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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

B₂

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **JAN 18 2009**
SRC 02 266 50459

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to
Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to
the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, initially approved the preference visa petition. Subsequently, the director issued a notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140) without considering the petitioner's response to the NOIR. The director subsequently reopened the matter on motion and issued a new NOR that took into account the petitioner's response to the NOIR. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded for further action and consideration.

The petitioner seeks classification as an "alien of extraordinary ability" in athletics, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

On appeal, counsel does not challenge the merits of the director's decision other than to affirm the petitioner's eligibility in general terms. Rather, counsel limits his appellate briefs¹ to procedural issues. For the reasons discussed below, we do not find any of counsel's procedural assertions persuasive. Nevertheless, while not raised by counsel, the director erred in raising issues in the final notice of revocation that were not raised in the NOIR. Thus, while we are aware of the delays that have occurred in this matter, we must remand the matter to the director for a new NOIR that raises all issues of concern.

Section 205 of the Act, 8 U.S.C. § 1155, states, in pertinent part, that the Secretary of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

¹ In addition to the pending appeal, counsel has filed several "motions" and "emergency motions" with this office, most of which repeat the same assertions made on appeal, sometimes verbatim. The motions are not accompanied by the proper fee for motions to reopen or reconsider pursuant to section 8 C.F.R. § 103.5. Moreover, this office has never issued a decision in this matter previously. Thus, it is not clear what action by this office counsel seeks to reopen or reconsider with his motions. As such, we will consider these "motions" as supplemental briefs supporting the appeal.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the revocation of the approval of an immigrant petition. *Id.* The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. *Id.* at 589. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.*

In order to address the issues raised by counsel on appeal, it is necessary to discuss the procedural history of this matter in detail. The petition was filed on September 11, 2002. The director denied the petition on November 3, 2003 with little discussion of the evidence submitted. The director reopened and approved the petition on January 29, 2004. On June 4, 2003, the petitioner filed a Form I-485, Application to Register Permanent Residence or Adjust Status. The petitioner subsequently sought a Writ of Mandamus to compel action on the Form I-485. On May 24, 2007, the petitioner was interviewed at the Miami District Office. Although the interviewing officer initially stamped the application approved, she did not, as will be discussed in more detail below, formally adjust the petitioner's status. Rather, she determined that the application was not yet approvable. She returned the Form I-140 petition to the director for review and possible revocation of the approval of that petition.

On July 13, 2007, the director issued a NOIR. The petitioner submitted a response. Despite that response, the director issued a final revocation notice on August 17, 2007, concluding no response had been submitted. On August 30, 2007, the petitioner filed the initial appeal. In that appeal, counsel requested that this office remand the matter to the director for a new decision that takes into account the response to the NOIR. Rather than forwarding the matter to this office for a remand order for a new decision, the director simply reopened the matter on his own motion and issued the new decision ultimately requested, which considered the response to the NOIR. The pending appeal followed.

Revocation vs. Rescission

Counsel's first assertion is that the director was precluded from revoking the petition because the petitioner had already adjusted status to that of a lawful permanent resident. Thus, the only way to challenge the validity of the petition would be through rescission proceedings pursuant to section 246 of the Act, 8 U.S.C. § 1256.

As stated above, counsel asserts that the petitioner is already a lawful permanent resident based on the action of a district adjudications officer at the Miami District Office. Counsel asserts that at the petitioner's interview on May 24, 2007, the district adjudications officer stamped the Form I-485 approved and signed and dated the stamp. Before the petitioner left, however, the officer made an inquiry with another staff member at the office and obliterated her stamp. Counsel does not assert that

the officer stamped the petitioner's passport or issued the petitioner a Form I-94 bearing a lawful permanent residence designation. In fact, the Form I-94 remains in the record. The record contains no Form I-181, Memorandum of Creation of Record of Lawful Permanent Residence, the generation of which is the final step of adjusting status. Citizenship and Immigration Services I-485 Standard Operating Procedures 7-4.7. *See also Nelson v. Reno*, 204 F. Supp. 2d 1355, 1359 (S.D. Fla. 2002).

