No. 14-2476

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Ganga Mantena,
Appellant,
v.
Janet Napolitano, Secretary U.S. Department of Homeland Security, et. al.
Appellees.

BRIEF OF *AMICI CURIAE* THE AMERICAN IMMIGRATION COUNCIL AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

I, Mary Kenney, attorney for *Amici Curiae*, the American Immigration Council and the American Immigration Lawyers Association, certify that *amici* are both not-for-profit organizations. Neither organization has a parent corporation; neither organization issues stock; consequently there exists no publicly held corporation which own 10% or more of the stock of either organization.

December 15, 2014 s/ Mary Kenney

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I. INTRODUCTION AND INTEREST OF AMICI[1]

Amici submit this brief to assist the Court in determining the scope of the District Court's review over the *proceeding* to revoke the immigrant visa petition under 8 U.S.C. § 1252(a)(2)(B)(ii) and also over the denial of the adjustment of status application under 8 U.S.C. § 1252(a)(2)(B)(i).[2]

Section 1252(a)(2)(B)(ii) does not bar the District Court from reviewing the procedure followed by the United States Citizenship and Immigration Services (USCIS) to revoke the visa petition in this case. USCIS revoked the immigrant visa petition filed on appellant's behalf without giving her notice or an opportunity to participate in the revocation proceedings. Appellant is an "affected party" within the well-defined meaning of "legal standing." The regulatory exclusion of a beneficiary from visa proceedings – which purportedly is based upon a lack of "legal standing" – conflicts with the Supreme Court's recent clarification of the meaning of statutory standing, see *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), and numerous Courts of Appeals decisions which have held that beneficiaries do have legal standing with respect to adverse visa petition decisions. This is particularly true in the context of a

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[1] Under Federal Rule of Appellate Procedure 29(c)(5), amici state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than amici—contributed money that was intended to fund preparing or submitting the brief.

[2] Amici take no position on any other issue in this case.

beneficiary who has "ported" to a new job with a new employer under 8 U.S.C. § 1154(j). While Congress did not change the Secretary's authority to revoke an immigrant visa petition, it did allow for a severance of the original employer-employee relationship, thus firmly establishing the beneficiary as the party with a continuing interest in the validity of the immigrant visa petition, separate from the original petitioner. The regulations simply cannot be read as stripping such beneficiaries of the right to notice and an opportunity to offer rebuttal evidence prior to a decision to revoke a visa petition. To read them otherwise would conflict with Congress' clear intent in adopting the portability provisions of § 1154(j).

With respect to the District Court's jurisdiction, a beneficiary's right to notice and a chance to offer rebuttal evidence is a predicate procedural event with which USCIS must comply, independent of any action that Congress may have specified to be in the Secretary of the Department of Homeland Security's (DHS) discretion under 8 U.S.C. § 1155. Consequently, the bar to review found in § 1252(a)(2)(B)(ii) does not apply to review of the agency failure to provide this notice. *See Firstland Int'l, Inc. v. INS*, 377 F.3d 127, 131 (2d Cir. 2004) (Attorney General's compliance with statutory notice requirements then in effect is not an exercise of discretion and not within the bar of § 1252(a)(2)(B)(ii)).

The District Court also retains jurisdiction to review the immigrant visa petition revocation because 8 U.S.C. § 1155 limits the Secretary's authority to

revoke to cases involving "good and sufficient cause." The Board of Immigration Appeals (BIA) has objectively defined this legal standard in a precedent decision binding on the Secretary. *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). Congress's inclusion of the phrase "good and sufficient cause," coupled with the interpretation given it by the Board, makes clear that "the authority of the Attorney General to revoke visa petitions is bounded by objective criteria." *ANA International, Inc. v. Way*, 393 F.3d 886, 894 (9th Cir. 2004). As such, it cannot be interpreted to be "specified … to be in the discretion of" the Secretary within the meaning of 8 U.S.C. § 1252(a)(2)(B)(ii), but instead remains reviewable. *ANA*, 393 F.3d at 892.

The District Court also has jurisdiction to review USCIS's denial of appellant's adjustment of status application. The prohibition against judicial review in 8 U.S.C. § 1252(a)(2)(B)(i) is not implicated because USCIS did not exercise any discretion. USCIS denied the application solely on the basis of statutory eligibility; that is, because it had revoked the immigrant visa petition. *See Sepulveda v. Gonzales*, 62 F.3d 59, 62-63 (2d Cir. 2005).

The Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The

Council frequently appears before federal courts on issues relating to the interpretation of the Immigration and Nationality Act.

AILA is a national association with more than 13,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters.

II. BACKGROUND

For individuals seeking to immigrate to the U.S. through an offer of employment, there is usually a two or three-step process. This section will provide an overview of this process and the requirements with which the employer-petitioner and employee-beneficiary must comply.

A. The Employment-based Immigrant Visa Process

In most employment-based visa categories, the first step in the process is for an employer to obtain a labor certification from the Department of Labor (DOL). *See* 8 U.S.C. §§1153(b) and 1182(a)(5)(A). At this step, the DOL considers whether there are U.S. workers who are qualified, willing, and available for the

job. The DOL also determines what the prevailing, or minimum, wage for the job in the area of intended employment will be.

If the DOL certifies the labor certification, the employer has 180 days to proceed to the second step, which is to file an I-140 immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* 8 U.S.C. § 1182(a)(5)(A); 20 C.F.R. § 656.30(b). With the immigrant visa petition, the employer must submit the certified labor certification application. *See, e.g.*, 8 C.F.R. § 204.5(k)(4)(i). Generally, the employer also submits other documentation to establish that the foreign national meets the employer's requirements for the job offered. *See Hoosier Care, Inc. v. Chertoff*, 482 F.3d 987, 990-91 (7th Cir. 2007) (distinguishing between DOL's statutory responsibility for labor certification and USCIS's statutory responsibility to determine if the foreign national is qualified for the job).

The third step in this process is the application to adjust status to lawful permanent residence filed by the noncitizen visa petition beneficiary. To be granted adjustment of status, an applicant must be eligible for a visa and the visa must be currently available. 8 U.S.C. § 1255(a). The beneficiary's eligibility for a visa is determined, in part, based upon the approval of the visa petition filed by the sponsoring employer with USCIS. *See, e.g.*, 8 C.F.R. § 245.1(c)(4). Whether a visa is currently available is determined by the beneficiary's "priority date."

Because Congress has set annual and per country limits on the number of visas available in each employment-based immigrant category, *see* 8 U.S.C. §§ 1151-1153, there are too few visas available to meet the demand and a backlog exists.[3] The priority date gives the foreign national a place in the backlog queue. When, as in the present case, a labor certification application is required, the priority date is the date that the employer filed the application with DOL. *See* 8 C.F.R. § 204.5(d). The priority date does not "attach," in terms of the foreign national's ability to receive an immigrant visa number, unless DOL certifies the labor certification application **and** USCIS approves the immigrant visa petition. *See* 8 C.F.R. § 204.5(e).

By regulation, however, USCIS permits the foreign national to file the application to adjust status to permanent residence if the priority date is current in the U.S. Department of State's monthly Visa Bulletin, even though USCIS has not yet approved the immigrant visa petition. *See* 8 C.F.R. § 245.1(g).[4] Sometimes, the foreign national can file his or her adjustment application concurrently with the employer's filing of the immigrant visa petition. In no case, however, may USCIS

[3] The historical movement of the priority dates can be found here: http://travel.state.gov/content/dam/visas/employment-cut-off-dates/EmploymentWorldwide.pdf (last visited December 12, 2014).

[4] The Visa Bulletin will list a category as (1) "current," so the beneficiary may apply; or (2) with a date certain (a "cut off" date), so the beneficiary may apply if his or her priority date is earlier than the date listed in the Bulletin (i.e., the category is current for those with a priority date earlier than the date listed); or (3) "unavailable," meaning no one in that category can apply. *See id*.

approve the adjustment application until after the immigrant visa petition is approved.

A priority date sometimes retrogresses. In such instances, a noncitizen may file her adjustment of status application when her priority date is current only to have the priority date retrogress subsequent to filing, as is the case here. When this happens, the adjustment of status application will remain pending but it cannot be approved until the priority date advances again.

The ability to file the adjustment application is critical because the applicant also can file for employment authorization and a travel document (for readmission after travel abroad). While the adjustment application is pending, the foreign national may apply to renew the employment authorization and travel document, even though the priority date may not be current at that time.

