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Administrative Appeals Office
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., MS 2090
ENCL: AMICUS: STANDING
Washington, DC 20529-2090

Brief Amicus Curiae of Immigration Reform Law Institute Regarding the Standing of Certain Visa Petitioners Following *Lexmark Int'l Inc. v. Static Control Components, Inc.*

The Immigration Reform Law Institute Inc. (IRLI) respectfully submits this letter brief in response to the April 7, 2015 request of the Administrative Appeals Office (AAO) for amicus briefing on the following question:

> In light of the Supreme Court decision in *Lexmark Int'l Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377 (2014), whether the beneficiaries of certain immigrant visa petitions have standing to participate in the administrative adjudication process, including standing to appeal to the AAO denials of Form I-140 petitions or USCIS revocations of prior approved petitions.

In *Lexmark*, a unanimous Supreme Court held that direct application of the zone-of-interest test and the proximate-cause requirement supplies the relevant limits on who may sue under a federal statute. *Lexmark*, 134 S.Ct. at 1391.

First, the court reaffirmed the "irreducible constitutional minimum" elements of Article III standing: An injury-in-fact, causation, and redressibility. *Lexmark*, 134 S.Ct. at 1386, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). IRLI notes that Article III jurisdiction remains an "antecedent question" for federal litigation. *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 101 (1998).

Second, the court withdrew the zone-of-interest test from prudential standing analysis, and found it to be an element of the case on the merits. *Lexmark*, 134 S.Ct. at 1387 (explaining that prudential standing is a "misnomer as applied to the zone-of-interests analysis," which asks whether this particular class of persons has a right to sue under a substantive statute). IRLI notes that the requirement that a plaintiff assert his own legal rights and interests, and does not base his claim for relief on the rights and interests of third parties remains as a prudential limitation on standing. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). A statutory cause of action is presumed to extend only to plaintiffs whose interests fall within the zone-of-interest protected by the law invoked. *Lexmark*, 134 S.Ct. at 1388, citing *Allen v. Wright*, 468 U.S. 737, 751 (1984).

A statutory cause of action is also presumed to be limited to plaintiffs whose injuries are proximately caused by violations of the statute. *Lexmark*, 134 S.Ct. at 1390-91, citing *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 268-270, 287 (1992). Like any other element of a cause of action, proximate cause must be adequately alleged at the pleading stage in order for the case to proceed. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-679 (2009). If a plaintiff's allegations, taken as true, are insufficient to establish proximate causation, then the complaint must be dismissed. *Lexmark*, 134 S.Ct. at 1391, n6.

Approval of a Form I-140 Immigrant Petition for Alien Worker visa application by United States Citizenship and Immigration Services (USCIS) is the middle step in a three-step process for many types of employment-based permanent immigration. For non-citizens seeking to obtain permanent employment in the United States in certain occupations, the Immigration and Nationality Act (INA) and related regulations provide:

(1) An employer must file a US DOL Form 9089 and obtain labor certification from the Department of Labor, pursuant to 8 U.S.C. §1153(b)(3)(C) and 8 U.S.C. §1182(a)(5)(A)(i)(I)-(III).

(2) Once labor certification is obtained, the employer must submit the certification along with an I-140 visa petition to the USCIS on behalf of the non-citizen worker, who is

known as the "beneficiary." 8 U.S.C. §1154(a)(1)(F); 8 C.F.R. §204.5(l)(1). The employer must also submit documentation to show that the proposed beneficiary will meet any education, experience, and good character requirements dictated by the labor certification. 8 C.F.R. §204.5(l)(3)(ii). The employer must further show that it has the ability to pay the wage specified in the labor certification. 8 C.F.R. §204.5(g)(2).

(3) Once USCIS approves the I-140 petition, the alien may apply to adjust status to that of a lawful permanent resident, by filing an I-485 Application to Register Permanent Residence or Adjust Status. 8 U.S.C. §1153(d); 8 U.S.C. §1255(a). USCIS cannot approve the I-485 application unless and until it approves the underlying I-140 visa petition. While a complete I-485 application is pending, the alien can also file an I-765 Application for Employment Authorization. *See* 8 C.F.R. §274a.12(c)(9).

