

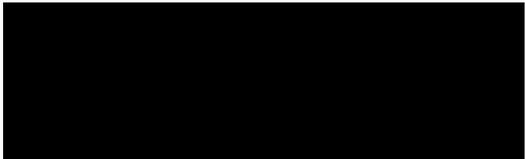


U.S. Citizenship  
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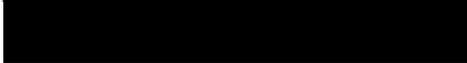
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FILE:  Office: CALIFORNIA SERVICE CENTER Date: JUN 01 2005

IN RE: Petitioner:   
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to  
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, initially approved the employment-based visa petition. Upon subsequent review of the record, the director issued a notice of intent to revoke and ultimately revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner avers it is a partnership established in the State of California in 1994. It claims to market and trade the foreign entity partner's products. The petitioner seeks to employ the beneficiary as its executive general manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

On August 5, 2003, the director issued a notice of intent to revoke approval of the petition. The director determined that the petitioner had not established: (1) that the beneficiary had been employed with a qualifying organization in one of the three years prior to filing the petition in a managerial or executive capacity; (2) that the beneficiary would be employed in a managerial or executive capacity for the United States entity; (3) a qualifying relationship with the beneficiary's foreign employer; or, (4) its ability to pay the beneficiary the proffered wage. The director noted that good and sufficient cause existed to revoke the petition and afforded the petitioner 30 days to offer evidence in support of the petition and in opposition to the proposed revocation.

On September 1, 2004, the director issued his revocation decision, observing that the documentation submitted in rebuttal to Citizenship and Immigration Services (CIS) notice of intent to revoke did not overcome the grounds for revocation. The director also noted that the beneficiary had informed CIS that he intended to work for a new employer pursuant to AC21.<sup>1</sup> The director stated that the revocation of this petition, absent a finding of fraud, did not affect the disposition of the beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status.

On appeal, counsel cites *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d 127 (2d Cir. 2004), issued by the United States Court of Appeals for the Second Circuit on August 2, 2004. Counsel asserts that CIS does not have the authority to revoke a previously approved immigrant visa petition when the alien is already inside the United States. Counsel does not dispute the director's determination that the beneficiary is not eligible for this visa classification on appeal.

Section 203(b) of the Act states in pertinent part:

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<sup>1</sup> In 2000, Congress passed American Competitiveness in the Twenty-First Century Act (AC21), Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000). Section 106(c) of AC21 amended section 204 of the Act. The "portability provision" at section 204(j) of the Act provides that "an individual whose application for adjustment of status pursuant to section 245 has been filed and remained adjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed." CIS has not issued regulations governing this provision.

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

\* \* \*

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

Counsel's only assertion on appeal is in reference to the recent opinion, *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d at 127 (2d Cir. 2004), issued by the United States Court of Appeals for the Second Circuit. The AAO acknowledges that in that opinion, the court interpreted the third and fourth sentence of section 205 of the Act, 8 U.S.C. § 1155 (2003), to render the revocation of an approved immigrant petition ineffective where the beneficiary of the petition did not receive notice of the revocation before beginning his journey to the United States. *Firstland*, 377 F.3d at 130. Counsel asserts that the reasoning of this opinion must be applied to the present matter and accordingly, CIS may not revoke the approval because the beneficiary did not receive notice of the revocation before departing for the United States, since he was already in the United States when the director issued the revocation.<sup>2</sup>

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<sup>2</sup> Counsel's assertion illustrates the illogical effects of the Second Circuit's reasoning: In the present matter, the beneficiary entered the United States as a nonimmigrant J-1 Exchange Visitor on July 9, 1990, more than seven years prior to filing the Form I-140, Immigrant Petition for Alien Worker and more than 14 years prior to the revocation of the petition's approval. Accordingly, it was physically impossible for CIS to have notified the beneficiary of the revocation before he departed for the United States. In effect, counsel's interpretation of *Firstland* would have created a situation where any alien would have an irrevocable immigrant visa petition if the alien simply waited to file the petition after he or she arrived in the United States.

According to the record of proceeding, the petitioner is located in the State of California; thus, this matter did not arise in the Second Circuit and *Firstland* was never a binding precedent. Even as a merely persuasive precedent, moreover, *Firstland* is no longer good law.

