

# University of Michigan Journal of Law Reform

---

Volume 52

---

2019

## Switching Employers in a Working World: American Immigrants and the Revocation Notice Problem

Julie Aust  
*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Immigration Law Commons](#), and the [Labor and Employment Law Commons](#)

---

### Recommended Citation

Julie Aust, *Switching Employers in a Working World: American Immigrants and the Revocation Notice Problem*, 52 U. MICH. J. L. REFORM 533 (2019).

Available at: <https://repository.law.umich.edu/mjlr/vol52/iss2/6>

<https://doi.org/10.36646/mjlr.52.2.switching>

This Note is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mLaw.repository@umich.edu](mailto:mLaw.repository@umich.edu).

## SWITCHING EMPLOYERS IN A WORKING WORLD: AMERICAN IMMIGRANTS AND THE REVOCATION NOTICE PROBLEM

---

Julie Aust\*

### ABSTRACT

*A current tension in U.S. employment immigration law involves the notice requirements for prospective permanent residency—"green card"—applicants. Foreign workers oftentimes do not receive their green cards for more than ten years after beginning the permanent residency process. For almost four decades after the first major employment immigration legislation was passed in 1965, green card applicants were unable to change employers during this extremely long process without abandoning their applications. In 2000, Congress sought to remedy the problem by passing legislation allowing foreign workers to change employers without sacrificing progress on their green cards. This legislation, however, created a massive gap in the process which remains to this day: currently, if a foreign worker changes employers after beginning her green card application, neither the worker nor her new employer is legally entitled to notice if anything goes wrong with the underlying petition. More specifically, if the government finds error in the green card petition and seeks to revoke it, the government is not obligated to provide revocation notice to the foreign national or to her new employer. Revoking a green card petition does not merely jeopardize a worker's permanent residency application; it could also jeopardize her entire underlying status and could force her to abruptly leave the country. The immigration agency issued a policy memo in 2017 partially addressing the problem by granting the worker temporary standing during her proceedings. The memo is an insufficient solution to the problem, however, because it may be withdrawn or superseded at any time. Because the revocation notice problem presents an immediate and dire threat to the immigration status of potentially every foreign worker who switches jobs during her green card process, this Note advocates for both immediate administrative—as well as long-term congressional—permanent reforms to the relevant statutes and regulations governing this system.*

---

\* J.D., December 2018, University of Michigan Law School. I would like to thank the entire editorial team on the *Michigan Journal of Law Reform* for their hard work and tremendous help with this Note! Specifically, I would like to thank Johannah Walker and Michael Periaatt for being the best Note Editors, Graves Lee and Marina Pino for their excellent final edits, and the Volume 52 Managing Editorial Board for being such a diligent and fun team this year. Thank you also to Professor Julian Mortenson for his early guidance and to Rob for encouraging me every step of the way. Finally, thank you to my mom, Elise. Your love and support made me the person I am today.

## TABLE OF CONTENTS

INTRODUCTION.....	534
I. THE EMPLOYMENT-BASED GREEN CARD PROCESS.....	537
A. <i>Overview of the System</i> .....	537
B. <i>The Green Card Process, Step by Step</i> .....	539
<i>Step 1: The Labor Certification</i> .....	539
<i>Step 2: The I-140</i> .....	540
<i>Step 3: The Adjustment of Status</i> .....	541
II. SWITCHING EMPLOYERS AND THE REVOCATION NOTICE PROBLEM.....	543
A. <i>Understanding the Revocation Notice Problem</i> .....	543
B. <i>The Old Way: The Immigration and Nationality Act of 1965</i> .....	544
C. <i>The New Way: The American Competitiveness in the 21<sup>st</sup> Century Act of 2000</i> .....	545
D. <i>The Notice Problem: “Applicants” v. “Petitioners” v. “Beneficiaries”</i> .....	546
E. <i>Courts’ Response to the Notice Problem</i> .....	547
F. <i>USCIS’s 2017 Policy Memorandum</i> .....	549
III. USCIS AND CONGRESS SHOULD EXPAND THE REVOCATION NOTICE REQUIREMENT TO INCLUDE BOTH THE FOREIGN WORKER AND THE WORKER’S CURRENT EMPLOYER.....	551
A. <i>The 2017 Policy Memorandum is a Temporary and Insufficient Solution to the Revocation Notice Problem</i> .....	551
B. <i>Modifying the Regulation will Honor the Legislative Intent Behind the INA and AC-21</i> .....	552
C. <i>Modifying the Regulation will Further the Policy Goals of Compassion and Efficiency</i> .....	556
CONCLUSION.....	557

## INTRODUCTION

The American immigration machine moves more people annually than any other immigration system in the world.<sup>1</sup> Hosting approximately one-fifth of the world’s migrants, the United States relies upon a convoluted web of statutes to shuttle millions of people

---

1. See Jie Zong, Jeanne Batalova, & Jeffrey Hallock, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL’Y INST. (Feb. 8, 2018), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states>.

in and out of the country each year.<sup>2</sup> Since 1965, Congress has layered immigration statutes atop one another to create the complex lattice of legislation governing the system as we know it. Today, that system brings in approximately 1.5 million human beings per year, but creates a regulatory maze for prospective migrants and for the American businesses and families seeking to help foreign nationals immigrate to the United States.<sup>3</sup>

This problem is particularly pronounced within the employment-based green card system: a multi-step process cobbled together by two major pieces of statute, several layers of regulatory addenda, and a patchwork of administrative guidance.<sup>4</sup> In 1965, Congress passed the Immigration and Nationality Act (INA) to standardize and humanize an immigration system that had previously employed national-origin quotas to prioritize certain preferred immigrants of specific races and nationalities.<sup>5</sup> In addition to committing the United States to accepting immigrants on a more equal basis, the INA established the basic process by which foreign workers could become permanent residents through their employment with American companies.<sup>6</sup> While this process provided immigrants a pathway to American citizenship, it allowed for very little flexibility once workers started their application for permanent residence. Specifically, a foreign worker could not, under the INA, voluntarily switch employers during the green card process without abandoning her application entirely. Because the green card process can take decades to complete,<sup>7</sup> a foreign worker was essentially involuntarily tethered to her employer until her application was either processed or abandoned.

In 2000, Congress amended the INA by passing the American Competitiveness in the 21st Century Act (AC-21). AC-21 attempted to introduce flexibility into the process by allowing workers to transfer, or “port” their ongoing green card applications to new employers.<sup>8</sup> While the new rules achieved their goal of increasing mobility for immigrants within the American job market, the subsequent administrative attempts to reconcile the details of INA and

---

2. *Id.*

3. *See id.*; Stuart Anderson, *America's Incoherent Immigration System*, 32 CATO J. 71, 74–75 (2012).

4. *See* Anderson, *supra* note 3, at 74–77.

5. Muzaffar Chishti et al., *Fifty Years On, the 1965 Immigration and Nationality Act Continues to Reshape the United States*, MIGRATION POL'Y INST. (Oct. 15, 2015), <https://www.migrationpolicy.org/article/fifty-years-1965-immigration-and-nationality-act-continues-reshape-united-states> [hereinafter *The 1965 Immigration and Nationality Act Continues to Reshape the United States*].

6. *See* RICHARD D. STEEL, STEEL ON IMMIGRATION LAW § 2:24 (2017 ed.).

7. *See infra* Figure 1.

8. *See* Immigration and Nationality Act (INA) § 204(j), 8 U.S.C. § 1154(j) (2018).

