as a matter of policy the AAO's decision in *Matter of V-S-G- Inc.*, which held that beneficiaries who have properly ported under AC21 are affected parties who are entitled to receive notices pertaining to the potential revocation of the approval of an immigrant visa petition due to their ability to port that petition to new employment and a new employer. Now, when USCIS sends a notice of intent to revoke (NOIR) an approval or

notice of revocation (NOR) for a Form I-140 (Immigrant Petition for Alien Worker) to the original petitioning employer, we will also inform the beneficiary of that petition in certain circumstances. Beneficiaries will receive such notice in cases where they have filed a Form I-485 (Application to Register Permanent Residence or Adjust Status) and that I-485 has been pending for 180 days or more and they have already properly requested to port to a new employer.<sup>1</sup> As of January 17, 2017, eligible beneficiaries must notify USCIS of their intent to port to new employment by filing a Supplement J to Form I-485, found at <https://www.uscis.gov/i-485supj>. If the beneficiary ported prior to the implementation of Supplement J, the beneficiary must have affirmatively and properly notified USCIS in writing. USCIS will adjudicate and must make a favorable determination concerning the beneficiary's porting eligibility in order for the beneficiary to be eligible to receive notices of an intent to revoke or of a revocation. These beneficiaries may file an appeal of or a motion on an adverse decision as an affected party.

Regulations state that USCIS may require the beneficiary to inform USCIS if he or she intends to port and to submit evidence that the new job is in the same or a similar occupation before final action is taken on the pending Form I-485. *See* 8 C.F.R. 245.25. In light of recent litigation and AC21, USCIS is reinterpreting its regulations governing revocation on notice in 8 C.F.R. 205.2.<sup>2</sup> This reinterpretation of the regulations concerning who may participate in visa petition adjudications will now include beneficiaries who have affirmatively and timely demonstrated porting eligibility to USCIS. This reinterpretation, however, is limited only to these beneficiaries.

## Background

The law generally recognizes that petitioners control their visa petitions; a beneficiary cannot force a petitioner to pursue or maintain a visa petition. Current regulations preclude

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<sup>1</sup> Under AC21, when the beneficiary of a valid Form I-140 employment-based immigration visa petition files an application to adjust his or her status to that of a lawful permanent resident, and that application remains pending for more than 180 days, the beneficiary may then "port" to a new job if that job is in the same or similar occupational classification as the original one. Codified at section 204(j) of the INA, 8 U.S.C. 1154(j), the provision reads:

JOB FLEXIBILITY FOR LONG DELAYED APPLICANTS FOR ADJUSTMENT OF STATUS TO PERMANENT RESIDENCE

A [employment-based] petition 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.

<sup>2</sup> By comparison, in instances of automatic revocation based on withdrawal or business termination, an approved I-140 remains valid if at least 180 days have passed since approval prior to the withdrawal request or business termination or an associated adjustment of status application has been pending for 180 days or more at the time of the withdrawal request or business termination, unless the petition's approval is revoked on other grounds. 8 C.F.R. 205.1(a)(3)(iii)(C) and (D). Additionally, beneficiaries of such petitions retain their priority dates. *See Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers*, 81 FR 82398 (Nov. 18, 2016).

*beneficiaries* from participating in employment-based immigrant visa adjudication proceedings, including during post-adjudication motions and appeals.<sup>3</sup> Accordingly, USCIS communicates with *petitioners*, not the *beneficiaries* of such petitions. Therefore, USCIS does not provide NOIRs or NORs of the approval of visa petitions to the petitions' beneficiaries.<sup>4</sup> These notices are only provided to the petitioners and/or their representatives. Similarly, beneficiaries may not file appeals or motions on the underlying petitions or the revocations of the approvals thereof.<sup>5</sup>

The traditional distinction of petitioner, beneficiary, and affected party breaks down, however, when the law allows the beneficiary to leave the employ of the original petitioner and take a job elsewhere without disrupting the validity of the underlying immigrant visa petition on which the pending adjustment application depends. As noted above, under AC21, when the beneficiary of a valid I-140 employment-based immigrant visa petition files an adjustment application, and that application remains pending for 180 days or more, the beneficiary may then request to "port" the valid immigrant petition to a new job if that job is the same or similar to the original one. *See* INA section 204(j), 8 U.S.C. § 1184(j); *see also* 8 C.F.R. 245.25(a).<sup>6</sup> When such a request is submitted, the intent of the original petitioner to employ the beneficiary and of the beneficiary to work for that employer in a permanent position may cease to exist, although the original petition would remain valid for purposes of the beneficiary's adjustment of status if the porting request is approved.<sup>7</sup>