Counsel provides no legal authority for the proposition that the mere placement of an approval stamp, with the officer's signature and date, on the Form I-485 renders the applicant a lawful permanent resident at that moment. Significantly, *Nelson*, 204 F. Supp. 2d at 1360, held that an erroneously placed "I-551" stamp, which serves as the applicant's record of lawful permanent resident status, is not itself an approval of lawful permanent resident status. In that case, the necessary adjustment procedure, approval of the Form I-130, the Form I-485 and the Form I-181, had not occurred. In *Bassey v. INS*, 2002 WL 31298854 (N.D. Cal. 2002), an approval notice and a passport stamp were both deemed insufficient evidence that the alien had adjusted status where the underlying Form I-130 had not been approved. Finally, in *Ayoub v. Chertoff*, 2005 WL 1028180 (E.D. Mich. 2005), a passport stamp was held not to establish adjustment of status where the Form I-485 was denied the day after the passport was stamped.

We acknowledge that the district court decisions cited above are not binding and may not have involved a situation where the I-485 was stamped approved, although an approval notice was issued in *Bassey*. Nevertheless, we find their reasoning persuasive and applicable in this matter. We are satisfied that the district adjudications officer in Miami did not complete the full processing required to formally adjust the petitioner's status. For example, the record lacks evidence that the officer in Miami created a Form I-181. Thus, as the petitioner has not adjusted status to that of a lawful permanent resident, the director was authorized to review the Form I-140 for potential revocation.

Validity of Second NOR

Counsel also asserts that the director acted "with malice aforethought" in trying to "usurp" the AAO's jurisdiction on a previously filed appeal. As stated above, the director initially revoked the petition on August 17, 2007. In this decision, the director stated that the petitioner had failed to respond to the NOIR. On August 30, 2007, the petitioner filed the initial appeal, requesting that the AAO remand the matter back to the director for the purpose of considering the petitioner's response to the NOIR. Instead of forwarding the appeal to the AAO, which, if it had granted the relief requested, would have remanded the matter back to the director for consideration of the petitioner's response, the director reopened the matter on his own motion and issued a new revocation that takes into consideration the petitioner's response. We note that this action is the *exact* relief the petitioner requested this office to order via remand.

We acknowledge that the regulation at 8 C.F.R. § 103.3(a)(2)(iii) only allows the director the option of treating an appeal as a motion for purposes of taking "favorable action." It is a reasonable interpretation of the phrase "favorable action" to include granting the relief requested in the appeal, in

this case the issuance of a new decision considering the response to the NOIR. Even if we interpret “favorable” to mean only an approval rather than whatever relief was requested, counsel has still failed to demonstrate how the director’s new decision, which would have been the eventual outcome had the AAO reviewed the appeal and remanded the matter for a new decision taking into account the response to the NOIR, prejudiced his client, especially in light of counsel’s constant assertions that there have already been unreasonable delays in this matter. Forwarding the appeal to this office to await a decision ordering the director to issue a new decision would only have delayed this matter further.

In his “Fifth Motion, Brief and Memorandum of Law,” counsel asserts that the petitioner is entitled to have the initial appeal “heard by the AAO as it existed before Defendant Officer 1014 fixed it up in violation [of] due process and 8 C.F.R. § 103.3.” Counsel has not explained what purpose would be served in considering the director’s August 17, 2007 denial. Clearly, that decision, which erroneously found that the petitioner had not responded to the NOIR, was flawed and, if that were the only decision before us, would mandate a remand for a new decision considering the NOIR response. The director, however, has already issued a new decision that takes into account the NOIR response. Remanding the matter for an action the director has already taken appears pointless. We note that one of the cases referenced by counsel on appeal, *Deering Milliken, Inc. v. Johnston*, 295 F. 2d 856 (4th Cir.), upheld the district court’s injunction against a remand order by the National Labor Relations Board, finding that a remand for proceedings that are “repetitive, purposeless and oppressive” can represent an unreasonable delay. As counsel repeatedly asserts that there have already been unreasonable delays in this matter and has sought a Writ of Mandamus to compel final action, we cannot see what purpose it would serve to act upon the petitioner’s first appeal and remand the matter to the director to take action he has already taken.

Finally, counsel has repeatedly asserted that this office cannot consider any evidence submitted in response to the director’s NOIR because this office does not have *de novo* review. First, considering this evidence would not constitute *de novo* review because the director did consider this new evidence in the October 12, 2007 notice of revocation. Regardless, the AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989); *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

While we reject counsel’s assertions on appeal, another issue mandates that we remand the matter back to the director for a new NOIR despite previous delays in this matter. Specifically, the director’s NOIR raised only the issue of whether or not the petitioner seeks to continue working in his field of expertise. The director’s October 12, 2007 notice of revocation, however, also concluded that the petitioner had not established extraordinary ability as a swimmer, his claimed field of expertise. A revocation can only be grounded upon, and the petitioner is only obliged to respond to, the factual allegations in the



director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.