AC-21 created a substantial regulatory gap. Namely, under this regime, if a foreign worker ports their green card to a new employer and something goes wrong with that application, neither the foreign worker nor the new employer is statutorily entitled to notice of the problem. Only the original employer—the “petitioner”—is guaranteed notice of impending revocation of a petition. If the foreign worker or her new employer cannot timely respond to problems with the petition, the petition may be revoked. Revoking an immigration petition does not merely jeopardize a foreign worker’s immediate green card application; it could also jeopardize her underlying visa status, as well as her ability to remain in the country entirely. While U.S. Citizenship and Immigration Services (USCIS) took a step in the right direction in 2017 by issuing a policy memo granting certain immigrants an “affected party” status for the purposes of administrative adjudications—entitling them to notice of an impending revocation and the opportunity to respond—USCIS may revoke or supersede this guidance at any moment.<sup>9</sup> The memo is therefore an unstable, short-term solution to a long-term problem; its proposals remain an insufficient remedy in closing a massive statutory loophole. The discretionary policy is particularly unstable in the current executive administration, which has otherwise sought to tighten restrictions on legal business immigration and which could revoke USCIS’s policy memo at any time.<sup>10</sup> Thus, the revocation notice problem continues to present an immediate and grave threat to the immigration status of potentially every foreign worker who switches jobs during their green card process.

This Note explores the background of the modern employment immigration system and the multi-step green card process, analyzes the two pieces of legislation that brought about the revocation notice statutory gap, and suggests both a regulatory and a statutory solution to close the gap. Part I introduces the employment-based green card process and explains the complex and often lengthy process step-by-step. Part II introduces the revocation notice prob-

---

9. U.S. CITIZENSHIP AND IMMIGRATION SERV., PM-602-1049, MATTER OF V-S-G- INC., ADOPTED DECISION 2017-06 (2017), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-11-11-PM-602-0149-Matter-of-V-S-G-Inc.-Adopted-Decision.pdf> [hereinafter ADOPTED DECISION].

10. See, e.g., Iain Thomson, *H-1B visa hopefuls, green card holders are feeling the wrath of ‘America first’ Trump*, REGISTER (Jan. 24, 2018, 1:03 PM), [https://www.theregister.co.uk/2018/01/24/trump\\_immigration\\_h\\_1b\\_crackdown/](https://www.theregister.co.uk/2018/01/24/trump_immigration_h_1b_crackdown/); Gabrielle Levy, *Trump Administration Adds New Hurdles for Green Card Seekers*, U.S. NEWS (Dec. 28, 2017, 11:55 AM), <https://www.usnews.com/news/national-news/articles/2017-12-28/trump-administration-adds-new-hurdles-for-green-card-seekers>; Tal Kopan, *Trump administration adding extra hurdle for green cards*, CNN POLITICS (Aug. 29, 2017, 7:30 AM) <https://www.cnn.com/2017/08/28/politics/trump-administration-green-cards-interviews/index.html>.

lem, examines judicial responses to it, and discusses why the 2017 immigration policy memorandum is an unstable short-term fix. Part III advocates for two solutions. First, it argues that the immigration agency should modify its regulations through notice-and-comment procedures to require that any green card revocation notice must be provided to the foreign worker, as well as to the worker's current employer. Second, Part III argues that, should Congress modify any part of the INA or AC-21 that would revoke or supersede the agency's new regulation, Congress should ensure that it closes the statutory gap itself. Finally, Part III discusses why alternative approaches will not work and explains why cooperative regulatory action would increase the efficiency of the system and honor the humanitarian principles animating the INA and AC-21.

## I. THE EMPLOYMENT-BASED GREEN CARD PROCESS

### A. *Overview of the System*

The INA is the backbone of the modern employment immigration system. In 1965, the INA established a multi-step "green card" process allowing a foreign national (FN), who is in the U.S. pursuant to non-immigrant worker visas, to become a permanent resident.<sup>11</sup>

The number of steps in the green card process depends on whether a FN is a "priority" or "non-priority" worker.<sup>12</sup> "Priority workers," defined by the INA, are those whose skill and expertise place them in "that small percentage who have risen to the very top of the field of endeavor."<sup>13</sup> In order to receive a green card, "priority workers" need only complete two steps: the I-140 Immigrant Petition and I-485 Adjustment of Status application. "Non-priority workers"—non-skilled workers and skilled workers who do not

---

11. Although there are many non-employment paths to immigration, this note focuses only on eligibility through employment. See STEEL, *supra* note 6, § 2:24.

12. See *id.* § 6:27.

13. 8 C.F.R. § 204.5(h)(2) (2018). Priority workers are aliens with extraordinary ability in a particular field, as demonstrated by "sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation;" internationally-recognized outstanding professors and researches; or executives/high-level managers who, for at least one year in the three years prior to the instant visa petition, worked for the same corporation or its affiliate in a managerial or executive capacity. INA § 203(b)(1), 8 U.S.C. § 1153(b)(1) (2018).

otherwise meet the “priority worker” qualifications<sup>14</sup>—must complete a labor certification in addition to the I-140 and I-485.<sup>15</sup>

First, the FN’s employer completes the labor certification and I-140, so that the employer may hire the non-priority worker on a permanent basis. The FN herself then completes the final step, the I-485 Adjustment of Status.<sup>16</sup> For the first two steps, the FN is considered a “beneficiary,” as opposed to an “applicant” of the visa process.<sup>17</sup> As a beneficiary—a person receiving the benefit of an application, but not necessarily filing the application herself—the FN has no statutory right to receive communications from the government about the status of her green card process.<sup>18</sup>

Once the FN receives her approved I-140, she is placed on a waiting list. Even though she has completed both “beneficiary” stages, she will not become an “applicant” until she begins the last step: the I-485 Adjustment of Status application. The government only allows a finite number of employment-based green card applicants to adjust their status per year. This number varies based on the applicant’s visa category and country of origin.<sup>19</sup> To know

---

14. INA § 203(b)(2), 8 U.S.C. 1153(b)(2) (2018); INA § 203(b)(3)(A)(i)–(iii), 8 U.S.C. § 1153(b)(3)(A)(i)–(iii) (2018). This category includes individuals capable of performing skilled labor requiring at least two years of training or experience for which qualified U.S. workers are not available, professionals with baccalaureate or advanced degrees, and individuals performing unskilled labor for which qualified U.S. workers are not available. INA § 203(b), 8 U.S.C. § 1153(b).

15. In rare cases, a non-priority FN may be exempt from a labor certification requirement if she can demonstrate that the exemption would be in the United States’ national interest. 8 C.F.R. § 204.5(k)(4)(ii) (2018).

16. See Adjustment of Status, U.S. CITIZENSHIP AND IMMIGRATION SERV., <https://www.uscis.gov/greencard/adjustment-of-status> (last updated Jan. 11, 2018). For certain specialized priority workers, the FN may file the I-140 for herself, in lieu of having her employer file. STEEL, *supra* note 6, § 6:27.

17. See *Glossary*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/glossary.html#P> (last visited Jan. 8, 2019) (defining “applicant (visa)” as “[a] foreign citizen who is applying for a nonimmigrant or immigrant U.S. visa [and who] may also be referred as [sic] a beneficiary for petition based visas” and “beneficiary” as “[a]n applicant for a visa as named in a petition filed with DHS, USCIS”).

18. The beneficiary is also not statutorily entitled to challenge administrative decisions in court. 8 CFR § 103.5(a)(1)(i) (2018) (limiting motions to reopen or reconsider an I-140 revocation to the “applicant or petitioner” or an “affected party”); *id.* § 103.3(a)(1)(iii)(B) (defining “affected party” as “the person or entity with legal standing in a proceeding,” and noting specifically that “[affected party] does not include the beneficiary of a visa petition”). For more information on the difference between a “beneficiary” and an “applicant,” see the discussion on p. 546 *infra*. See also the discussion about USCIS’s internal policy memorandum which grants FN’s “affected party” status for purposes of I-140 notice revocation proceedings, on p. 544 *infra*.

