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

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass., 3/F
425 Eye Street N.W.
Washington, D.C. 20536



File: WAC 03 106 52505

Office: CALIFORNIA SERVICE CENTER

Date: OCT 23 2003



IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as an Unskilled Worker Pursuant to § 203(b)(3)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(iii).

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the immigrant visa petition. The District Director, Los Angeles, California, returned the petition to the service center for review and possible revocation. The director ultimately revoked the approval of the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a private household. It seeks to employ the beneficiary permanently in the United States as a live-in child monitor. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA-750), approved by the Department of Labor. The petitioner filed the current petition to classify the beneficiary as an other worker capable of performing unskilled labor pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). The director found that the petitioner no longer met the employment criteria on the labor certification and revoked the approval of the petition.

The procedural history of the case is complex, and is fully outlined below.

The record reflects that the beneficiary began working for the petitioner as a live-in child monitor in January 1985. The beneficiary indicates that she entered the United States on June 22, 1987 as a nonimmigrant visitor.

The Form I-140 immigrant visa petition was initially approved by the California Service Center on July 7, 1988. On November 15, 1991 the beneficiary applied in London for an immigrant visa based on the approved I-140 petition. The consular official denied the visa under section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), based on a finding of material misrepresentation, i.e. that the beneficiary entered the United States on June 22, 1987 as a visitor when she was intending to work for the petitioner. The beneficiary reentered the United States and subsequently applied for adjustment of status on October 1, 1997 based on the approved I-140 petition. The Los Angeles District Office denied the beneficiary's application for adjustment of status in September 2001 and subsequently returned the petition to the service center for review. Removal proceedings were commenced against the beneficiary in August 2002.

The California Service Center issued a Notice of Intent to Revoke the approval of the I-140 petition under 8 C.F.R. § 205.2 on February 20, 2003. The director indicated that the job description in the approved labor certification was no longer applicable, as the children for whom the beneficiary would be caring, described in the labor certification as a three-year-old and a soon to be born

child, were now grown. The director indicated that the beneficiary had twice been denied an immigrant visa based upon the finding of material misrepresentation.

In response to the notice of intent to revoke, counsel acknowledged that the children were now 15 and 18 years old, but submitted no evidence indicating that the petitioner intends to continue to employ the beneficiary as a live-in child monitor.¹ On May 28, 2003 the service center revoked the approval, based on the fact that the petitioner had failed to overcome the director's concerns. The director also stated that the petitioner had not shown that the job offer was full-time, and that the beneficiary did not qualify for the classification sought.

On appeal, counsel for the petitioner argues that the revocation is invalid. Counsel states that the director did not have jurisdiction to revoke the approval of the immigrant visa petition, and failed to follow the procedures for revocation of an approved petition. Counsel argues that section 204(j) of the Act, 8 U.S.C. § 1154(j), allows for a job to change over time. Counsel contests the finding of material misrepresentation against the beneficiary. Counsel submits a brief but no evidence on appeal. The record contains no evidence from the petitioner couple that it intends to continue to employ the beneficiary as a live-in child monitor or that it has a current need for the beneficiary's services described in the approved labor certification.

The primary issue in this proceeding is whether the director has stated sufficient grounds to revoke the approval of the immigrant visa petition.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General 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."

The regulation at 8 C.F.R. § 205.2 provides that any CIS officer may revoke the approval of a petition upon notice to the petitioner, who must be given the opportunity to offer evidence in support of the petition and in opposition to the grounds alleged for revocation of the approval.

The director in this case gave the petitioner adequate notice of

¹ The record of proceeding indicates that the petitioner submitted a letter in January 2001 at the time of the beneficiary's adjustment interview stating that the petitioner couple is now divorced, but that the beneficiary continues to "aid the children in getting to and from school, lessons, shopping and other activities. She performs food shopping and helps prepare meals." The letter indicated that the beneficiary lives with the male petitioner, but that she performs her duties at both households.

the alleged grounds for revocation of the approval and the opportunity to respond under 8 C.F.R. § 205.2. In the approved labor certification, the job duties of the beneficiary are described as follows:

Care, attention and stimulation for 1 minor child 3 years old. Monitor and oversee playing activities. Initiation of primary pre-educational activities and skills for minor child. Preparation of meals for child, bathe, dress, sing, play, read, drive to school activities. Expecting 2nd child in September and child monitor will prepare formulas, change diapers, oversee sleeping hours. Will bathe, dress and oversee playing activities. Supervise outings and other events for the children. Potti [sic] train minor child.

The director found that this job opportunity no longer exists. Counsel submitted a brief but no evidence in response to the director's notice of intent to revoke.

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.

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

Labor certification determinations by the Department of Labor are not subject to review by CIS absent fraud or willful misrepresentation, 20 C.F.R. § 656.30(d), but all matters relating to preference classification eligibility not expressly delegated the Department of Labor remain within CIS' authority under section 203 of the Act, 8 U.S.C. § 1153. See *Madany v. Smith*, 696 F.2d 1008, 1011-1012 (D.C. Cir. 1983). An immigrant visa may not be issued under section 203(b)(3) of the Act unless it is accompanied by the required labor certification from the Secretary of Labor. See §§ 203(b)(3)(C) and 212(a)(5)(A) of the Act, 8 U.S.C. §§ 1153 and 1182. The petitioner bears the ultimate burden of proving eligibility until the visa is issued or the alien adjusts status to

permanent resident. See, e.g. *Tongatapu Woodcraft Hawaii v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