The American Competitiveness in the Twenty-First Century Act (AC21) allows certain I-485 applicants for adjustment of status (AOS) to transfer ("port") their approved I-140 petitions to an employer other than the employer who filed the Form I-140. P.L. No. 106-313, 114 Stat. 1251 (2000). Under 8 U.S.C. §1182(a)(5)(A)(iv) and §1154(j), portability applies only to certain approved petitions. A DOL labor certification is not portable. Portability under these two provisions is available only where the alien remains the beneficiary of a valid I-140 certification and only if the I-485 application to adjust status has been pending for at least 180 days, and the job with a new employer is in the same or similar occupational classification as the job sought under the I-140 visa petition. 8 U.S.C. §1154(j).

USCIS regulations require notice to the petitioner—*i.e.* the employer—of intent to deny an I-140 petition, 8 C.F.R. §103.3(a) (requiring use of Form I-292), or to revoke an approved I-140 petition, 8 C.F.R. §205.2(b). By regulation, the petitioner may present evidence and argument. *Id.* USCIS must provide the "petitioner or self-petitioner" with written notice of revocation, followed by 15 days in which to appeal revocation to the AAO. 8 C.F.R. §205.2(c), (d).

Section 205.2(d) limits USCIS administrative jurisdiction to appeals of revocations brought by "affected parties," as defined in 8 C.F.R. Part 103:

"[A]ffected party (in addition to the Service) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition."

8 C.F.R. §103.3(a)(1)(iii).

Congress has granted very broad authority to the Secretary of the Department of Homeland Security (DHS) to revoke visa applications. 8 U.S.C. §1155 (USCIS may at any time revoke a petition for "good and sufficient" cause.). A visa revocation is now retroactive to the date of approval. Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458, §5304(d). "Good and sufficient cause" refers to a petitioner's failure to meet his burden of proof, where the evidence of record at the time the revocation notice is issued, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intent, or if unexplained and unrebutted. *In re Ho*, 19 I. & N. Dec. 582 (B.I.A. 1988).

A large majority of federal circuits hold that challenges by aliens to immigrant visa revocations, including I-140 employment-based applications, have been barred from judicial review by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) court-stripping provision, 8 U.S.C. §1252(a)(2)(B)(ii). See *Jilin Pharmaceutical USA Inc. v. Chertoff*, 447 F.3d 196 (3rd Cir. 2006); *Ghanem v. Upchurch*, 481 F.3d 222 (5th Cir. 2007); *Mehanna v. USCIS*, 677 F.3d 312 (6th Cir. 2012); *El-Khader v. Monica*, 366 F.3d 562 (7th Cir. 2004); *Abdelwahab v. Fraizier*, 578 F.3d 817, 820-22 (8th Cir. 2009); *Green v. Napolitano*, 627 F.3d 1341 (10th Cir. 2010). District courts in other circuits that have also found the §1155 falls under IIRIRA's court-stripping provisions include *Mohammad v. Napolitano*, 680 F.Supp.2d 1 (D.D.C. 2009); *Punathil v. Heinauer*, 876 F.Supp.2d 1294, 1298-1300 (M.D. Fla. 2012); *Kurapati v. USCIS*, 950 F.Supp.2d 1230 (M.D. Fla. 2013) (apply judicial review bar to AC21 "port" applications).

A minority of federal circuits have found that jurisdiction to review §1155 revocations has not been statutorily stripped. *See Firsthand Int'l Inc. v. INS,* 377 F.3d 127, 130-31 (2nd Cir. 2004); *Herrera v. USCIS*, 571 F.3d 881 (9th Cir. 2009). However, both the Second and Ninth Circuits agreed in these cases that, although judicial review of §1155 revocations is available, revocation is discretionary and retroactive if "good and sufficient cause" is shown.

With the zone of interest test now removed from the standing equation, certain Article III and prudential thresholds for "legal standing" remain, still significantly restricting the adjudication and judicial review of I-140 petitions, as well as for I-140-based I-485 applications for adjustment of status to permanent resident alien.