19. See INA § 202(b), 8 U.S.C. § 1152(b) (2018); INA § 203(b), 8 U.S.C. § 1153(b) (2018); STEEL, *supra* note 6, § 4:11. There are approximately 140,000 employment-based immigration slots available each year: 28.6% of the slots are for priority workers, 28.6% for workers of exceptional merit and ability in the arts and sciences/persons with advanced degrees, 28.6% for “professionals” and other skilled/unskilled workers, 7.1% for “special” immigrants such as religious workers, and 7.1% for investors and other “employment creat[ors].” STEEL, *supra* note 6, § 4:15.

whether a FN may adjust her status by filing an I-485—and therefore officially become an “applicant” —the FN must wait for her “priority date” to come due.<sup>20</sup> Each month, the State Department determines which priority dates have come due by monitoring the current country and visa category limits.<sup>21</sup> It then issues a Visa Bulletin, which sets forth that month’s quota availability; the Visa Bulletin effectively informs the public as to which priority dates have come due.<sup>22</sup> Only when a FN’s priority date has come is she eligible to file her I-485 and request that the government adjust her status to “permanent resident.”<sup>23</sup> Depending on the FN’s country of origin and visa preference category, it could take years—even decades—for her priority date to come due.<sup>24</sup>

A FN with an approved I-140 may keep her priority date even if she later becomes the beneficiary of another employment-based immigrant petition.<sup>25</sup> However, if at any time a FN’s I-140 petition is revoked, she loses the corresponding priority date.<sup>26</sup>

## B. *The Green Card Process, Step by Step*

### *Step 1: The Labor Certification*

For non-priority workers, an employer may not file an immigrant petition until it has first obtained an approved labor certification from the Department of Labor’s Employment and Training Administration.<sup>27</sup> A labor certification is the Secretary of Labor’s two-prong determination that 1) there are no other workers “qualified, willing, able, and available” to fill the FN’s position; and that 2) hiring the FN will not have “an adverse effect on workers in the United States similarly employed.”<sup>28</sup> To make this determination, the Department of Labor investigates the number of U.S. workers qualified for (and able to fill) the FN’s prospective position, as well as the effect that the FN’s employment would have on the wages

---

20. Priority dates will be discussed in greater detail on p. 542 *infra*.

21. See 22 C.F.R. §§ 42.51–42.55 (2018); STEEL, *supra* note 6, § 4:17.

22. *Id.*

23. STEEL, *supra* note 6, § 4:18.

24. See *Acceptance of Adjustment of Status Applications*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/greencard/visa-availability-priority-dates#Acceptance> (last updated Nov. 5, 2015).

25. 8 C.F.R. § 204.5(e) (2018).

26. See STEEL, *supra* note 6, § 4:18.

27. *Permanent Labor Certification Details*, U.S. DEP’T LAB., [https://www.foreignlaborcert.doleta.gov/perm\\_detail.cfm](https://www.foreignlaborcert.doleta.gov/perm_detail.cfm) (last updated July 26, 2018).

28. STEEL, *supra* note 6, § 6:8; see also INA § 203(b)(2)–(3), 8 U.S.C. § 1153(b)(2)–(3) (2018); INA § 212(a)(5)(A), 8 U.S.C. § 1182(a)(5)(A) (2018).



and working conditions of U.S. workers employed in the same occupation as the FN.<sup>29</sup>

Labor certifications are worksite-specific.<sup>30</sup> For workers requiring an approved labor certification, the date that the Department of Labor receives the labor certification application ultimately becomes the FN's priority date.<sup>31</sup> After the Department of Labor approves a labor certification, the certification is valid for 180 days.<sup>32</sup> Within this timeframe, the FN's employer must submit the approved labor certification along with the formal immigrant petition (Form I-140) to USCIS.<sup>33</sup>

### *Step 2: The I-140*

Form I-140—Immigrant Petition for Alien Worker—is the formal petition requesting that USCIS classify a FN as “someone who is eligible for an immigrant visa based on employment.”<sup>34</sup> The I-140 is a “necessary predicate” for any employment-related permanent resident status.<sup>35</sup> Priority workers in the “extraordinary ability” category<sup>36</sup> may file their own I-140, but all other priority and non-priority workers must have an employer file the I-140 on their behalf.<sup>37</sup> For non-priority workers, the I-140 petition packet must contain the approved labor certification along with proof that the FN both 1) met all necessary educational and experiential qualifications at the time the labor certification was filed; and 2) meets the qualifications currently.<sup>38</sup> Conversely, because priority workers do not submit a labor certification, they must show in their petitions that they are “pre-certified,” in that they meet the requirements of their heightened preference category.<sup>39</sup> For worker categories that do not require an approved labor certification, the date that

---

29. See *Labor Certification*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/tools/glossary/labor-certification> (last visited Jan. 8, 2019).

30. INA § 212(a)(5)(A)(i)(I), 8 U.S.C. § 1182(a)(5)(A)(i)(I) (2018).

31. *Permanent Labor Certification Details*, *supra* note 27.

32. *Id.*

33. 20 C.F.R. § 656.30(b) (2018); *Permanent Labor Certification Details*, *supra* note 27.

34. *Petition Filing and Processing Procedures for Form I-140, Immigrant Petition for Alien Worker*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/forms/petition-filing-and-processing-procedures-form-i-140-immigrant-petition-alien-worker> (last updated Mar. 8, 2018).

35. STEEL, *supra* note 6, § 6:34.

36. See *supra* note 13 for a discussion of the extraordinary ability category.

37. STEEL, *supra* note 6, § 6:27.

38. *Id.* § 6:30.

39. *Id.*

USCIS receives the I-140 petition ultimately becomes the FN's priority date.<sup>40</sup>

A FN's approved I-140 may be automatically revoked for several reasons: some discretionary and some automatic. For example, the Attorney General may, at her discretion, revoke an approved petition "at any time, for what [s]he deems to be a good and sufficient cause."<sup>41</sup> Additionally, an I-140 will be automatically revoked in any one of the following four circumstances: 1) the underlying labor certification expires or is revoked; 2) the petitioner or beneficiary dies; 3) the petitioner or beneficiary formally withdraws;<sup>42</sup> or 4) the petitioner's business ceases to exist.<sup>43</sup>

In non-automatic revocation cases, USCIS will send a Notice of Intent to Revoke (NOIR) to the petitioner's last known address.<sup>44</sup> The petitioner then has thirty days to appeal the revocation decision.<sup>45</sup>

### *Step 3: The Adjustment of Status*

The I-485 form—Application to Register Permanent Residence or Adjust Status—is the formal "green card" application.<sup>46</sup> While some preference categories allow the I-140 Immigrant Petition and I-485 Adjustment of Status application to be filed concurrently, most employment-based applicants must wait to adjust until a visa becomes available in their country-and-preference categories.<sup>47</sup> The Department of State (DOS) grants a maximum of 140,000 employment-based visas a year, and imposes additional visa limits based on an individual's country of origin and visa preference category.<sup>48</sup> For this reason, after receiving an approved I-140, a FN may have to wait a long time—years—before she may finally file her I-485.

---

40. See 8 C.F.R. § 204.5(d) (2018); STEEL, *supra* note 6, § 6:34.

41. INA § 205, 8 U.S.C. § 1155 (2018).

42. This condition only applies to certain preference categories.

43. 8 C.F.R. § 205.1 (2018).

