

USCIS Administrative Appeals Office Solicits Amicus Curiae Briefs: Impact on I-140 Immigrant Applicants

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Immigration & Compliance

The Administrative Appeals Office (AAO) has [solicited amicus curiae \(“friend of the court”\) briefs](#) on whether the beneficiaries of certain I-140 immigrant visa petitions have standing to participate in the administrative adjudication process, including standing to appeal to the AAO. An amicus curiae brief is a written statement of law or legal opinion written by someone who is not directly related to, or a party to, the specific case under consideration.

This is an important consideration for foreign nationals who are the beneficiaries of an I-140 immigrant petition filed by a U.S. employer who are transferring to a new U.S. employer under the American Competitiveness in the Twenty First Century Act (AC21) portability provisions. Given the lengthy adjudication process for permanent residence applications, AC21 provides an opportunity for employees to transfer to a new employer if the following conditions are met: a) the employee has an I-485 Adjustment of Status pending for at least 180 days and b) the employee will continue to work in the same or similar occupation as reflected in the underlying PERM labor certification and I-140 petition. The I-140 petition must also be approved. However, even if these conditions have been met, there are many other issues that can interrupt the permanent residence process in this scenario.

Under current regulations, the affected party is defined as the person or entity with legal standing in a proceeding, and does not include the beneficiary of a visa petition. The I-140 petition is considered an employer-sponsored petition and therefore, the beneficiary (employee) is not considered an “affected party.” In these cases, the beneficiary has no legal standing in the I-140 petition process, which consequently, could ultimately lead to a denial of the entire permanent residence process.

As stated in the CIS Adjudicator’s Field Manual “...if the employer withdraws the approved Form I-140 on or after the date that the Form I-485 has been pending 180 days, the approved Form I-140 shall remain valid under the provisions of §106(c) of AC21. It is expected that the alien will have submitted evidence to the office having jurisdiction over the pending Form I-485 that the new offer of employment is in the same or similar occupational classification as the offer of employment for which the petition was filed. Accordingly, if the underlying approved Form I-140 is withdrawn, and the alien has not submitted evidence of a new qualifying offer of employment, the adjudicating officer must issue a Notice of Intent to Deny the pending Form I-485. See 8 CFR 103.2(b)(16)(i)...”

So why is this important if the applicant has an approved I-140 petition and has notified USCIS of the

new qualifying offer of employment? It is important to remember that USCIS also has the authority to revoke an approved I-140 petition for cause. In this case, USCIS will notify the petitioner (former employer) of the revocation. As an “unaffected party” to the case, the beneficiary is often unaware that a revocation notice was issued and employers are not obligated to respond to such notices. If USCIS does not receive a response, Form I-485 will also be denied. With “legal standing” as an “affected party” to the case, the beneficiary would also be notified of a Notice of Intent to Revoke or any other correspondence on the I-140 case and would be able to respond to an inquiry or action on the case.

In the Request for Amicus Brief, DHS states that in light of several court cases the AAO now seeks amicus briefing on the issue of whether I-140 beneficiaries have a standing to participate in the administrative adjudication process, including appeals to the AAO, particularly in the context of AC21 cases. The AAO posts solicitations for amicus curiae briefs on the [AAO webpage](#).

This post was written by Patty Elmas, who is not admitted into the practice of law.

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