B. Congress Provides Relief for Adjustment of Status Applicants Whose Applications Suffer Due to Lengthy Delays.

Recognizing the lengthy waiting periods that many beneficiaries of employment-based immigrant visa petitions were experiencing because of extensive visa backlogs, Congress provided a new procedure in 2000, but only for those beneficiaries who were able to file their applications to adjust status. 8 U.S.C. § 1154(j).[5] Congress intended that this procedure would "provide '[j]ob

[5] A similar provision preserves the validity of the labor certification. 8 U.S.C. § 1182(a)(5)(A)(iv).

flexibility for long delayed applicants for adjustment of status to permanent residence.'" *Matter of Neto*, 25 I&N Dec. 169, 171 (BIA 2010).

Before Congress acted, an adjustment applicant was "locked into" the job for which the employer had sponsored him or her.[6] If the foreign national changed employers, this would invalidate the immigrant visa petition. The foreign national often would lose work authorization because USCIS would deny the adjustment application under these circumstances. The foreign national also would not be able to retain the priority date from the approved immigrant visa petition unless a new employer successfully completed the immigrant visa petition process (including labor certification, if the category required). Frequently, there would not be enough time for the second employer to complete the process because the foreign national either would not be able to maintain lawful status or would not be eligible for a status that would allow him or her to work.

Under 8 U.S.C. § 1154(j), also known as the "portability provision," a foreign national can change jobs with the same employer, or change employers, and the immigrant visa petition remains valid if: USCIS has approved the

[6] It is possible for an employer to sponsor a beneficiary for a job when the beneficiary does not work for the employer (either where the beneficiary is outside of the United States or occasionally is working in a nonimmigrant status for an employer other than the sponsor). However, the usual situation – which Congress was addressing – was a beneficiary who was working for the sponsoring employer in the job which was the basis for the labor certification and immigrant visa petition.

immigrant visa petition; the application to adjust status to lawful permanent residence has been pending with USCIS for at least 180 days; and the job is "in the same or a similar occupational classification." *See id*.

Significantly, the foreign national as an adjustment applicant is not "tied" to the employer that filed the immigrant visa petition. A foreign national who changes employers retains his or her priority date from the immigrant visa petition filed by the original employer and can continue in the adjustment of status process – even if the original employer subsequently withdraws the approved petition – while the new employer does not have to file a new immigrant visa petition on the foreign national's behalf. The foreign national provides notice to USCIS (or, if the foreign national has not provided the notice in advance, responds to a request for evidence at the time that USCIS is adjudicating the adjustment application) that the new job is "in the same or a similar occupational classification" as the job for which the foreign national was sponsored.

However, if USCIS revokes the immigrant visa petition for fraud or willful misrepresentation of a material fact, then the petition is invalid and the beneficiary/adjustment applicant cannot change to, or remain in, a new job and cannot continue in the adjustment application process.

Section 1154(j) benefits U.S. employers and the noncitizens they seek to sponsor. It allows a U.S. employer to hire a noncitizen who already has an

approved visa petition without having to go through the expense and delay of the labor certification and immigrant visa petitioning process. It allows the original I-140 petitioner to promote the beneficiary or transfer her to a similar job without having to go through the expense and delay of re-filing a labor certification and visa petition. And it allows I-140 beneficiaries to commit to applying their talents in the U.S. without extended disruptions should an employer go out of business or a new job prospect offer a more promising career future. In short, § 1154(j) promotes exactly the job flexibility that Congress sought to achieve when it adopted this provision.

III. ARGUMENT

A. The District Court has Jurisdiction to Review USCIS's Revocation of the Immigrant Visa Petition Because, Prior to Any Exercise of Discretion, USCIS is Required to Give the Beneficiary, an Affected Party, Notice of its Intent to Revoke and an Opportunity to Participate in the Proceeding.

The District Court can review USCIS's failure to give the beneficiary of a visa petition notice of intent to revoke the petition or an opportunity to participate in the revocation proceedings because these actions precede and are independent of any exercise of discretion by USCIS under 8 U.S.C. § 1155. Notice is outside of the scope of § 1252(a)(2)(B)(ii) because this is not a matter of the Secretary's discretion. *See Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (extent of the Attorney General's authority to detain beyond the removal period is not an

exercise of discretion); *see also Firstland Int'l, Inc. v. INS*, 377 F.3d 127, 131 (2d Cir. 2004) (Attorney General's compliance with statutory notice requirements then in effect is not an exercise of discretion).