44. STEEL, *supra* note 6, § 6:37.

45. *Id.*

46. *Adjustment of Status*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/greencard/adjustment-of-status> (last updated Jan. 11, 2018).

47. *Id.*

48. *Acceptance of Adjustment of Status Applications*, *supra* note 24.

FIGURE 1: USCIS VISA BULLETIN, FEB. 2019

Final Action Dates for Employment-Based Adjustment of Status Applications:						
Employment- Based	All Chargeability Areas Except Those Listed	CHINA-mainland born	EI SALVADOR GUATEMALA HONDURAS	INDIA	MEXICO	PHILIPPINES
1st	01DEC17	08FEB17	01DEC17	08FEB17	01DEC17	01DEC17
2nd	C	01OCT15	C	06APR09	C	C
3rd	C	01JUL15	C	22APR09	C	01AUG17

For example, the figure above is a snapshot of USCIS’s February 2019 Visa Bulletin.<sup>49</sup> As of February 1, 2019, *all* FNs who have received approved I-140’s in the second employment-based preference category—except those from China and India—have current priority dates (as indicated by the “C”).<sup>50</sup> These FNs are therefore eligible to file their I-485 Adjustment of Status applications in February 2019. However, FNs from all countries in the first employment-based preference category are ineligible to file I-485 applications unless their priority dates match, or date earlier than, the dates listed on the chart. Thus, while Indian FNs in the first preference category face a backlog of two years—and will be unable to adjust status unless they received their priority date on or before February 8, 2017—Indian FNs in the second and third preference category face a backlog of almost ten years.<sup>51</sup>

While a FN’s I-485 application is pending, the FN must continue to renew her underlying non-immigrant visa, which allows her to live and work in the United States. She must also update the U.S. government on any address changes and may not travel without applying for a separate travel document, called an “advance parole.”<sup>52</sup> If the FN leaves the country without an advance parole

49. See *supra* Figure 1; see also *When to File Your Adjustment of Status Application for Family-Sponsored or Employment-Based Preference Visas: February 2019*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/green-card/green-card-processes-and-procedures/visa-availability-priority-dates/when-file-your-adjustment-status-application-family-sponsored-or-employment-based-preference-visas-february-2019> (last updated Jan. 17, 2019).

50. See *supra* Figure 1.

51. *Id.*

52. See *While Your Green Card Application is Pending with USCIS*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/greencard/while-application-is-pending> (last updated Mar. 23, 2018).

while her I-485 pends, the government will consider her application “abandoned”—meaning that if she returned to the United States and still wanted to file for a green card, she would need to begin her application again.<sup>53</sup>

Once USCIS approves the I-485 application, USCIS sends the FN a permanent resident card—a green card—in the mail.<sup>54</sup> This card allows the FN to live and work permanently in the United States. Assuming the FN follows all green card renewal procedures and fulfills the terms and obligations of permanent residence,<sup>55</sup> she will remain a permanent resident in the United States until she either loses/abandons her status, or until she naturalizes and becomes a U.S. citizen.<sup>56</sup>

## II. SWITCHING EMPLOYERS AND THE REVOCATION NOTICE PROBLEM

### A. *Understanding the Revocation Notice Problem*

People change jobs. In 2018, the Bureau of Labor Statistics reported that the average employee worked with their current employer for only 4.2 years.<sup>57</sup> How, then, does the immigration system handle employment shifts within a process that can take decades to complete?

Clumsily. Under the old system, described below in Part B, FNs could not change employers during the green card application unless they were willing to restart the process with each new company. A congressional amendment in 2000 allowed certain FNs to change employers—“port” from one employer to another—without losing their immigration progress,<sup>58</sup> but the updated system caused *the revocation notice problem*: a statutory gap creating administrative confusion regarding which employer—the old or the new—should be notified in the event of a problem. In creating a

---

53. *See id.*

54. *Id.*

55. For more information about green card renewals and maintenance, see *Renew a Green Card*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/green-card/after-green-card-granted/renew-green-card> (last updated Feb. 1, 2018).

56. *Maintaining Permanent Residence*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/green-card/after-green-card-granted/maintaining-permanent-residence> (last updated Feb. 17, 2016).

57. *Employee Tenure Summary*, U.S. DEP'T LAB., <https://www.bls.gov/news.release/tenure.nr0.htm> (last updated Sept. 20, 2018).

58. American Competitiveness in the 21st Century Act, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

clear avenue for FNs to transfer their approved I-140s to new employers, Congress failed to develop a clear avenue for the new employers to receive USCIS updates about previously-submitted I-140s. Thus, in portability cases, prior employers—many of whom have not employed or even seen the FN in years—are the only entity statutorily entitled to notice if the government invalidates that FN's I-140.

In 2017, the government took a step in the right direction. USCIS introduced an internal policy memorandum that granted FNs “affected party” status during USCIS I-140 revocation proceedings.<sup>59</sup> “Affected parties” are statutorily entitled to notice and an opportunity to respond to legal actions taken on the petition. Unfortunately, USCIS explicitly declined to extend this privileged status to the FNs' new employer. While USCIS's overdue recognition of FNs as “affected parties” correctly acknowledges the centrality of FNs in their own immigration proceedings, the change does not go far enough. USCIS's failure to also classify subsequent employers as “affected parties” undermines statutory intent by failing to give new employers procedural notice about the I-140—the critical underlying immigration petition—that they have effectively adopted as their own.

Further, because USCIS can change or supersede its policy memorandum at any time,<sup>60</sup> any short-term benefit the policy provides is an insufficient and impermanent solution to the long-term revocation notice problem and does nothing to fix the statutory gap itself.<sup>61</sup> This gap jeopardizes not only a FN's green card process, but potentially her entire employment eligibility and immigration status in the United States.

### B. *The Old Way: The Immigration and Nationality Act of 1965*

Under the INA, a FN going through the employment-based immigration process would have two options if she wanted to change employers. First, the FN could wait to switch until after receiving her green card, which would provide her with general employment

---

59. See ADOPTED DECISION, *supra* note 9, at 4.

60. See introduction to ADOPTED DECISION, *supra* note 9 (“This policy memorandum . . . 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.”).

61. See *Precedent Decisions*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/laws/precedent-decisions> (last updated Sep. 10, 2013).

authorization.<sup>62</sup> Alternatively, the FN could switch employers *during* the green card process. Choosing this option, however, would require her to redo steps 1 and 2 (the Labor Certification and I-140 petitions) with the new employer.<sup>63</sup> Depending on the visa demand from the FN's country of origin, switching employers after initiating the labor certification could add decades to her immigration process.<sup>64</sup>

Ultimately, because the INA required the original I-140 petitioner to remain as the FN's employer until USCIS approved the I-485, an alien employee was essentially bound to her initial I-140 employer until she received her green card.<sup>65</sup>

### C. *The New Way: The American Competitiveness in the 21<sup>st</sup> Century Act of 2000*

In 2000, Congress amended the INA by passing the AC-21.<sup>66</sup> AC-21 established a "portability" provision within the INA, which made I-140 petitions and labor certifications transferrable to new employers.<sup>67</sup> Essentially, the amended statute no longer required a FN's employer during stages 1 and 2 of the green card process to be the same as the employer during stage 3.