First, an I-485 AOS application can only be approved where the applicant presents a valid approved I-140 petition and DOL labor certification. *See, e.g., Vemuri v. Napolitano*, 845 F.Supp.2d 125, 134 (D.D.C. 2012) ("At the point Plaintiff lacks standing to challenge the denial of the underlying I-140 petition, Plaintiff also lacks standing to challenge the denial of the related I-485 and I-765 applications for want of a redressible injury."). Only an employer can apply for and obtain a labor certification. Where an alien is not the beneficiary of a current valid labor certification, he thus lacks Article III standing to seek administrative or judicial review of the denial or revocation of an I-140 petition. Any injury to his ability to work in the United States could not have been proximately caused by USCIS rejection of his application for an employment-based immigrant visa, but instead was a consequence of the rejection by the U.S. *Department of Labor* of the visa's statutory prerequisite, labor certification.

It should be kept in mind that the alien does not have a fundamental liberty or property interest protected by *constitutional* due process in the labor certification or employment-based immigrant visa, for which the petitioning employer has applied on his behalf. *Contreras v. AG of the United States*, 665 F.3d 578, 585 (3rd Cir. 2012) (stating the "Fifth Amendment simply does not apply to the preparation and filing of a petition that does not relate to the fundamental fairness of an ongoing removal proceeding."); *Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1051 (9th Cir. 2008) (same).

Instead, the alien must rely on establishing his position within the zone-of-interests of the appropriate provisions of the immigration laws, as part of his case on the merits. The alien beneficiary must plead this claim directly, or indirectly if seeking purely injunctive relief, by meeting the more flexible Administrative Procedure Act (APA) standard of an interest "arguably within the zone of interests protected or regulated by the statute in question." *See, e.g., Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1268 (11th Cir. 2011).

However, an alien beneficiary will have Article III standing to allege a failure of USCIS to follow its own procedural regulations, *e.g.* requirements for notice to the beneficiary of agency intent to revoke. *Kurapati v. USCIS*, 775 F.3d 1255, 1260 (11th Cir. 2014) (noting the *Lexmark* decision).

For the alien who has in fact filed a valid labor certification and I-140 petition as part of an I-485 application package, the legal standing analysis and related zone-of-interest analysis for challenge to a denial or revocation of the adjustment of status application post-*Lexmark* changes structurally, but with little practical effect. 8 U.S.C. §1153(b) and 8 U.S.C. §1255(a) provide that the petitioner is *the alien*, not the employer. Similarly, the portability provision at 8 U.S.C. §1154(j) does not provide a benefit to the employer who obtained the I-140 visa approval but later loses the opportunity to employ the alien, due to excessive delay in I-485 adjustment of status process.

In all but the Second and Ninth Circuits, the federal courts are stripped of subject matter jurisdiction to even hear challenges to the I-140 petition revocation. In those two circuits, after *Lexmark*, the district court still lacks subject matter jurisdiction, unless the alien beneficiary whose AC21 port application is denied or revoked meets his burden of pleading, to *Iqbal* standards of specificity, that USCIS lacked good and sufficient cause to act. As noted above, through the joint operation of 8 C.F.R. §205.2(d) and 8 C.F.R. §103.3(a)(1)(iii), the Secretary of DHS has also restricted the jurisdiction of the AAO to appeals brought by persons meeting the same "legal standing."

Lexmark held that the zone-of-interest test now applies to all statutorily created causes of action:

> In sum, the question this case presents is whether Static Control falls within the class of plaintiffs whom Congress has authorized to sue under §1125(a). In other words, we ask whether Static Control has a cause of action under the statute.

Lexmark, 134 S.Ct. at 1387. The test is a "requirement of general application" and Congress is presumed to "legislate against the background of the zone-of-interests limitation, which applies unless it is expressly negated." *Lexmark*, 134 S.Ct. at 1388, citing *Bennett v. Spear,* 520 U.S.

154, 163 (1997). A federal court must determine the meaning of the provision invoked, using traditional principles of statutory interpretation. *Lexmark*, 134 S.Ct. at 1387, 1388, citing *Steel Co.*, 523 U.S. at 97.

The *Lexmark* decision examined the zone-of-interests created by the Lanham Act, 15 U.S.C. §1125(a), whose zone-of-interest the court found to "require no guesswork." *Lexmark*, 134 S.Ct. at 1389. In the context of federal immigration law, the zone-of-interests created by relevant provisions of the INA is among the most explicit for U.S. Code Title 8. Although it can no longer be used to dismiss a challenge on the basis of lack of standing, since *Lexmark* the zone-of-interest scrutiny of a plaintiff's cause of action must occur, and if the alien beneficiary is not found to be in that zone, a federal court—and, per the 8 C.F.R. §103 regulation defining agency jurisdiction as limited to appellants with "legal standing" —the AAO must dismiss the challenge for lack of subject-matter jurisdiction.