A beneficiary who has ported to new employment based upon an approved visa petition has "legal standing" within the plain meaning of that term and thus is an affected party to the proceedings. An interpretation of the governing notice regulations as excluding a beneficiary in this circumstance from receipt of notice conflicts with the clear intent of 8 U.S.C. § 1154(j), the statute that authorizes porting. In fact, in many § 1154(j) situations, the beneficiary is the only party that has any interest in preserving the validity of the I-140 petition. For example, the original petitioner may be out of business or may have lost interest in the beneficiary.

1. Existing Courts of Appeals Decisions Establish that the Beneficiary of an Immigrant Visa Petition Is an "Affected Party" Entitled To Participate in Visa Petition Revocation Proceedings.

No statute or regulation bars USCIS from providing notice to a beneficiary of its intent to revoke a visa petition. The statute is silent on the issue. 8 U.S.C. § 1155.[7] The regulation simply states that notice must be given to the petitioner and

[7] In late 2004, Congress amended this section by deleting a requirement that specified *when* notice was to be given to the beneficiary. *See* Intelligence Reform & Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 5304(c), 118 Stat. 3638, 3736 (striking the sentence which required notice to the beneficiary "before [he] commences his journey to the United States"); *see also Firstland v, U.S.A.*,

says nothing about the beneficiary. 8 C.F.R. § 205.2. Nevertheless, USCIS read this regulation in conjunction with 8 C.F.R. § 103.3(a)(1)(iii)(B) and concluded that no notice of its intent to revoke was required to be served on the beneficiary. The latter regulation states that a beneficiary of a visa petition is not an "affected party," which it defines as "a person or entity with legal standing in a proceeding." *Id*.[8] This interpretation predates and has been superseded by 8 U.S.C. § 1154(j), which gives beneficiaries an interest in visa petitions.

The conclusion that a beneficiary is not an "affected party" cannot stand for several reasons. First, the concept that a beneficiary does not have "legal standing" in a visa petition proceeding conflicts with the Supreme Court's recent clarification of the standard for "statutory standing." *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388, 1390 (2014) (explaining that the

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No. 06-1704, 2008 U.S. App. LEXIS 1404 at *5 n.3 (2d Cir. 2008). The statute was then and remains silent with respect to notice to a beneficiary already within the United States. Nothing in the 2004 amendment suggests an intent by Congress to address this broader notice issue.

[8] "Legal standing" is not defined in the regulations. The Federal Register notice adopting these regulations merely cites to the historical fact that the appealing party in a visa proceeding has always been limited to the petitioner, citing to *Matter of Sano*, 19 I&N Dec. 299 (BIA 1985). *See* "Appeals, Precedents, Certifications and Motions," 55 Fed. Reg. 20767 at 3 (May 21, 1990). In turn, *Matter of Sano* held that only a petitioner could appeal a visa decision because the regulations dictated this result. 19 I&N Dec. at 301. The earlier Board decisions cited in *Matter of Sano* discuss only the petitioner's interest under the statute and regulations without specifically addressing the impact that visa proceedings have on the petitioner. *See id*. (citing cases).

determination of whether an individual has standing to raise a claim under a statute requires a showing that the individual falls within the statute's "zone of interests" and that his injuries were "proximately caused by [the alleged] violations of the statute").

Here, as numerous courts of appeals have recognized – although in cases that pre-date *Lexmark* – a visa petition beneficiary satisfies both parts of the test. As one court explained, "the immigrant beneficiary [of a preference visa petition] is more than just a mere onlooker; it is [her] own status that is at stake when the agency takes action on a preference classification petition." *Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998) (citing *Sanchez-Trujillo v. INS*, 620 F. Supp. 1361, 1363 (W.D.N.C. 1985)). When USCIS revokes a visa petition, the beneficiary loses the opportunity to receive the visa; this lost opportunity "represents a concrete injury to [the beneficiary] that is traceable to [USCIS'] conduct and remediable by a favorable decision." *Id; see also Kurapati v. USCIS*, 767 F.3d 1185, 1190-91 (11th Cir. 2014) (finding that the visa petition beneficiaries "suffered an injury-in-fact from USCIS's revocation of the I-140 visa petitions – namely, the deprivation of an opportunity to apply for adjustment of status – which is fairly traceable to USCIS and would be redressable by a favorable decision" and that they fell within the zone of interests of the statute); *Bangura v. Hansen*, 434 F.3d 487, 499-500 (6th Cir. 2006) (finding that visa petition beneficiary fell within

the "zone of interest" of the statute and had standing); *Ghaley v. INS*, 48 F.3d 1426, 1434 n.6 (7th Cir. 1995) (same); *Taneja v. IN*S, 795 F.2d 355, 358 n.7 (4th Cir. 1986) (same).