The new portability provision allowed a FN to "port" her I-140 from one employer to another under three conditions. First, the FN must have already applied for adjustment of status. Second, the adjustment of status must have remained unadjudicated for at least 180 days. Finally, the FN's new job must be in the "same or similar" occupational classification as the job for which the underlying I-140 was filed.<sup>68</sup> Thus, after AC-21, workers no longer had to remain with their sponsoring employers until their I-485 applications were approved. AC-21 did not even require the FN's successor employer

---

62. See *Rights and Responsibilities of a Green Card Holder (Permanent Resident)*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/green-card/after-green-card-granted/rights-and-responsibilities-permanent-resident/rights-and-responsibilities-green-card-holder-permanent-resident> (last updated July 15, 2015).

63. See, e.g., *Mantena v. Johnson*, 809 F.3d 721, 733–34 (2d Cir. 2015).

64. See *supra* Figure 1.

65. See 8 U.S.C. § 1154(a)(1)(F) (2018).

66. Pub. L. No. 106-313, 114 Stat. 1251 (2000).

67. INA §§ 204(j), 212(a)(5)(A)(iv), 8 U.S.C. §§ 1154(j), § 1182(a)(5)(A)(iv) (2018); see also AC-21 § 106(c)(1).

68. INA § 204(j), 8 U.S.C. § 1154(j) (2018). The labor certification portability provisions of the AC-21 largely mirror the I-140 portability provisions, but will not be discussed here. See INA § 212(a)(5)(A)(iv), 8 U.S.C. § 1182(a)(5)(A)(iv) (2018); AC-21 § 106(c)(2).

to file a new I-140: it allowed the successor employer to rely entirely on its predecessor's petition.<sup>69</sup>

AC-21 also provided a special protection to those FNs who took advantage of its new portability provisions. As the USCIS Adjudicator's Field Manual explains, if a FN's I-485 has been pending for 180 days, "the approved Form I-140 shall remain valid under the provisions of § 106(c) of AC-21" even if a predecessor employer withdraws their I-140.<sup>70</sup> If USCIS determines that the prior I-140 is fraudulent, however, USCIS may revoke it and the adjudicating officer may deny the FN's I-485 "immediately."<sup>71</sup>

#### D. *The Notice Problem: "Applicants" v. "Petitioners" v. "Beneficiaries"*

Key to understanding the notice problem is understanding the legal difference between "applicants," "petitioners," and "beneficiaries." In short, petitioners and applicants refer to the entities making the requests, and beneficiaries refer to the entity upon whom the benefit is conferred.<sup>72</sup> Because the employer files the labor certification and I-140 immigrant petition, the employer is the "petitioner" during those stages. Because a FN does not *file* the labor certification or I-140, but receives the benefits of those applications, she is considered the "beneficiary" of those processes.

USCIS's "Revocation on Notice" regulation states that only visa *petitioners* may receive notice of the USCIS's intent to revoke an I-140 petition.<sup>73</sup> Further, the regulations do not allow beneficiaries to challenge revocations through a motion to reconsider.<sup>74</sup>

69. INA § 204(j), 8 U.S.C. § 1154(j) (2018); AC-21 § 106(c)(1). Note that there are circumstances in which a new employer might still file a new labor certification and I-140 petition, such as when an FN receives a promotion with the new employer. *See, e.g.*, *Musunuru v. Lynch*, 831 F.3d 880 (7th Cir. 2016).

70. U.S. CITIZENSHIP AND IMMIGR. SERVS., ADJUDICATOR'S FIELD MANUAL § 20.2(c) (2014) [hereinafter ADJUDICATOR'S FIELD MANUAL], <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1.html> (Petition Validity).

71. *Id.* § 22.2(d)(1) (Employment-Based Immigrant Visa Petitions (Form I-140)).

72. The Department of State defines "applicant (visa)" as "[a] foreign citizen who is applying for a nonimmigrant or immigrant U.S. visa [and who] may also be referred as [sic] a beneficiary for petition based visas," "beneficiary" as "[a]n applicant for a visa as named in a petition filed with DHS, USCIS," and "petitioner" as "[a] U.S. citizen or lawful permanent resident family member or employer . . . who files a[n] . . . employment-based immigrant visa petition with USCIS." *Glossary*, U.S. DEPARTMENT OF STATE, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/glossary.html#P> (last visited Jan. 8, 2019).

73. 8 C.F.R. § 205.2 (2018).

74. 8 C.F.R. § 103.5(a)(1)(i) (2018) (limiting motions to reopen or reconsider an I-140 revocation to the "applicant or petitioner" or an "affected party"); *id.* § 103.3(a)(1)(iii)(B) (defining "affected party" as "the person or entity with legal standing in a proceeding," and noting specifically that "[affected party] does not include the beneficiary of a visa petition").

E. *Courts' Response to the Notice Problem*

In 2015, the Seventh Circuit held in *Musunuru v. Lynch* that USCIS must inform a worker's current employer when it revokes a prior employer's I-140 petition.<sup>75</sup> There, Musunuru was an Indian national and the beneficiary of two I-140s: one with a current priority date from a previous employer, Vision Systems Group ("VSG"), and one from a newer employer, Crescent Solutions, with a priority date that would take years to become current.<sup>76</sup> After Musunuru filed his adjustment of status under the older I-140's priority date, USCIS revoked the older I-140 and invalidated his current priority date.<sup>77</sup> VSG's owners had previously pled guilty to unlawfully hiring an alien worker, so USCIS incorrectly assumed that all of VSG's I-140 petitions were fraudulent.<sup>78</sup>

USCIS had sent notice to VSG, revealing its intent to revoke Musunuru's I-140, but VSG had gone out of business. Because USCIS did not notify Musunuru or Crescent Solutions of its intended revocation, Musunuru did not learn that his I-140 had been revoked until well after the deadline to file an administrative appeal. USCIS denied Musunuru's request to reopen the case because, as VSG's beneficiary, Musunuru was entitled to neither the revocation notice nor the right to administratively challenge the revocation.<sup>79</sup>

Reversing the district court's finding for USCIS, the Seventh Circuit held that the new employer, Crescent Solutions, had become the "de facto petitioner" for the old employer's I-140 petition.<sup>80</sup> "To give effect to Congress's intent . . . USCIS should have given Crescent Solutions notice of their intent to revoke the approval of VSG's I-140 petition."<sup>81</sup>

In *Mantena v. Johnson*, a Second Circuit case with almost identical facts, another employee of VSG faced denial at the post-portability I-485 stage when USCIS revoked VSG's I-140.<sup>82</sup> Unlike Crescent Solutions, however, Mantena's new employer had not

---

75. 831 F.3d 880 (7th Cir. 2016).

76. *See id.* at 881.

77. *Id.*

78. *Id.*

79. *Id.* USCIS also attempted to revoke Crescent Solutions' I-140 petition. Based on the VSG convictions, USCIS asserted that Musunuru's VSG work experience was likely fraudulent, and Crescent Solutions had therefore likely erroneously relied on that work experience when applying for its own I-140 on Musunuru's behalf. Crescent Solutions successfully overcame USCIS's challenge by demonstrating that Musunuru's work experience with VSG was real. *Id.* at 885–86.

80. *Id.* at 891.

81. *Id.* at 890.

82. *Mantena v. Johnson*, 809 F.3d 721, 724 (2d Cir. 2015).



filed a new I-140 petition on her behalf.<sup>83</sup> Thus, Mantena lost her I-485 application entirely, as well as her current priority date.<sup>84</sup>

While the Seventh Circuit in *Musunuru* explicitly held that new employers are entitled to revocation notice under AC-21, the Second Circuit was less clear. The *Mantena* court held that USCIS had acted inconsistently with the AC-21 portability provisions by failing to provide revocation notice to both Mantena and her successor employer; however, the court declined to specify which one of the two was statutorily entitled to notice.<sup>85</sup> Although the court noted that the successor employer, “as contemplated by AC-21, ha[d] in effect adopted the original I-140 petition,” it ultimately remanded the case to the district court with instructions to determine who was entitled to notice.<sup>86</sup>

The *Musunuru* and *Mantena* decisions represent the outer limits of circuit court expansions of the INA’s notice requirement. They also highlight a central tension between AC-21 and the statute it was intended to fix. In many ways, AC-21 created a positive solution for both FNs and employers, allowing FNs more versatility within the labor market and allowing employers the ability to poach talent without waiting the years required by the INA.

