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U.S. Citizenship  
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*RBG*  
MAR 21 2005

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date:  
SRC-91-154-00255

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

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)  
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:  
[REDACTED]

**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*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was initially approved by the Director, Texas Service Center. In connection with information obtained while adjudicating an application to adjust status to lawful permanent resident, the Houston district office director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the district director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter was appealed to the Administrative Appeals Office (AAO), which remanded to the district director. Subsequently, the director of the Texas Service Center filed a motion to reopen, automatically revoked the petition, and certified her decision to the AAO. The director's decision will be affirmed. The petition will remain revoked.

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, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The petition was approved on June 3, 1991. The beneficiary applied to adjust her status to lawful permanent resident on August 7, 1995.

The record of proceeding reflects that prior to the beneficiary's adjustment of status to lawful permanent resident interview, the married couple that constituted the private household divorced on August 5, 1996. The petition only listed the petitioner as Dr. [REDACTED] (Dr. [REDACTED]) and did not mention her husband's name, Mr. [REDACTED] (Mr. [REDACTED]). On June 5, 1995, Dr. [REDACTED] wrote a letter confirming the beneficiary's employment. On October 10, 1996, Dr. [REDACTED] faxed a letter that stated the following: "This letter is to verify that [the beneficiary] is not employed by me at the present. I however, would not hesitate to offer her a position as child monitor if the need arose." Additionally, at the same time an undated letter was received by Mr. [REDACTED] stating that "[a]s part of [their] divorce, [they] have agreed upon joint custody of Blake. I would like to continue to offer employment to [the beneficiary] to serve as a Child Monitor." The beneficiary was subsequently interviewed in connection with her adjustment of status to lawful permanent resident on October 22, 1996. A letter from Dr. [REDACTED] dated November 19, 1996 also states that the purpose of hiring the beneficiary was to care for her son with Mr. [REDACTED] and that her husband had always supported her sponsorship.

The Houston district office director issued a notice of intent to revoke the approved visa on February 21, 1998 on the grounds that the "beneficiary is no longer employed by [the petitioner] as required on Form ETA 750." The petitioner's counsel responded that the petitioner is not required to employ the beneficiary until after she adjusted to lawful permanent resident status. Counsel cited Texas state law to assert that Mr. [REDACTED] has rights to the labor certification application and visa petition since he was married to the petitioner at the time they were both filed. Counsel stated that Mr. [REDACTED] continues to offer a bona fide offer of employment as a live-in child monitor.

The Houston district office director subsequently revoked the petition on April 1, 1998 because he determined that the beneficiary's counsel responded instead of the petitioner's counsel. Also on April 1, 1998, the Houston district office director denied the beneficiary's application to adjust status to lawful permanent resident.

Counsel appealed the Houston district office director's decision on May 13, 1998. The AAO remanded the case back to the Houston district office director on August 28, 2001 stating that the appeal was late and that the AAO did not have jurisdiction; but also that the Houston district office director lacked authority to revoke the petition's approval. Thus, the AAO remanded to the Houston district officer director to reopen the proceedings on a motion and refer to the Texas service center director. Counsel wrote the Houston district office director and submitted a letter from Mr. [REDACTED] dated November 28, 2001, confirming an offer of employment similar to the proffered position, and stating the following, in pertinent part: "This letter will serve to confirm my offer of employment to [the beneficiary] as a child care provider for my children. My wife and I have four children, ages 11 months, 4 years, 10 years and 13 years old." Counsel's accompanying letter references the American Competitiveness in the

21<sup>st</sup> Century Act (AC21) and states that the beneficiary is eligible to continue the immigration process with Mr. Sonne's household.

The director of the Texas service center then issued the most recent decision in this matter on March 1, 2004 after filing a motion to reopen the proceedings. She stated that the petitioner was filed by Dr. [REDACTED] and Dr. [REDACTED] made clear her intention to withdraw the offer of employment in her letter dated October 10, 1996 since she stated she did not need the beneficiary's services any longer. Citing to the regulations guiding automatic revocations at 8 C.F.R. § 205.1, the director determined that the petition could be considered to be withdrawn as of October 10, 1996. Additionally, the director stated that there is no successor-in-interest relationship between Mr. Sonne and Dr. [REDACTED] and thus Mr. [REDACTED] cannot be substituted as the petitioner. The director stated that AC21 was enacted after the revocation of the petition and denial of the beneficiary's adjustment of status to lawful permanent resident application, and thus, the beneficiary does not have eligibility for benefits under AC21.