As these cases demonstrate, the continuing validity of the general regulatory exclusion of a beneficiary from visa petition proceedings is questionable, at best. However, as shown below, even were the regulation valid with respect to beneficiaries of visa petitions in general, it cannot be interpreted as applying to a beneficiary of a visa petition who has "ported" to new employment under § 1154(j).

2. Appellant is an "Affected Party" Since Congress made the Continued Validity of an Immigrant Visa Petition the Basis for A Beneficiary's Authorized Change of Employers and Ability to Continue in the Adjustment of Status Process.

Appellant's right to notice and an opportunity to participate in the revocation proceeding is a matter of law and not a question of the Secretary's exercise of discretion. USCIS summarily rejected appellant's attempt to offer evidence about the bona fides of the immigrant visa petition because she was not an "affected party" within the meaning of 8 C.F.R. § 103.3(a)(1)(iii)(B). *See* USCIS Decision (Sept. 9, 2013), Appendix (App.) at 94-95.[9] Although the regulation defines an "affected party" as someone with "legal standing in the proceeding," it purports to

[9] Appendix citations refer to Appellant's Appendix, filed with appellant's brief.

exclude all beneficiaries. 8 C.F.R. § 103.3(a)(1)(iii)(B). The notion that a beneficiary who "ported" to new employment is not an "affected party" with regard to proceedings concerning the revocation of the immigrant visa petition directly conflicts with 8 U.S.C. § 1154(j). A beneficiary who is relying on § 1154(j) will often be the only party with any interest in the continued validity of the I-140 petition, particularly in a case like Ms. Mantena's, where the petitioning entity no longer exists. Revoking visa petitions without any notice to or input from the beneficiary will result in decisions made on incomplete and inaccurate records. These decisions will have drastic consequences for the beneficiary and his or her family, who have often been in the U.S. for years pursuing lawful permanent residency in reliance on offers of employment from U.S. employers.

A beneficiary who "ports" has a very real interest in whether USCIS revokes the immigrant visa petition. Section 1154(j) provides:

> Job flexibility for long delayed applicants for adjustment of status to permanent residence. – A petition under subsection (a)(1)(D)[10] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remains unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the job is in the same or a similar occupational classification as the job for which the petition was filed.

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[10] Legal sources commonly mark this as "*sic*," with the comment that this subsection should be "(a)(1)(F)," which is 8 U.S.C. § 1154(a)(1)(F): "Any employer desiring and intending to employ within the United States an alien entitled to classification under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) may file a petition … for such classification."

If USCIS revokes the petition for any reason other than the employer's withdrawal of the petition, the revocation invalidates the petition. *See* USCIS Adjudicator's Field Manual, ch. 20.2(c). If the petition is invalid, then USCIS denies the adjustment of status application. *See id*.

In enacting this provision, Congress did not change the Secretary's authority to revoke the approval of an immigrant visa petition "at any time, for what he deems to be good and sufficient cause," as provided in 8 U.S.C. § 1155. *See* American Competitiveness in the Twenty-First Century Act ("AC21"), Title 1, § 106, Pub. L. 106-313 (Oct. 17, 2000) enacting § 1154(j)). But Congress did alter the relationship of the "porting" employee to the immigrant visa petition. Congress gave a beneficiary who "ported" to a new employer an interest in the continued validity of the petition separate and apart from the original petitioning employer.[11]

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[11] In *Herrera v. USCIS*, 571 F.3d 881, 889 (9th Cir. 2009), the court held that § 1154(j) does not affect USCIS's revocation authority. *Amici* agree, but this holding does not resolve the notice issue. This case also is distinguishable from appellant's situation as USCIS notified Ms. Herrera, after she submitted to USCIS her "porting" notice that she was changing employers, that USCIS intended to revoke the original immigrant visa petition. The court found that Ms. Herrera had been "plainly advised that she was not, and had never been, 'eligible for the classification sought.'" *Id*. Also in *Herrera*, plaintiffs put forth alternative arguments regarding the limitation on the Secretary's revocation authority because the beneficiary had "ported." The court responded that Congress "did not intend to grant *extra* benefits to those who changed jobs." 571 F.3d at 888 (emphasis in original). Such arguments are not being made here.