However, if USCIS later seeks to revoke the approval of the original visa petition, such as for fraud or material misrepresentation, the original petitioner and the beneficiary are again intertwined by the collateral effect of the revocation on the beneficiary who may have ported, even though the original petitioner may have no further interest in employing the beneficiary. It may be the case that the beneficiary would not learn of the revocation until his or her application for adjustment of status was denied because the approval of the underlying Form I-140 had been revoked. Under prior interpretation of current regulations,<sup>8</sup> in these cases USCIS would issue a NOIR or NOR solely to the original petitioner/employer; no notice would go to the beneficiary or the new employer. In instances in which the beneficiary did learn of the NOIR, and tried to respond to it, the regulations prohibited USCIS from considering that reply. *See* 8 C.F.R.

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<sup>3</sup> 8 C.F.R. 103.2(a)(3) ("A beneficiary of a petition is not a recognized party in such a proceeding."); 8 C.F.R. 103.3(a)(1)(iii)(B) (for motions and appeals, a beneficiary is not an "affected party" with legal standing in a proceeding).

<sup>4</sup> 8 C.F.R. 205.2(b)-(c).

<sup>5</sup> 8 C.F.R. 205.2(d).

<sup>6</sup> 8 C.F.R. 245.25 was recently codified in the final rule, "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers; Final Rule." 81 Fed Reg. 82,490 (Nov. 18, 2016). The rule, which took effect on January 17, 2017, clarified and codified longstanding policies and procedures previously articulated in memoranda and precedent decisions implementing sections of AC21. The final rule did not address notices and standing of INA section 204(j) beneficiaries in Form I-140 revocation proceedings.

<sup>7</sup> The intent to enter into an employment relationship should remain if the beneficiary moves to a new, same, or similar position with the same petitioning employer, but we are discussing the effect of a change in employers in this case.

<sup>8</sup> 8 C.F.R. 205.1(b) and 205.2(b) and (c) address automatic and notice-based revocation, respectively. Both provide for notice solely to the petitioner. *See also* 8 C.F.R. 103.8(a)(1)(i) (designating routine service of mailing decisions to "affected part[ies]" and their representatives only).

205.2(a)-(d) (providing notice of intent to revoke the approval of a visa petition only to the petitioner or self-petitioner, and limiting any appeal from a revocation to the petitioner or self-petitioner).

Porting eligibility under the AC21 statute effectively provides the beneficiary with a means to pursue lawful permanent residence without the initial employer (or “petitioner/employer”). The beneficiary still relies on the I-140 petition approval for adjustment of status to lawful permanent residence but at the same time the beneficiary is not tied to employment with the original petitioner provided that the beneficiary has a new job offer in the same or a similar occupational classification as the job offer in the I-140 petition. Therefore, while no longer tied to employment with the original Form I-140 petitioner, the beneficiary still has an interest in the status of the approved I-140 petition while the petitioner may not.

Put another way, the beneficiary is within the statute’s “zone of interests.” *Cf. Lexmark Int’l, Inc. v. Static Control Components*, 572 U.S. ----, 134 S.Ct. 1377, (2014) (a plaintiff has the ability to sue when his or her claim is within the “zone of interests” a statute or regulation protects). Following *Lexmark*, courts have found that beneficiaries who have ported to new employers fall within the INA section 204(j)’s zone of interests and thus have standing to participate in visa revocation proceedings. *See Mantena v. Johnson*, 809 F.3d 721 (2d Cir. 2015) (the INA, as amended by AC21, requires a form of notice of intent to revoke to either “the successor employer, who is not the original I-140 petitioner,” or the “alien beneficiary who has availed herself of the portability provisions to move to a successor employer,” whichever USCIS determines on remand to be appropriate.); *Kurapati v. USCIS*, 775 F.3d 1255 (11th Cir. 2014) (“We agree that a beneficiary of an I-140 visa petition who has applied for adjustment of status and has attempted to port under [AC21] ‘falls within the class of plaintiffs’ Congress has authorized to challenge the denial of that I-140 visa petition. It is clear from the statutory framework that such immigrant beneficiaries fall within the zone of interests it regulates or protects.”) (citing *Lexmark*).