For employment-based immigrant petitions, the relevant provisions for the zone-of-interests analysis are (1) 8 U.S.C. §1154(a)(1)(F) (any employer desiring and intending to employ within the United States an alien entitled to classification ... may file a petition ....); (2) 8 U.S.C. §1154(b)(the [Secretary of DHS] after investigation of the facts ... and consultation with the Secretary of Labor ... shall ... if he determines that the facts stated in the petition are true and that the alien ... is eligible for preference under subsection (b) of section 203 ... approve the petition); and (3) 8 U.S.C. §1155 (authorizing the Secretary of DHS at any time and for good and sufficient cause, to revoke any immigration petition approved under 8 U.S.C. §1154). Integrally related to these provisions, and thus relevant for the zone-of-interests inquiry, is (4) 8 U.S.C. §1182(a)(5), which outlines the labor certification process. *Vemuri v. Napolitano*, 845 F.Supp.2d 125, 131 (D.D.C. 2012).

As part of the 1965 reforms of the INA, Congress revised the labor certification process for employment visas to require the Secretary of Labor to affirmatively find that an alien seeking to enter the United States for employment purposes would not replace a U.S. worker or adversely affect U.S. wages or working conditions. P.L. No. 89-236, at §10(a)(1965), codified at 8 U.S.C. §1182(a)(5)(A). The purpose of the revision was "to protect the American economy from job

competition and from adverse working standards as a consequence of immigrant workers entering the labor market. Sen. Rep. No 89-748, 1965 USCCAN 3328, 3329, 3333-34 ("Simultaneous with the abolition of national quotas, controls to protect the American labor market from an influx of both skilled and unskilled foreign labor are strengthened."). *Id.*

> The plain language as well as the legislative history of the relevant provisions reflect a clear congressional concern for protecting the interests of American labor over those of foreign workers ... and ensuring that American employers have the ability to hire qualified non-resident alien workers where no qualified American workers are available. However, nothing in the language or legislative history ... reflects a similar concern with to protect the interests of nonresident aliens seeking to enter this country to obtain a job, and those aliens' interests are seemingly inconsistent with the interests of American workers.

Pai v. USCIS, 810 F.Supp.2d 102, 110 (D.D.C. 2011). In *International Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, (D.C. Cir. 1985), the circuit court explained that the provision described in the 1952 legislative history was amended in 1965 to its current form: "alien labor is admitted only if the Secretary of Labor finds that American labor will not be adversely affected by the entry." *Bricklayers*, at 805. This statutory change was made to strengthen further the 1952 INA protections of American workers. *Id.* (citing legislative history of 1965 amendments). *Pai*, 810 F. Supp. 2d at 110:

> In the 1952 Act, the alien could enter unless the Secretary of Labor closed the door. Under the 1965 statute, the door is closed to the alien, unless the Secretary of Labor opens it.

Gordon, Mailman, Yale-Loehr and Wada, 3 Immigration law and Procedure, Rel 135, § 39.02[3][a] (2011)(citing CRS Report, U.S. Immigration Law and Policy 1952-1979, Sen. Jud. Comm. Print, 89th Cong. 1st Sess. 58 (May 1979).

After *Lexmark*, the zone-of-interest test constitutes a more significant barrier to AAO and federal district court subject matter jurisdiction, because it is a general and non-waiveable prerequisite. The plain language, legislative history, and agency regulations all continue to exclude unsuccessful alien beneficiaries from the classes protected by the joint action of 8 U.S.C. §§ 1154, 1155, and 1182(a)(5)(A). Two possible exceptions to the reduced post-*Lexmark* class of intended beneficiaries are the small classes of statutorily-created self-petitioners, and the even

smaller class of AC21 adjustment of status applicants whose approved labor certifications and I-140 petitions remain valid and thus are *not* the subject of the alien beneficiary's appeal.