But AC-21 also created a problem unanticipated by the INA, which did not provide a similar pathway to “port” one underlying I-140 to another employer. After AC-21, the new employer received the benefit of the previous employer’s petition, but neither the new employer nor the FN had any statutory right to notice regarding the most critical category of predecessor petition activity: revocation. Thus, if the government revoked an I-140, the only entity statutorily entitled to notice was the employer who actually filed the I-140—and who was correspondingly not required to provide any notice to the new employer.<sup>87</sup>

---

83. *Id.* at 726–27.

84. *Id.*

85. *Id.* at 736.

86. *Id.* The court continued:

It might appear that given the successor employer’s adoption of the original I-140 petition, it is notice to the successor employer that is required. However, in the absence of post-porting regulations requiring information about the new employer to be provided to USCIS, we cannot decide that it is necessarily the successor employer who is entitled to notice. For this reason we remand to the district court for further consideration.

*Id.* at 736 n.14.

87. See *Musunuru v. Lynch*, 831 F.3d 880 (7th Cir. 2016) (discussed *infra*); *Mantena v. Johnson*, 809 F.3d 721 (2d Cir. 2015) (discussed *infra*).

## F. USCIS's 2017 Policy Memorandum

In November 2017, USCIS applied a band-aid to the revocation notice problem.<sup>88</sup> In adjudicating an April 2017 revocation-notice case that arose out of another VSG fraud debacle, USCIS issued a non-precedent decision finding the FN beneficiary to be an “affected party” for purposes of I-140 revocation proceedings.<sup>89</sup> Seven months later, USCIS reopened the case and reissued its ruling as an “Adopted Decision,” a policy guidance memorandum that applies to, and binds, all USCIS employees.<sup>90</sup> Adopted Decisions turn administrative non-precedent decisions—which apply retroactively and only to the facts of the case before them—into prospective policy guidance; they are the functional equivalent of internal interpretations of USCIS regulation.<sup>91</sup>

USCIS's 2017 policy memorandum does two things. First, it establishes that “beneficiaries of valid employment-based immigrant visa petitions who are eligible to change jobs or employers (‘port’) and who have properly requested to do so under . . . 8 U.S.C. § 1154(j), are ‘affected parties’ under DHS regulations for purposes of revocation proceedings.”<sup>92</sup> This designation entitles FNs to notice in the event of an I-140 revocation, as well as to an opportunity to respond and participate in subsequent legal proceedings.<sup>93</sup> USCIS based its decision in part on criticism it received from the Second Circuit's decision in *Mantena*, as well as on prior amicus briefs from multiple interested parties and on the reasoning that “while the original petitioner-employer and beneficiary may no longer intend to enter into an employment relationship,” the parties nevertheless “remain connected for immigration law purposes.”<sup>94</sup>

Second, the memorandum clarifies that certain other entities—including the subsequent employers of the FN beneficiaries seeking to port—are *not* “affected parties” within the meaning of the statute. These entities, therefore, are *not* entitled to notice, an opportunity to respond, or an ability to participate in the proceedings.<sup>95</sup> In addressing its decision to exclude subsequent employers specifically, USCIS acknowledged that the Seventh Circuit made

---

88. See ADOPTED DECISION, *supra* note 9.

89. *Id.* at 1 n.4.

90. *Id.* at 1.

91. See *Adopted AAO Decisions*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-ao/adopted-ao-decisions> (last updated Mar. 29, 2018).

92. ADOPTED DECISION, *supra* note 9, at 4.

93. *Id.* at 7 n.16.

94. *Id.* at 4, 7–8.

95. *Id.* at 1.

the contrary decision in *Musunuru*.<sup>96</sup> USCIS then argued against extending “affected party” status to subsequent employers on two grounds: first, because subsequent employers have no relationship with the prior employers’ original I-140 petition; and second, because any interest the employers might have in the outcome of I-140 adjudication is so “marginally related to” the purposes implicit in AC-21 that Congress could not have intended to permit the subsequent employers’ participation in the prior employers’ administrative proceedings.<sup>97</sup>

The policy memorandum represents the extent of USCIS’s commentary and action on the revocation notice problem. Though the memorandum serves as guidance to USCIS employees in revocation notice cases going forward, the memorandum makes clear that any change it creates constitutes internal USCIS interpretive guidance only:

This policy memorandum . . . 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.<sup>98</sup>

USCIS further clarifies that it could change or supersede this policy at any time.<sup>99</sup> Thus, while USCIS’s internal designation of FNs as “affected parties” for purposes of I-140 revocation notice is a helpful step in remedying the AC-21’s procedural loophole, this short-term fix is an unstable, and therefore insufficient, solution to a long-term regulatory problem.

Additionally, USCIS is wrong to decline I-140 revocation notice to subsequent employers. The 2017 memorandum focuses specifically on the question of whether to expand the definition of “affected parties,” which would grant subsequent employers standing to respond and to participate in the proceedings.<sup>100</sup> While USCIS could certainly grant subsequent employers a notice right without granting them full administrative standing—USCIS is still incorrect in arguing that subsequent employers have no relationship with the prior employers’ I-140 petition and that their interests are only

---

96. *Id.* at 12–13.

97. *Id.* (citing *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987) (holding that a party has no administrative right of review if the party’s interests are only marginally related to, or inconsistent with, the purposes implicit in a statute)).

98. *Introduction to ADOPTED DECISION*, *supra* note 9.

99. *Precedent Decisions*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/laws/precedent-decisions> (last updated Sep. 10, 2013).

100. *See ADOPTED DECISION*, *supra* note 9, at 4.

“marginally related to” the purposes implicit in AC-21.<sup>101</sup> In fact, USCIS should grant the revocation right precisely *because* subsequent employers functionally adopt prior employers’ I-140 petition, and precisely *because* subsequent employers’ interests align with the purposes implicit in AC-21, as will be discussed below.

### III. USCIS AND CONGRESS SHOULD EXPAND THE REVOCATION NOTICE REQUIREMENT TO INCLUDE BOTH THE FOREIGN WORKER AND THE WORKER’S CURRENT EMPLOYER

USCIS should modify 8 C.F.R. § 205.2, “Revocation on notice,” to require that any I-140 revocation notice must be provided to the FN beneficiary, as well as to the FN’s current employer. Additionally, should Congress modify any part of the INA or AC-21 that would revoke or supersede 8 C.F.R. § 205.2,<sup>102</sup> Congress should include within the new legislation a provision requiring that revocation notice be provided to both the FN beneficiary and to the FN’s current employer. Reforming the regulation—and potentially the legislation—in this way will ensure that all affected parties are properly equipped to challenge the revocation process, will humanize a system that currently doesn’t guarantee immigrants a permanent voice during a critical part of their immigration journey, and will honor the humanitarian principle behind the INA as well as the animating impulse driving AC-21, which is to maximize efficiency in the modern immigrant workforce.