Accordingly, CIS must review the job opportunity at the time of the application for adjustment of status to determine whether it still exists as certified by the Secretary of Labor. 20 C.F.R. § 656.30(c)(1) states that "[a] labor certification involving a specific job offer is valid only for the particular job opportunity and for the area of intended employment stated on the Application for Alien Employment Certification form." In this case the director clearly acted within his authority in revoking the approval of the immigrant visa petition where the certified job opportunity no longer exists. In *Matter of United Investment Group*, 19 I&N Dec. 248, 249 (Comm. 1984), the Commissioner stated:

The issue in this proceeding in the context of the labor certification is whether the particular job opportunity remains as certified. If it does not, then the validity of the certification is considered to have expired. To remain as certified, the facts of employment or intended employment must remain as stated and the specific employer-employee relationship stipulated and intended must continue both in present fact and prospectively. A review of this fact centers on the circumstances of the petitioner and on its intent. Analysis of the issue in a certain matter extends beyond the circumstances at the time of filing to those present at the time of adjudication, and in fact, through the mechanisms provided in section 205 of the Act, 8 U.S.C. § 1155, beyond even that point.

The Commissioner found the labor certification to have expired in *Matter of United Investment Group*, as the facts of employment in the approved labor certification were no longer applicable. Similarly, in *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966), the Regional Commissioner denied an immigrant visa to a live-in domestic worker who planned to attend school in the daytime, and the job duties called for a full-time domestic worker during daylight hours. The Regional Commissioner found that the petitioner did not establish that the employment would be in accordance with the conditions set forth in the Department of Labor's certification. See also *Che-Li Shen v. Immigration & Naturalization Service*, 749 F.2d 1469, 1473 (10th Cir. 1984).

One district court has held that CIS does not have the authority to make a determination of the continuing validity of the job opportunity under 20 C.F.R. § 656.30(c). *Hassanali v. Atty. Gen.*, 599 F.Supp. 189 (D.D.C. 1984). However, that decision is directly in conflict with the body of administrative and judicial decisions that have held or implied that CIS has authority to determine that a labor certification is no longer valid on the basis of this regulation. See *Che-Li Shen v. Immigration &*

Naturalization Service, supra at 1473; see also *Matter of Sunoco Energy*, 17 I&N Dec. 283 (Reg. Comm. 1979); *Matter of United Investment Group, supra* at 249. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of KS*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration, the analysis does not have to be followed as a matter of law. *Id.* at 719. In the present matter, the director did not invalidate the certification made by the Secretary of Labor pursuant to 20 C.F.R. § 656.30(c), but rather examined whether the job opportunity continued to exist at the time the alien applied for adjustment of status, more than ten years after the labor certification was originally issued. Accordingly, the reasoning of the *Hassanali* decision will not be followed in this matter.

As stated in *Matter of Ho*, a notice of intent to revoke an approved 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 record clearly establishes that the job duties described in the approved labor certification no longer exist. No evidence has been submitted that either the beneficiary or the employer maintains a bona fide intent that the beneficiary will be employed in the job upon which the labor certification was based, and that the job offer certified by the Department of Labor remains outstanding. Thus, the labor certification no longer applies to the job opportunity in this matter, or as stated in *Matter of United Investment Group*, the labor certification has "expired." See *Matter of United Investment Group, supra* at 249. See also *Pei-Chi Tien v. INS*, 638 F.2d 1324, 1328 (5th Cir. 1981).

On appeal, counsel argues that the revocation is invalid because section 204(j) of the Act, 8 U.S.C. § 1154(j), allows a change in the job duties set forth on the labor certification. That section provides:

A petition under subsection (a)(1)(D)² for 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.

² The reference to subsection (a)(1)(D) of the Act has been redesignated as section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F).

Counsel has not established that the beneficiary qualifies for relief under section 204(j) of the Act. The petitioner has not submitted any evidence that the beneficiary has changed jobs or employers, and has not submitted a new qualifying offer of employment.

Further, the beneficiary's application for adjustment of status was denied in September 2001. While counsel indicates that the beneficiary has renewed her application for adjustment of status in immigration court, he has not established that this section of law applies to an application to adjust status that has been denied by CIS and is subsequently renewed during removal proceedings.

On appeal, counsel argues that CIS has no jurisdiction to adjudicate the validity of an I-140 petition when the beneficiary of the petition is in removal proceedings. Neither of the cases cited by counsel, *Matter of Siffre*, 14 I&N Dec. 444 (BIA 1973), or *Matter of Rosas-Ramirez*, 22 I&N Dec. 616 (BIA 1999), support counsel's argument that the immigration court with jurisdiction over a beneficiary's removal proceeding under section 240 of the Act, 8 U.S.C. § 1229a, divests CIS of jurisdiction to determine the beneficiary's eligibility for an immigrant visa under section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii).

On appeal, counsel argues that the revocation is invalid because the director found for the first time in the notice of revocation that the employment is not full-time and that the beneficiary is not qualified for the job. As the director did not give the petitioner proper notice of these issues in the notice of intent to revoke, the findings of the director relating to the qualifications of the beneficiary and the part-time nature of the position will be withdrawn. However, the director based his decision to revoke primarily on the fact that the job certified by the Department of Labor is no longer available. The petitioner had an adequate opportunity to offer evidence in support of the petition and in opposition to this ground for revocation of the approved petition.

On appeal, counsel contests the finding by the State Department and CIS that the beneficiary is inadmissible because of material misrepresentation under section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C). Section 212(a) of the Act lists the classes of aliens that are inadmissible to the United States. The section 212(a)(6)(C) finding of material misrepresentation is not relevant to a determination of whether the immigrant visa is valid under section 203 of the Act.

For the reasons discussed above, the notice of intent to revoke and the subsequent revocation are found to have been issued for good and sufficient cause in accordance with section 205 of the Act. The petitioner has not established the beneficiary's eligibility for an immigrant visa under section 203(b)(3)(A)(iii) of the Act.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.