USCIS generally agrees with the *Mantena* and *Kurapati* courts that beneficiaries who have properly ported under AC21 fall within that statute’s zone of interests due to their ability to pursue lawful permanent residence without the original petitioner. This is not, however, true in cases in which the traditional petitioner/beneficiary relationship exists. For example, in *Patel v. U.S. Citizenship & Immigration Servs.*, 732 F.3d 633 (6<sup>th</sup> Cir. 2013), the court said, “To the contrary, [INA section 203(b)(3), 8 U.S.C. 1153(b)(3)] makes employment visas available *to the immigrant*, rather than his employer, which suggests that Congress gave the immigrant, too, a stake in whether he gets a visa.” *Id.* at 636. (Emphasis in original). USCIS respectfully disagrees with this statement. When the petitioner and beneficiary are in their customary posture (i.e., outside of the INA section 204(j) porting context), and the continuing adjustment application rests on the continuing validity of the petition which is under the petitioner’s control, then USCIS would not conclude that the beneficiary is within INA section 204(j)’s zone of interests. *See* INA section 204(a)(1)(F), 8 U.S.C. 1154(a)(1)(F) (requiring an employer to file a petition to employ an alien under INA section 203(b)(3)).

Therefore, the AAO's adopted decision in *Matter of V-S-G- Inc.* interprets "affected party" for purposes of I-140 immigrant visa petition revocation proceedings, as well as subsequent motions or appeals, to include the petitioner and beneficiary of a valid I-140 who is eligible to and has properly requested to port to new employment under INA section 204(j).<sup>9</sup> A beneficiary's request to port is "proper" when USCIS has evaluated the request and determined that the beneficiary is indeed eligible to port prior to the issuance of a NOIR or NOR. Accordingly, a beneficiary becomes an "affected party" upon USCIS' favorable determination that the beneficiary is eligible to port.

### **Scope of this Memorandum and Revision to the Adjudicator's Field Manual**

USCIS is updating chapters 20.3 and 22.2 of the Adjudicator's Field Manual (AFM) consistent with this memorandum.

### **When USCIS Must Notify a Beneficiary of a Notice of Intent to Revoke the Approval or the Revocation of an I-140 Petition**

In accordance with the *Matter of V-S-G- Inc.* decision, beginning on November 11, 2017, when USCIS sends a NOIR or NOR to the petitioner of an approved I-140 petition, USCIS also will send a NOIR or NOR to the beneficiary of that petition if: (A) the beneficiary has filed a Form I-485 with USCIS that has been pending for 180 days or more; and (B) the beneficiary is otherwise eligible to port and has properly requested to port.<sup>10</sup>

### **Content and Timing of NOIRs and NORs**

USCIS may issue separate and different versions of NOIRs or NORs to a petitioner and a beneficiary when necessary to protect personal and/or proprietary information. The adjudicator should consult his/her supervisor and work with local counsel in drafting the NOIRs or NORs in these cases.

To promote adjudicative efficiency, officers should issue the respective versions of the NOIR and NOR to the petitioner and beneficiary on the same date to ensure that their response times coincide. Officers should place a copy of both notices, as well as any response(s) received, in the same case file.

Below are some common scenarios that may, depending on the circumstances, serve as a basis for USCIS to issue an NOIR and NOR. Please note, this list is not exhaustive.

- USCIS material error in approving the petition. USCIS may revoke an approval if, in the prior decision, USCIS misapplied a legal requirement to the facts at hand. Examples may include:

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<sup>9</sup> "New employment" will include porting to the same or a similar job with the I-140 petitioner/employer (*i.e.*, this policy will apply even if the beneficiary does not change employers).

<sup>10</sup> For purposes of this policy memorandum, USCIS considers communication with petitioners and beneficiaries as including appropriate communication with the parties' authorized representatives as indicated on a valid G-28.