#### A. *The 2017 Policy Memorandum is a Temporary and Insufficient Solution to the Revocation Notice Problem*

Because the revocation notice problem has dire personal and economic consequences, it requires both a quick and permanent solution. While USCIS partially addressed the problem by issuing a new interpretation of its policy through the Administrative Appeals Office, this change provides only temporary “policy guidance” to USCIS personnel.<sup>103</sup> USCIS could change or supersede the interpretation at any time, and multiple other entities—including the Attorney General, Congress, and federal courts—have the authority to modify or overrule its decision.<sup>104</sup> Directly modifying 8 C.F.R. §

---

101. *See id.* at 13.

102. *E.g.*, 8 U.S.C. §§ 1101, 1103, 1151, 1153, 1154, 1155, 1182, 1324(a), or 1186(a) (2018).

103. *See Adopted AAO Decisions*, *supra* note 91.

104. *See Precedent Decisions*, *supra* note 99.

205.2 (hereinafter “the Regulation”) through notice-and-comment rulemaking procedures will grant the interpretation both permanence and force of law, thereby fixing the problem, as opposed to merely treating the symptoms.

To modify the Regulation, USCIS needs to take three steps. First, USCIS should submit the proposed rule to the *Federal Register* for a set time<sup>105</sup> to solicit feedback from the public. Second, USCIS should consider all comments and make any appropriate responses or changes. Finally, USCIS should issue the final rule and respond to public feedback received during the process.<sup>106</sup> From there, the rule could face opposition from either the Office of Information and Regulatory Affairs or even Congress, if either body chose to intervene.<sup>107</sup> Should USCIS issue the final rule modifying 8 C.F.R. § 205.2, the new rule would amend Title 8 of the Code of Federal Regulations, publish in the *Federal Register*, and make the new rule irrevocable absent a congressional modification, federal arbitrary and capriciousness review, or another onerous notice-and-comment rulemaking procedure.<sup>108</sup>

### B. *Modifying the Regulation will Honor the Legislative Intent Behind the INA and AC-21*

Modifying 8 C.F.R. § 205.2 to expand revocation notice will advance Congress’s original objectives for both the INA and AC-21. Congress passed the 1965 INA with humanitarian goals in mind. In eliminating the use of national-origin quotas—under which the United States granted most of its available visas to white, European nationals—the INA committed the United States to accepting immigrants of all nationalities on a more equal basis.<sup>109</sup> The INA also established a framework for the modern skills-based employment immigration system and prioritized the reunification of families torn apart by migration.<sup>110</sup> In the pro-immigration world created by

---

105. The comment period typically ranges from thirty to sixty days, but could extend to 180 days for complex rulemakings. *A Guide to the Rulemaking Process*, OFF. FED. REG., [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf) (last visited Jan. 8, 2019). This is not a complex rulemaking.

106. *Frequently Asked Questions*, OFF. INFO. REG. AFF., [https://www.reginfo.gov/public/jsp/Utilities/faq.jsp#reg\\_rule](https://www.reginfo.gov/public/jsp/Utilities/faq.jsp#reg_rule) (last visited Jan. 8, 2019).

107. See Paperwork Reduction Act of 1980, 44 U.S.C. ch. 35 (2018); Congressional Review Act, 5 U.S.C. ch. 8 (2018).

108. See *USCIS Federal Register Announcements*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/laws/uscis-federal-register-announcements> (last visited Jan. 8, 2019).

109. See *The 1965 Immigration and Nationality Act Continues to Reshape the United States*, *supra* note 5.

110. *Id.*

the INA, the Regulation provided meaningful protection to FNs and employers in the event of an I-140 revocation: “Revocation of the approval of a petition . . . [shall] be made only on notice to the petitioner or self-petitioner, [who] must be given the opportunity to offer evidence . . . in opposition to the grounds alleged for revocation.”<sup>111</sup> Because the INA allowed a FN to have only one employer throughout her entire immigration process, this regulation clearly intended to provide revocation notice to the FN’s current—and only—employer.

However, in a post-portability world, this robust procedural protection extends only to some FNs, and is denied to those who take advantage of the job mobility benefits granted by AC-21. This disparate allocation of rights undercuts the humanitarian and pro-immigration principles driving the INA. Modifying the Regulation to expand revocation notice would bring USCIS in line with Congress’s original intent: to protect the green card process by ensuring that current employers can swiftly respond to procedural problems.

Additionally, expanding the notice requirement will honor the principles animating AC-21. These are different from—but compatible with—those of the INA. In 2000, Congress passed AC-21 to compliment the American Competitiveness and Workforce Improvement Act.<sup>112</sup> Together, the two sought to increase efficiency within the American labor force in anticipation of an impending technological revolution.<sup>113</sup> AC-21 helped realize this goal by allowing alien workers to port their immigration petitions from one employer to another, in recognition of the fact that a robust workforce requires job mobility.<sup>114</sup> Indeed, the goal of mobility was so important that Congress baked it into the title of the relevant AC-21 provision itself: “Job flexibility for long delayed applicants for adjustment of status to permanent residence.”<sup>115</sup>

USCIS’s policy memo argues that Congress did not intend, in enacting AC-21, to aid employers.<sup>116</sup> In declining to designate subsequent employers as “affected parties” for I-140 revocation purposes, USCIS notes that “[n]either the statutory language in AC[21] nor its legislative history suggests that Congress was concerned with other beneficiaries beyond the specific scenario redressed by

---

111. 8 C.F.R. § 205.2(b) (2018).

112. See S. REP. NO. 106-260, at 2 (2000).

113. *Id.* (“In the Information Age, when skilled workers are at a premium, America faces a serious dilemma when employers find that they cannot grow, innovate, and compete in global markets without increased access to skilled personnel.”).

114. See *id.*

115. See INA § 204(j), 8 U.S.C. § 1154(j) (2018).

116. ADOPTED DECISION, *supra* note 9, at 4.

AC[-]21.”<sup>117</sup> While USCIS’s “other beneficiaries” language is specific to its focus on the question of standing,<sup>118</sup> USCIS is wrong to conclude that Congress was unconcerned with the rights and interests of subsequent employers. As the Seventh Circuit agreed in *Musunuru*, Congress’s clear intent for AC-21 was to allow the new employer to adopt the prior employer’s I-140.<sup>119</sup> For example, AC-21 does not require a new employer to file a new I-140 in order to employ a FN: the new employer may rely entirely, if it chooses, on the prior employer’s petition.<sup>120</sup> Additionally, while a FN’s *current* employer may revoke its I-140 at any time, AC-21 prevents a prior employer from revoking their I-140 once a FN has lawfully ported to another company.<sup>121</sup> That Congress would take away the prior employer’s revocation right to protect the subsequent employer’s petition indicates that Congress intended to confer the specific I-140 immigration benefit on the new employer.

USCIS’s policy memo provides additional support for the conclusion that the subsequent employer should be treated as the de facto I-140 petitioner once the FN has properly requested to port. The memo allows the original petitioner-employer to remain an “affected party” under the regulations, even though some original employers “may not be interested in the immigration outcome of beneficiaries who seek to port to a new employer.”<sup>122</sup> The memo allows the original employer to remain a party for four reasons: 1) because the employer may wish to protect itself against USCIS questions of fraud or noncompliance; 2) because the departed beneficiary’s immigration outcome may impact the employer’s efforts to recruit and retain other employees; 3) because the employer may wish to support the FN; and 4) because the employer is the party who paid to file and attested to the petition’s accuracy and therefore retains the filer’s right to notice.<sup>123</sup>

Each one of USCIS’s petitioner concerns applies to the subsequent employer as well as to the prior employer. Though a subsequent employer might not be liable for an original employer’s fraudulent I-140, the subsequent employer relies on the fraudulent petition and may lose an employee, as well as its financial investment in the employee’s immigration process.<sup>124</sup> Further, a subse-

---

117. *Id.* at 11.