On December 17, 2004, the President signed the Intelligence Reform and Terrorism Prevention Act of 2004 (S. 2845). See Pub. L. No. 108-458, \_\_ Stat. \_\_ (2004). Specifically relating to this matter, section 5304(c) of Public Law 108-458 amends section 205 of the Act by striking "Attorney General" and inserting "Secretary of Homeland Security" and by striking the final two sentences. Section 205 of the Act now reads:

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 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition.

Furthermore, section 5304(d) of Public Law 108-458 provides that the amendment made by section 5304(c) took effect on the date of enactment and that the amended version of section 205 applies to revocations under section 205 of the Act made before, on, or after such date. Accordingly, the amended statute specifically applies to the present matter and counsel's *Firstland* argument no longer has merit.

Generally, the director's decision to revoke the approval of a petition will be affirmed, notwithstanding the submission of evidence on appeal, where a petitioner fails to offer a timely explanation or rebuttal to a properly issued notice of intention to revoke. See *Matter of Arias*, 19 I&N Dec. 568, 569 (BIA 1988). 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 un rebutted, 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.

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

CIS regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed. See 8 C.F.R. § 245.1(a). If the beneficiary of an approved visa petition is no longer eligible for the classification sought or if the petition was approved in error, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for "good and sufficient cause." Notwithstanding the CIS burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

In this matter, the director raised four separate issues in the notice of intent to revoke, based on the eligibility requirements set by the applicable statute and regulations. *See generally*, section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j). The director informed the petitioner that the record of proceeding: (1) did not contain any substantive evidence that the beneficiary had been employed in a managerial or executive capacity for the foreign entity for one year prior to the beneficiary's entry into the United States as a nonimmigrant; (2) did not contain a substantive description of the beneficiary's duties for the United States entity and showed that the beneficiary was the petitioner's sole employee; and, (3) did not demonstrate that a qualifying relationship exists with the overseas company, The director also determined that the record did not demonstrate the petitioner's ability to pay the proffered wage, contrary to the requirements of 8 C.F.R. § 204.5(g)(2).

The record does not contain evidence that the beneficiary qualifies for this visa classification. Based on the record of proceeding, the director's initial approval of this petition was contrary to the statute and plainly in error. Here, the petitioner failed to offer substantive evidence in explanation or rebuttal to the four issues raised in the director's properly issued notice of intention to revoke. The director's decision will be affirmed.

Of note, the beneficiary's new job and the portability considerations of AC21 are separate issues that must be addressed in the adjudication of the beneficiary's I-485 application, not in the I-140 revocation decision. No appeal lies from the denial of an application for adjustment of status under section 245 of the Act, 8 C.F.R. § 245.2(a)(5)(ii).

However, the AAO observes that for the portability provisions to apply, the underlying petition must be "valid" to begin with if it is to "*remain* valid with respect to a new job." Section 204(j) of the Act, 8 U.S.C. § 1154(j) (emphasis added). Considering the statute as a whole, it would severely undermine the immigration laws of the United States to find that a petition is "valid" when that petition was never approved or, even if it was approved, if it was filed on behalf of an alien that was never "entitled" to the requested visa classification. It would be irrational to believe that Congress intended to throw out the entire statutorily mandated scheme regulating immigrant visas whenever that scheme requires more than 180 days to effectuate. It would also be absurd to suppose that Congress enacted a statute that would encourage large numbers of ineligible aliens to file immigrant visa petitions, if the legislation was actually meant to be an impetus for CIS to reduce its backlogs. To construe section 106(c) to include unadjudicated, denied, and revoked petitions would create a situation where ineligible aliens would gain a "valid" visa simply by filing frivolous visa petitions and adjustment applications, thereby increasing CIS backlogs, in the hopes that the application might remain unadjudicated for 180 days.

In the present matter, the petition was filed on behalf of an alien who was not "entitled" to the classification and the petition's approval was ultimately revoked pursuant to the statutory authority of CIS. Section 106(c) of AC21 does not repeal or modify section 204(b), section 205, or section 245 of the Act, which all require an approved petition prior to CIS granting immigrant status or adjustment of status and further provide that CIS may revoke the approval at any time for good and sufficient cause. Accordingly, this petition cannot be deemed to have been "valid" for purposes of section 106(c) of AC21.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.