- An adjudicator relied on an inaccurate employer identification number and associated financial information that did not pertain to the petitioner's ability to pay the proffered wage.
  - The petitioner has not established its ability to pay under the applicable regulatory criteria.
  - The adjudicator finds evidence that the beneficiary did not have the required education or experience.
- Fraud or willful misrepresentation of a material fact.<sup>11</sup> USCIS may revoke an approval procured through fraud or misrepresentation. Examples may include:
    - Petitioners obtain a prevailing wage determination for a worksite location where it does not intend to place the beneficiary.
    - Petitioners provide falsified financial documentation to hide their inability to pay the wages of beneficiaries.
    - Beneficiaries, on their own or in collusion with the petitioner, submit falsified educational documentation or experience letters.
    - Beneficiaries misrepresented qualifying education or experience on the labor certification.
- Lack of a bona fide job offer. USCIS may revoke an approval if the record fails to demonstrate a bona fide job offer. Examples may include:
    - The petitioner may not be a viable entity (virtual office, shell office, may trigger additional investigation and confirmation).
    - Off-site work may not be consistent with the work address(es) on the labor certification.
    - Petitioner will not be the beneficiary's actual employer.
    - The lack of a full-time, year round job opportunity.
- Other omissions or new adverse information. Revocations may be based on the discovery of new, previously unknown, adverse information. New information may result from:
    - Changes post-filing (e.g., a change of circumstances such as a company declaring bankruptcy or corporate dissolution).
    - A site visit.
    - An adjustment of status interview.
- Revocation or Invalidation of a labor certification.<sup>12</sup> USCIS may issue notices for I-140 petitions requiring a labor certification if the labor certification has been revoked by the Department of Labor,<sup>13</sup> if grounds for invalidation of the labor certification have been

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<sup>11</sup> See 8 C.F.R. 204.5(e)(2)(i).

<sup>12</sup> See 8 C.F.R. 204.5(e)(2)(ii) and (iii).

<sup>13</sup> See 20 C.F.R. 656.32.

identified, and when an invalidation of the labor certification has been issued by USCIS or the Department of State.<sup>14</sup>

- The most common scenario is where the petitioner fails to disclose the beneficiary's influence over the job offer due to close business or familial relationships to the petitioner.

As stated above, the content of the notices that are sent to the beneficiary may be very similar or identical to the notice that is sent to the petitioner. However, the content may differ when needed to protect private and/or proprietary information about either party. As a general rule, any publicly available or accessible information or evidence from a reputable source may be set forth in either notice. Reputable sources include other governmental web sites or publications, published court decisions, or press releases from courts or prosecutors' offices. This information will be incorporated into the record of proceeding and conveyed in the notices if required by 8 C.F.R. 103.2(b)(16). Adjudicators must consider this when faced with the following scenarios:

- Notices based upon a petitioner's continuing ability to pay
  - Disclosures of the petitioner's non-public financial information, particularly that included on federal tax returns, may violate the Trade Secrets Act, and should never be disclosed in a notice to a beneficiary. **Specific figures included on a petitioner's federal tax returns, annual report, or audited financial statements not otherwise publicly available should not be disclosed to the beneficiary.** Instead, more generic phrases should be used, such as "the petitioner's federal tax returns for the years 2010 and 2011 do not establish its ability to pay the offered wage."
  - If the notice focuses on the ability to pay multiple beneficiaries, any wage or tax information or other personally identifying details relating to other beneficiaries on whose behalf the petitioner has filed a Form I-140 should not be included in the beneficiary's notice. Instead, a more general statement relating to the petitioner's ability to pay multiple beneficiaries should be used.
  - Financial or other information that is publicly available, such as information included in SEC Forms 10-K or in bankruptcy filings, would not be covered under the Trade Secrets Act and may be disclosed to the beneficiary.
  - USCIS must strive to balance our privacy and notice obligations. Providing generic information referred to above may be sufficient to allow the beneficiary to submit documentation regarding the totality of the petitioner's financial circumstances.
- Notices based upon fraud or misrepresentation of a material fact
  - Publicly available information such as that disclosed in a law enforcement press release or a court order (for example, an indictment or conviction) may be disclosed in a notice to the beneficiary and/or petitioner.

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<sup>14</sup> See 20 C.F.R. 656.30(d).

- Mindful of the general requirement to disclose certain derogatory information to the parties under 8 C.F.R. 103.2(b)(16)(i), adjudicators should not disclose information if it may reveal information about an investigation. In such cases, the officer should consult with a supervisor and/or counsel in drafting the notice.

### **Consideration of Rebuttal Evidence and Burden of Proof**

Adjudicators must consider rebuttal evidence, if any is received, from both the petitioner and beneficiary before making a final determination on revocation. If the evidence received is contradictory, the adjudicator should evaluate the credibility of the evidence and make a determination on revocation based on the preponderance of the evidence standard. If rebuttal evidence is received from only one party, adjudicators will consider that evidence before making a final determination on revocation.