As the District of Columbia Circuit has astutely observed, "the jurisdictional and merits issues in [labor certification] cases are inextricably linked." *De Jesus Ramirez v. Reich*, 156 F.3d 1273, 1278 (D.C. Cir. 1998). In conclusion, IRLI predicts that AAO will in the future dismiss significantly fewer challenges to visa denials or revocations on lack of prudential standing. However, the Article III standing hurdles will remain as practical barriers.

Most significantly, any drop in dismissals on standing grounds should be more than offset by the legislative intent of the zone-of-interests test for INA employment-based immigration, as repositioned by *Lexmark*. The INA-based zone-of-interest—with its primary congressional objective of protecting the hiring preferences and working conditions of American workers and secondary objective of regulating access to certified foreign labor for U.S. employers where able and willing U.S. workers are not available—should assume a reinvigorated and more efficiency role in the USCIS case management and adjudication process.

Respectfully submitted,

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REQUEST FOR AMICUS BRIEF
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Submission Period Ends: 05-22-2015

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
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Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

USCIS Administrative Appeals Office: Request for Amicus Curiae Briefs

The Administrative Appeals Office (the AAO) may request "amicus curiae" (friend of the court) briefs to allow concerned stakeholders the opportunity to provide input regarding a complex or unusual issue in a particular case or group of cases. An *amicus* brief is a written statement from a person or organization that is not a party in a case but may have a strong interest in the issue being considered. *See* AAO Practice Manual section 3.8(e).

Current DHS regulations provide that only "affected parties" may appeal or make motions relating to immigration benefit requests and that the beneficiary of a visa petition is not an "affected party." *See* 8 C.F.R. § 103.3(a)(1)(iii)(B) ("For the purposes of this . . . part, *affected party* (in addition to the Service) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition."). Similarly, 8 C.F.R. §103.2(a)(3) limits representation to a recognized party and expressly excludes beneficiaries: "*Representation.* An applicant or petitioner may be represented by an attorney . . . . A beneficiary of a petition is not a recognized party in such a proceeding." Other provisions, generally applicable to most immigration benefit requests, also expressly reference applicants and petitioners, but not beneficiaries. *See, e.g.*, 8 C.F.R. §103.2(a)(2) (signature of benefit requests); 8 C.F.R. § 103.2(b)(6) (withdrawal of benefit requests); 8 C.F.R. §103.3(a)(1)(i) (notification of denial and appeal rights). The form instructions to Form I-140 restate these petitioner-directed filing requirements.[1]

Last year, the U.S. Supreme Court issued a decision establishing an 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, 1387, 188 L.Ed.2d 392 (2014).

In light of *Lexmark* and other court decisions,[2] the AAO seeks *amicus* briefing on whether the beneficiaries of certain immigrant visa petitions have standing to participate in the administrative adjudication process, including standing to appeal to the AAO (and if so, when, and under what circumstances). 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

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[1] 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.

[2] *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 ----, 2015 WL 365824 (E.D. Wis. 2015); *Vemuri v. Napolitano*, 845 F.Supp.2d 125 (D.D.C. 2012) and cases cited therein.

the Twenty-First Century Act of 2000 ("AC21"), on denied I-140 immigrant visa petitions or approved petitions later revoked.[3]

Format of the Briefs

The appearance of *amici curiae* is limited to the filing of a brief no longer than 25 pages, single spaced. The author should sign the brief, indicate any organization represented, and prominently indicate "Amicus: Standing" to ensure proper routing.

When to Submit Briefs

Amicus briefs must be received no later than May 22, 2015, 45 days from this announcement.

Where to Submit Briefs

Please mail your brief to the following address:

ENCL: AMICUS
U.S. Department of Homeland Security
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Administrative Appeals Office (AAO)
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[3] AC21 created a new provision in the Immigration and Nationality Act, section 204(j), 8 U.S.C. 1154(j), that permits an eligible beneficiary of an approved I-140 petition who has filed an application for adjustment of status to "port" that petition to a new job (with the same or different employer) if the adjustment application has been pending for 180 days or more and the new employment is in "the same or a similar occupational classification as the job for which the petition was filed." Some beneficiaries who have "ported" to a new employer under AC21 assert that, since they have a stated interest in the allocated immigrant visa based on a filed adjustment of status application, they should have standing related to the immigrant petition.