By permitting foreign workers to change employers, Congress knew that the employer-employee relationship between the worker and the original employer who filed the immigrant visa petition would be severed. Since Congress conditioned the worker's ability to port and to ultimately receive lawful permanent residence on the continued validity of the immigrant visa petition, USCIS is thwarting the "porting" process that Congress established by failing to provide notice of and an opportunity to participate in the revocation proceedings. The "affected party" regulatory definition upon which USCIS relies was promulgated more than ten years before Congress enacted § 1154(j), *see* 55 Fed. Reg. 20767 (May 21, 1990), at a time when "porting" was not yet contemplated. An interpretation of 8 C.F.R. §§ 205.2 and 103.3(a)(1)(iii)(B) as requiring notice to the beneficiary who has ported is the only way that these regulations can be harmonized with § 1154(j).

USCIS tries to avoid the impact of § 1154(j) by claiming that if a petition is revoked, at any time, for fraud, then the beneficiary "will not be eligible for the job flexibility provisions of [§ 1154(j)]." USCIS Adjudicator's Field Manual, ch. 20.2(c). While it is true that a beneficiary who changed jobs could not maintain this "portability" after USCIS revoked the prior employer's petition, this argument focuses on the end result of the revocation proceeding while ignoring the

Appellant's claim here that she is entitled to notice and an opportunity to participate before the revocation decision is made.

In Section 1154(j), Congress made clear its intent that a beneficiary may, in essence, "carry" an approved visa petition of the original employer with her when she ports to a new job and rely upon that approved petition as she proceeds with her adjustment of status application. Congress authorized this process understanding that, by changing jobs, the beneficiary would have severed ties with the old employer. In light of Congress's clear intent to promote such job flexibility, before USCIS can revoke the petition, thus ending the portability, USCIS must give appellant notice and an opportunity to participate in the revocation proceeding, including the ability to provide documentation showing that the petition is approvable.

Appellant epitomizes the long-delayed applicant whose hardship Congress intended to ameliorate. USCIS approved the VSG immigrant visa petition on November 21, 2006. App. at 45. Appellant filed her adjustment of status application on August 9, 2007. App. at 44. In December 2009, Appellant gave notice to USCIS of her change of employers, as provided by this statute. *See* App. at 38-43. Not until June 28, 2012, did USCIS issue a Notice of Intent to Revoke to VSG. By this time, the employment relationship between VSG and appellant had been over for more than 2 ½ years. At this point, VSG had no interest in this

petition or beneficiary, since she, the appellant, no longer worked for it. In contrast to VSG's lack of interest, appellant is vitally interested in a USCIS proceeding to revoke the immigrant visa petition on which her lawful permanent resident application depends.

B. Visa Petition Revocation under 8 U.S.C. § 1155 Does Not Fall Within the Bar to Jurisdiction under 8 U.S.C. § 1252(a)(2)(B)(ii) Because the Phrase "Good and Sufficient Cause" Provides A Legal Standard That Limits the Discretion of the Secretary of DHS.

This Court must consider the application of the jurisdiction-stripping provision of § 1252(a)(2)(B)(ii) in light of "the strong presumption in favor of judicial review of administrative action." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). Moreover, the Court has cautioned that, even when the result is to limit review to some extent, a narrower interpretation of a jurisdiction-stripping provision is to be favored over a broader one. *See Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 480-482 (1999) (rejecting the Ninth Circuit's "broad reading of § 1252(g)"). These rules of interpretation are particularly relevant where, as here, the issue in the case involves a legal standard that curtails the exercise of review by the Secretary.