On certification, counsel submits a brief and asserts that the petitioner never expressly stated an intention to withdraw the offer of employment. Counsel also states in a footnote that even assuming that a withdrawal had occurred, there was a procedural defect since the petitioner sent her letter to the Houston district director, not the director of the service center who had jurisdiction over the visa petition. Alternatively, counsel asserts that AC21 applies to the facts of the case since the AAO determined that the Houston district director lacked jurisdiction to revoke the visa petition. Thus, counsel asserts that the beneficiary's adjustment application was pending at the time AC21 came into effect. Counsel does not assert a successor-in-interest theory. Counsel states that if Citizenship and Immigration Services (CIS) really believed that a withdrawal had taken place, the Houston district director and the AAO would have stated so in their decisions. The petitioner does not submit any new evidence on certification.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department 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." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The regulation at 8 C.F.R. § 205.1(a)(3)(iii)(C) states that approvals of a petition made under section 204 of the Act are automatically revoked "[u]pon written notice of withdrawal filed by the petitioner, in employment-based preference cases, with any officer of [CIS] who is authorized to grant or deny petitions."

Counsel's assertion that the word "withdraw" was not expressly used by the petitioner in her October 10, 1996 letter is disingenuous. The petitioner stated that the beneficiary was not employed by her and she would only employ her "if the need arose" (i.e., the job offer no longer existed). This clearly states an intention not to employ the beneficiary unless something else occurred (i.e., the job was re-created). Since the date of that letter, the only other letter submitted from the petitioner states that her husband motivated the sponsorship. The petitioner has not provided any further correspondence to illuminate her intentions not to withdraw her sponsorship or to continue it. Thus, the director had good and sufficient cause in interpreting the October 10, 1996 letter to be a *de facto* withdrawal of the job offer. Withdrawal by a petitioner results in automatic revocation of the petition retroactive to the date of approval, without appellate, review, or reinstatement rights. See 8 C.F.R. §

205.1(a)(3)(iii)(C); *see also* *Matter of Zaidan*, 19 I&N Dec. 297 (BIA 1985); *Matter of Aurelio*, 19 I&N Dec. 458 (BIA 1987); and 57 Fed. Reg. 41053 (Sept. 9, 1992). The AAO concurs with the director's determination that the petition was automatically revoked on October 10, 1996 based on the petitioner's withdrawal.

Counsel's jurisdiction argument is without merit. The petitioner's letter is contained in the record of proceeding. The regulation at 8 C.F.R. § 205.1(a)(3)(iii)(C) uses the language "any officer" who can "grant or deny petitions," but does not limit that language to a particular sub-entity of CIS. Thus, the director of the service center properly relied upon the letter and had jurisdiction to accept the petitioner's withdrawal.

Finally, counsel argues that the portability provisions of AC21 apply to this petition. AC21 amended the Act enabling qualified beneficiaries to retain eligibility for an employment-based preference visa if they met certain eligibility requirements in the instance of lengthy adjudications and changed circumstances during a petition's pendency. Those eligibility requirements under section 106(c) of AC21 are that (a) the I-485, Application for Adjustment of Status, must be pending (unadjudicated) for 180 days or more; and (b) the new job must be the same as, or similar to, the job described in the labor certification and I-140 petition. In this case, the AAO concurs with the director's decision that the denial of the Form I-485 and withdrawal and revocation of the petition all preceded the enactment of AC21 and thus the statute does not impact the outcome of this case.<sup>1</sup>

Additionally, the AAO concurs with the director that Mr. [REDACTED] does not have any legal rights to substitute himself as the petitioner in these proceedings. Counsel concedes that a successor-in-interest evaluation does not apply. Mr. [REDACTED] was not named on the visa petition, and counsel never stated how the federal Department of Homeland Security's CIS agency is bound by state marital property law to give Mr. [REDACTED] the right to carry on with the petitioner's employment-based immigrant visa sponsorship.

Finally, counsel's assertion that since the Houston district director and the prior AAO adjudicator failed to raise the issue of withdrawal and automatic revocation that the decision of the service director is in error is without merit. The AAO is never bound by a decision of a service center or district director. *See Louisiana Philharmonic Orchestra vs. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 2000), *aff'd.*, 248 F. 3d 1139 (5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Additionally, the AAO did not adjudicate the past decision on its substantive merits but noted procedural error and remanded to the Houston district director for further proceedings. Even if the AAO made an error in its past decision, the AAO would not be bound by its own errors or the errors of a service center or district director.<sup>2</sup>

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The director's decision on March 1, 2004 is affirmed. The petition is revoked.

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<sup>1</sup> In any event, the AAO notes that the beneficiary's adjustment application was adjudicated in 1998 and denied so it did not "remain unadjudicated," and contrary to counsel's assertion, was not pending at the time AC21 was enacted. Only CIS could have reopened the denied adjustment application, which was properly within the Houston district director's jurisdiction to deny, contrary to counsel's assertion.

<sup>2</sup> *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).