If revoking the petition's approval, the adjudicator should assess whether a copy of the same revocation notice can be issued to both parties, or whether two separate and different notices are needed to protect certain information under privacy or other laws. The separate decision notices should be mailed to the appropriate parties on the same date so that the time available for a post-adjudication motion or appeal coincides. Copies of both decision notices should be placed in the same case file.<sup>15</sup>

### **Motions and Appeals**

In cases where USCIS determines that the beneficiary is an affected party, USCIS will send a decision to both the petitioner and beneficiary. The petitioner and the beneficiary may file separate motions and/or appeals. Beneficiaries, who are affected parties, as defined in the *Matter of V-S-G- Inc.* decision, may file an appeal or motion on Form I-290B with respect to a revoked Form I-140, even though existing form instructions generally preclude beneficiary filings. Adjudicators should evaluate each appeal or motion and preserve copies of the materials in the case file.

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<sup>15</sup> Adjudicators should not provide copies of both notices to both the petitioner and beneficiary. Each should only receive the notice corresponding to their role in the matter.

## Implementation

### Adjudicator's Field Manual Update

Chapter 20.3(b) of the AFM (AFM Update PM-602-0152) is revised to add a new sentence to the end of paragraph (b) and (b)(1). Chapter 22.2(b)(11)(B) is revised to add a new sentence to the end of paragraph (b)(11)(B); (1)(3)

☞ 1. Chapter 20.3(b) of the AFM is revised to read as follows:

(b)

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On November 11, 2017, the USCIS' Administrative Appeals Office (AAO) issued the adopted decision, *Matter of V-S-G- Inc.*, which held that beneficiaries who have properly requested to port under AC21 are affected parties due to their ability to pursue lawful permanent residence without the original petitioner. As a result of this decision, USCIS will provide notices of intent to revoke (NOIRs) and/or notices of revocation (NOR) to all beneficiaries who have an approved I-140 immigrant petition, an I-485 that has been pending for 180 days or more and are otherwise eligible to and have properly requested to port to a new job offer. Prior to January 17, 2017, a beneficiary requested to port by submitting a request in writing. Beginning on January 17, 2017, a beneficiary must request to port by submitting Form I-485 Supplement J. A porting request is proper when it has been reviewed and adjudicated favorably by USCIS.

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(b)(1)

New paragraph 4 added: In cases where an I-140 immigrant petition has been approved and an I-485 has been pending for 180 days or more, and the beneficiary has submitted a proper porting request that has been reviewed and favorably adjudicated prior to the issuance of a notice of intent to revoke (NOIR) or notice of revocation (NOR), USCIS must also provide the beneficiary with a NOIR and/or a NOR.

☞ 1. Chapter 22.2(b) of the AFM is revised to read as follows:

(b)(11)(B); Revocation of a Labor Certification, new 5<sup>th</sup> paragraph as follows:

In addition, per the AAO's decision in *Matter of V-S-G- Inc.*, beneficiaries who are otherwise eligible to and have properly requested to port under AC21 are affected parties. As a result of this decision, USCIS will provide a notice of intent to revoke (NOIR) and/or a notice of revocation (NOR) to a beneficiary who has an approved Immigrant Petition for Alien Worker (Form I-140), an Application to Register Permanent Residence or Adjust Status (Form I-485) that has been pending for 180 days or more, and has properly requested to port. The porting request is proper when it has been reviewed and favorably adjudicated by USCIS prior to the issuance of a NOIR or NOR. Prior to January 17, 2017, a beneficiary requested to port by submitting a request in writing. Beginning on January 17, 2017, a beneficiary must request to port by submitting Form I-485 Supplement J.

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(1)(3) – add last sentence: Also see the adopted decision in *Matter of V-S-G- Inc.* As a result of this decision, USCIS will provide a notice of intent to revoke (NOIR) and/or a notice of revocation (NOR) to a beneficiary who has an approved Immigrant Petition for Alien Worker (Form I-140), an Application to Register Permanent Residence or Adjust Status (Form I-485) that has been pending for 180 days or more, and has properly requested to port. The porting request is proper when it has been reviewed and favorably adjudicated by USCIS prior to the issuance of a NOIR or NOR. Prior to January 17, 2017, a beneficiary requested to port by submitting a request in writing. Beginning on January 17, 2017, a beneficiary must request to port by submitting Form I-485 Supplement J.

### **Use**

This PM is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications and petitions. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

### **Contact Information**

Questions or suggestions regarding this PM should be addressed through appropriate channels to the Office of Policy and Strategy.