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U.S. Citizenship
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MAY 18 2005

FILE: [Redacted]
WAC 98 082 52968

Office: CALIFORNIA SERVICE CENTER

Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

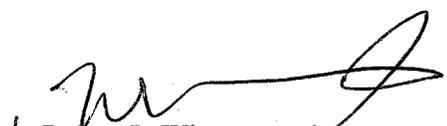
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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 is a corporation organized in the State of California in April 1995. It imports and distributes automotive and irrigation products. The petitioner seeks to employ the beneficiary as its vice-president. 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 January 31, 2004, 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 of \$26,000. The director noted that good and sufficient cause existed to revoke the petition, requested additional evidence to aid in overcoming the director's determinations, and afforded the petitioner 30 days to offer evidence in support of the petition and in opposition to the proposed revocation.

On April 9, 2004, the director issued his revocation decision, observing that Citizenship and Immigration Services (CIS) had received no communication in this matter.

On appeal, counsel for the petitioner takes issue with the director's determination that CIS had not received any communication regarding this matter. Counsel states that the beneficiary¹ responded to the notice of intent to revoke by requesting a change of employer pursuant to AC 21.² Counsel includes the packet of information sent in rebuttal to the director's notice of intent to revoke. The packet includes: (1) a February 19, 2004 letter from counsel stating that the beneficiary is changing employers under the provisions of section 106(C) of AC21; (2) a February 13, 2004 letter from the beneficiary's claimed new employer stating the beneficiary's "position will be

¹ The beneficiary is not the party in interest. The "party affected" in visa petition cases is the petitioner, and the beneficiary does not have standing to move to reopen the proceedings. *Matter of Dabaase*, 16 I&N Dec. 720 (BIA 1979).

² 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 unadjudicated 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 to this provision.

an Executive, in charge of overseeing our U.S. domestic and foreign sales of beauty supplies;" and, (3) evidence of the claimed new employer's 2002 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return. Counsel asserts that the director's determination that there was a failure to respond to the notice of intent to revoke is without merit as the beneficiary provided a response.

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

- (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).

Section 205 of the Act, 8 U.S.C. 1155 (2005), states: "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."

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)).

Citizenship and Immigration Services (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 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; (3) did not demonstrate that a qualifying relationship exists with the overseas company, as the record contained inconsistencies regarding the petitioner's actual ownership. 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 petitioner did not address any of these issues in rebuttal to the director's notice of intent to revoke.

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 a timely 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). In this matter, the record does not establish the beneficiary's initial eligibility for this visa classification.

Section 204(b) of the Act, 8 U.S.C. § 1154(b), governs CIS' authority to approve an immigrant visa petition and grant immigrant status:

After an investigation of the facts in each case, and after consultation with the Secretary of Labor with respect to petitions to accord a status under section 1153(b)(2) or 1153(b)(3) of this title, the Attorney General [now Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is . . . eligible for preference under subsection (a) or (b) of section 1153 of this title, approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.

Accordingly, pursuant to the statutory framework for the granting of immigrant status, any United States employer desiring and intending to employ an alien "entitled" to immigrant classification under the Act "may file" a petition for classification. Section 204(a)(1)(F) of the Act. However, section 204(b) of the Act mandates that CIS approve that petition only after investigating the facts in each case, determining that the facts stated in the petition are true and that the alien is eligible for the requested classification, and consulting with the Secretary of Labor when required. Section 204(b) of the Act.

Congress specifically granted CIS the sole authority to approve an immigrant visa petition; an alien may not adjust status or be granted immigrant status by the Department of State until CIS "approves" the petition. As in the present case, Congress also granted CIS the sole authority to revoke the approval of an immigrant visa petition for good and sufficient cause. Section 205 of the Act.

Therefore, to be considered "valid" in harmony with the thrust of the related provisions and with the statute as a whole, the petition must have been filed for an alien that is "entitled" to the requested classification and that petition must have been "approved" by a CIS officer pursuant to his or her authority under the Act. *See generally*, § 204 of the Act, 8 U.S.C. § 1154. Contrary to counsel's assertions, a petition is not made "valid" merely through the act of filing the petition with CIS or through the passage of 180 days. And if the approval of a petition is ultimately revoked, the revocation serves as the CIS notice that the petition was not valid. To interpret this provision in any other manner would subvert the statutory scheme of the U.S. immigration laws.³

³ The problematic issues presented by this case are primarily the result of immigration procedures that have arisen since the enactment of section 106(c) of AC21. CIS implemented the "concurrent filing" process on July 31, 2002 whereby an employer may file an employment-based immigrant visa petition and an application for adjustment of status for the alien beneficiary at the same time. *See* 8 C.F.R. § 245.2(a)(2)(B) (2004); *see also* 67 Fed. Reg. 49561 (July 31, 2002). CIS implemented the concurrent filing process as a convenience for aliens and their U.S. employers; CIS in no way suggested that an adjudicated I-140 could be the basis for I-485 approval under the portability provisions of section 106(c). Prior to this date, only immediate relatives

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.

and family-based preference cases could concurrently file a visa petition and an adjustment application. Accordingly, at the time that Congress enacted AC21, no alien could assert that a denied or unadjudicated immigrant visa petition "shall remain valid" through the passage of 180 days, since the application for adjustment could not be filed until after the petition was approved by CIS. It is presumed that Congress is aware of INS regulations at the time it passes a law. See *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).