118. *Id.* at 9.

119. 831 F.3d 880 at 889.

120. INA § 204(j), 8 U.S.C. § 1154(j) (2018).

121. ADJUDICATOR’S FIELD MANUAL, *supra* note 70, § 20.2(c) (Petition Validity).

122. ADOPTED DECISION, *supra* note 9, at 4.

123. *Id.*

124. *See, e.g.,* *Musunuru v. Lynch*, 831 F.3d 880 (7th Cir. 2016); *Mantena v. Johnson*, 809 F.3d 721 (2d Cir. 2015).

quent employer attempting to help a FN through her immigration process would certainly be concerned with how the FN's outcome impacts other potential employees. A subsequent employer would also be concerned with supporting the FN in whatever way possible, especially if the employer were to receive notice of a fatal error in an underlying immigration document like the I-140. Finally, though the subsequent employer did not file the original petition or initially attest to its accuracy, the subsequent employer relies upon and functionally adopts the I-140 as a baseline immigration document for its own subsequent FN-specific filings with USCIS.<sup>125</sup> Though the subsequent employer did not take the first step in assisting the FN's immigration process, AC-21 envisions a system in which the prior employer "passes the baton" to the subsequent employer, with the subsequent employer being just as invested in the petition's success as was its predecessor.

USCIS's four rationales do not differentiate the prior employer's petition interest from the subsequent; rather, they demonstrate why it is incredibly important for a FN's *current employer* to participate in the employment immigration process. Any employer who shepherds a FN through the final stages of the immigration process is dependent upon the success of the underlying documents. As Congress has recognized, subsequent employers have the same economic incentives as did the prior employers at the time of the I-140's filing. In creating the AC-21 portability provision, Congress envisioned a world in which successor employers adopted their predecessors' I-140. Expanding the I-140 revocation notice requirement would therefore fully realize Congress's express intention and would marry the pro-efficiency, pro-mobility goals of AC-21 with the egalitarian, pro-immigration goals of the INA.<sup>126</sup>

---

125. See 8 U.S.C. § 1154(j); ADJUDICATOR'S FIELD MANUAL, *supra* note 70, § 20.2(c) (Petition Validity).

126. It should be noted that FNs still face tremendous difficulty in demonstrating that they have standing to fight a revocation or notice decision, though some circuit courts have ruled that FNs have standing on constitutional, if not statutory, grounds. See, e.g., Kurapati v. USCIS, 775 F.3d 1255 (11th Cir. 2014) (holding that an FN had constitutional standing to appeal an I-140 revocation decision despite not having standing to bring an administrative appeal under USCIS regulations); Patel v. USCIS, 732 F.3d 633 (6th Cir. 2013) (holding that the FN as a beneficiary has both constitutional and prudential standing to challenge the denial of his prospective employer's I-140 petition). Further, FNs face administrative reviewability challenges, as Congress added a jurisdiction-stripping provision to the INA's revocation statute in 1996. Though this Note does not address standing or justiciability concerns, such concerns add an additional layer of difficulty for FNs faced with an impending I-140 revocation. See INA § 204(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii) (2018); see also Rajasekaran v. Hazuda, 815 F.3d 1095 (8th Cir. 2016) (holding that the district court lacked jurisdiction to consider whether USCIS failed to comply with regulatory disclosure requirements prior to revoking an I-140); Khalil v. Hazuda, 833 F.3d 463 (5th Cir. 2016) (holding that federal courts lack jurisdiction to review I-140 revocation decisions, pursuant to INA § 1252(a)(2)(B)(ii)); Bernardo *ex rel.* M & K Engineering, Inc. v. Johnson, 814 F.3d 481 (1st



C. *Modifying the Regulation will Further the  
Policy Goals of Compassion and Efficiency*

Modifying the Regulation to expand revocation notice will serve a compelling humanitarian interest in addition to maximizing procedural efficiency within the employment immigration system. Despite the compassionate principles animating both the INA and AC-21, the current employment immigration framework discounts the needs of its foreign workforce by placing employers of FNs—not the FNs themselves—at the center of the system.<sup>127</sup> This employer prioritization manifests at all levels of the employment-based green card process, from the labor certification requiring that FNs not have “an adverse effect on workers in the United States”<sup>128</sup> to FNs being explicitly, statutorily defined as “[not] affected part[ies]” for I-140 standing purposes<sup>129</sup>—flimsy internal memo notwithstanding. Ultimately, FNs are shuffled throughout the process with very little agency. Expanding the revocation notice requirement would acknowledge the objective—if not the current statutory—truth, that FNs are not merely an “affected party” to their own green card application, they are the *most* affected party, and they deserve permanent procedural recognition throughout the immigration process.

Critics may argue that the current system correctly places the needs of the immigrant workforce below the needs of American businesses and workers impacted by the immigration process. However, modifying the revocation requirement will not only advantage individual FNs, it will also benefit the FN’s employers and increase efficiency within the overall business immigration system. A team works best when every member’s incentives align. Though FNs oscillate between being passive “beneficiaries” and active “applicants” throughout the green card process, they are always the party with the strongest interest in a favorable immigration outcome. Stated differently, FNs have the most at stake in the green

---

Cir. 2016) (holding that USCIS’s decision to revoke the visa petition was discretionary and not subject to judicial review). For more information on the preclusion of judicial review under the INA, see Josh Adams, *Federal Court Jurisdiction over Visa Revocations*, 32 VT. L. REV. 291 (2007).

127. See Anand G. Sinha & Shane Dizon, *Can Portability Truly Keep the Dream Alive? The Beneficiary’s Evolving Struggle Across Case Law and Agency Guidance to Preserve a Previous Employer’s I-140 Petition*, IMMIGR. BRIEFINGS, May 2016, at 1.

128. INA § 203(b)(2)–(3), 8 U.S.C. § 1153(b)(2)–(3) (2018); INA § 212(a)(14), 8 U.S.C. § 1182(a)(14); STEEL, *supra* note 6, § 6:8.

129. See 8 CFR § 103.5(a)(1)(i) (2018) (limiting motions to reopen or reconsider an I-140 revocation to the “applicant or petitioner” or an “affected party”); *id.* § 103.3(a)(1)(iii)(B) (defining “affected party” as “the person or entity with legal standing in a proceeding,” and noting specifically that “[affected party] does not include the beneficiary of a visa petition”).

card process, and they therefore have the biggest incentive to ensure that the process succeeds. From a pure efficiency perspective, it makes little sense that FNs have no right to notice when the government jeopardizes the process through potential I-140 revocation. Therefore, mandating notice of revocation to the FNs themselves provides the strongest likelihood that such notice will be transferred to the new employer—and de facto petitioner—so that all interested parties may coordinate a response to whatever concern has jeopardized the immigration process. Additionally, expanding the revocation notice requirement to include both FNs and subsequent employer will permanently reduce the number of revocations based on USCIS's flawed information, as in cases such as *Musunuru* and *Mantena*.<sup>130</sup>

#### CONCLUSION

The employment immigration system seeks to secure foreign talent to ensure a prosperous American workforce. Unfortunately, the current system endangers, rather than supports, the status of expert workers—human beings—due to an *extremely* fixable administrative oversight. USCIS took a step toward closing the gap by granting FNs internal procedural recognition for revocation purposes, but that policy is an unstable and insufficient short-term solution to a critical long-term problem. Expanding the revocation notice requirement will not only increase administrative efficiency and honor the labor goals of the American immigration system, it will permanently lessen the burden of merely existing as a working immigrant in the United States today.

---

130. See discussion *supra* Part II, pp. 547–48.