The Secretary's authority to revoke an immigrant visa petition is limited to "what he deems to be good and sufficient cause." 8 U.S.C. § 1155. "To put a purely subjective construction on the statute is to render the words 'good and sufficient cause' meaningless. Congress did not have to put those words there, and

in many other instances it did not." *ANA International, Inc. v. Way*, 393 F.3d 886, 893-94 (9th Cir. 2004). Instead, this phrase inserts a legal standard. In turn, that standard has been interpreted by the BIA which, as the delegate of the Attorney General, has the authority and responsibility to interpret the immigration statute for Department of Homeland Security (DHS) employees as well as immigration judges. 8 U.S.C. § 1103(a)(1) ("the determination and ruling of the Attorney General with respect to all questions of law shall be controlling"); 8 C.F.R. § 1003.1(g) (describing binding nature of precedent decisions of the BIA). Congress's inclusion of the phrase "good and sufficient cause," coupled with the interpretation given it by the Board, makes clear that "the authority of the Attorney General to revoke visa petitions is bounded by objective criteria." *ANA*, 393 F.3d at 894.

Because § 1155 sets out a specific standard governing the Secretary's decision, such a decision is not "specified … to be in the discretion of" the Secretary within the meaning of 8 U.S.C. § 1252(a)(2)(B)(ii), and remains subject to judicial review. *ANA*, 393 F.3d at 892;[12] *see also Firstland*, 377 F.3d at 129

[12] The Second Circuit has not decided this issue. In *Firstland*, 377 F.3d at 131, the court concluded that – based upon the statutory language existing at the time – the decision was not so specified because INS "had no statutory basis for its revocation decision." In *dicta*, the court discussed the language of § 1155 currently before this Court, but this discussion does not "dictate" a conclusion that the Secretary's decision is unreviewable. *Id.* Other circuits have rejected the conclusion of *ANA*, however. *See Mehanna v. USCIS*, 677 F.3d 312, 313 (6th Cir.

(holding that a limit placed upon a statutory grant of discretion takes that discretion outside the bar to review of § 1252(a)(2)(B)(ii)); *Ogbolumani v. Napolitano*, 557 F.3d 729, 732 (7th Cir. 2009) (finding that a court has jurisdiction under § 1252(a)(2)(B)(ii) to review decisions "circumscribed by an explicit legal standard"): *Ayanbadejo v. Chertoff*, 517 F.3d 273, 277-78 (5th Cir. 2008) (concluding that the court has jurisdiction to review denial of immediate relative petition because it involves a legal standard).

"Good and sufficient cause" is defined as when the evidence of record, at the time the immigrant visa petition was approved, would have warranted a denial if unexplained and unrebutted. *See Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990).[13] Moreover, revocation cannot be based on unsupported statements or unstated presumptions, nor on derogatory information when the agency has not

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2012); *Green v. Napolitano*, 627 F.3d 1341, 1344-46 (10th Cir. 2010); *Abdelwahab v. Frazier*, 578 F.3d 817, 821 (8th Cir. 2009); *Ghanem v. Upchurch*, 481 F.3d 222, 224-25 (5th Cir. 2007); *Jilin Pharm. USA, Inc. v. Chertoff*, 447 F.3d 196, 204-05 (3d Cir. 2006); *El-Khader v. Monica*, 366 F.3d 562, 567 (7th Cir. 2004). These decisions criticize *ANA* for giving weight to the phrase "good and sufficient cause" while supposedly disregarding other discretionary language. As shown above, however, *ANA* does not disregard the Secretary's discretionary authority. Rather, *ANA* reasonably concludes that the Secretary has authority to exercise that discretion by applying the "good and sufficient cause" standard.

[13] After the court has identified the legal standard in the statutory language, i.e., "good and sufficient cause," the court may look at relevant case law, i.e., the BIA decision in *Tawfik*, for a published interpretation of the meaning of the statutory language. *See ANA*, 393 F.3d at 893.

made the petitioner aware of the substance of that information. *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 459 (BIA 1987).[14]

The Secretary must apply this legal standard in every case, and his application of the standard is subject to judicial review. In accord with this, the beneficiary here is not seeking to review the Secretary's exercise of discretion, but rather the application of this legal standard. *Accord Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (judicial review of indefinite detention not eliminated by § 1252(a)(2)(B)(ii) because noncitizens challenged the extent of the Attorney General's statutory authority, which was not discretionary).

The present case illustrates the importance of adhering to an interpretation that provides for review of the application of a legal standard that curtails discretion. Applying the legal standard for "good and sufficient cause" to USCIS's revocation of the immigrant visa petition VSG filed on appellant's behalf, there would have to be evidence in the administrative record which would have warranted a denial due to fraud or willful misrepresentation of a material fact. USCIS did not meet the "good and sufficient cause" standard in this case.

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[14] Indeed, the Department of State has instructed in cases involving consular processing that "posts should not use the revocation request process as a means of disposing of problematic cases in which fraud, misrepresentation or ineligibility for status is only suspected but cannot be clearly established." Cable, DOS, 01-State-122801 (July 13, 2001), *reprinted in* 78 No. 30 *Interpreter Releases* 1276-77 (August 6, 2001); 9 FAM 42.43 and N.1-N.3.

USCIS's notice of its intent to revoke the immigrant visa petition, which USCIS addressed solely to petitioner, gave only one reason:

> On or about October 14, 2010, [VSG], through its president, Viswa Mohan Mandalapu, pleaded guilty to one count of mail fraud. ….
>
> ….As a result of the investigation and conviction, USCIS considers that all cases filed by VSG and its associated entities **may be fraudulent**.

App. at 119 (emphasis added).

USCIS never stated that there was anything in the record regarding the immigrant visa petition or labor certification that VSG filed on appellant's behalf that was fraudulent or contained a willful misrepresentation of material fact; only that "VSG's conviction raises doubts about the reliability" of what VSG filed. App. at 120. The revocation decision, also addressed solely to VSG, gave only one reason: "The petitioner [VSG] has failed to respond to our notice of intended revocation." App. at 117. [15] USCIS clearly failed to follow the binding legal standard which necessitated some evidence in the record, rather than mere speculation.

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[15] In addition to there being no evidence of fraud or willful misrepresentation in the record, the beneficiary tried to submit evidence to rebut any such allegation, as part of her December 2012 motion to reopen/reconsider USCIS's denial of her adjustment of status application, but was unable to do so. *See* USCIS Decision (Feb. 21, 2013), App. at 70 *and* USCIS Decision (Sept. 9, 2013), App. at 92-96.

Amici urge this Court to follow the Ninth Circuit and hold that § 1155 does not fall within the bar to review of § 1252(a)(2)(B)(ii).

C. 8 U.S.C. § 1252(a)(2)(B)(i) Does Not Preclude this Court from Reviewing the Denial of an Adjustment of Status Application that is Based on Nondiscretionary Statutory Eligibility Factors.

The District Court has not been divested of jurisdiction to review USCIS's denial of appellant's adjustment of status application, filed pursuant to 8 U.S.C. § 1255. Matters not subject to review under § 1252(a)(2)(B) are those committed to the DHS Secretary's discretion. The first subsection bars review over "any judgment regarding the granting of relief under section[] [1255]." 8 U.S.C. § 1252(a)(2)(B)(i). Interpreting the language of this subsection, this Court has held that § 1252(a)(2)(B)(i) does not preclude review over nondiscretionary decisions regarding a noncitizen's eligibility for the specified relief. *Sepulveda v. Gonzales*, 62 F.3d 59, 62-63 (2d Cir. 2005) (finding jurisdiction to review denials of cancellation of removal and adjustment of status which were both based upon statutory eligibility grounds).

Appellant has not challenged the Secretary's exercise of discretion with regard to her adjustment of status application. No discretion was exercised here. USCIS's sole reason for the denial was its revocation of the VSG immigrant visa petition: "[T]he Form I-485 was denied because the underlying visa petition was

revoked for cause, leaving no basis on which to accord a visa or adjust your status." USCIS Denial (Sept. 9, 2013), App. at 95.

For an application for adjustment of status to be granted, the applicant must demonstrate, *inter alia*, that she is eligible for a visa and that a visa is immediately available at the time the application is filed. 8 U.S.C. § 1255(a). An approved visa petition is a prerequisite for demonstrating these statutory eligibility requirements. 8 C.F.R. § 245.1(c)(4). Consequently, when USCIS denies an adjustment of status application because the underlying visa petition has been revoked, it is denying the applicant for statutory ineligibility. As such, this Court has jurisdiction to review this non-discretionary statutory eligibility issue. The Court will not have to decide whether to grant the application but rather whether the agency relied on a permissible nondiscretionary reason in denying the application.

Respectfully submitted,

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Dated: December 15, 2014

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(s) Mary Kenney

Attorney for Amicus Curiae

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CAPTION:

Ganga Mantena v.

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