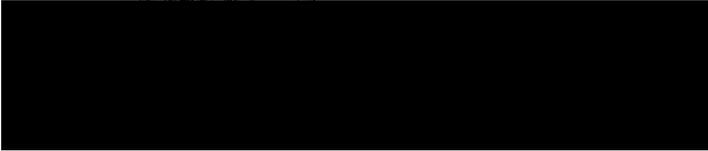




U.S. Citizenship  
and Immigration  
Services

identifying data deleted to  
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invasion of personal privacy

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FILE: EAC 00 250 52048 Office: VERMONT SERVICE CENTER Date: NOV 03 2005

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

PETITION: Immigrant 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:



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, Vermont Service Center, initially approved the employment-based preference visa petition. Subsequent to an investigation conducted by the American Consulate, Mumbai, India, the director served the petitioner with 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). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

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). A Notice of Intent to Revoke 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. *Matter of Esteime*, 19 I&N Dec. 450 (BIA 1987). 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).

The petitioner is a garden center and landscape servicer. It seeks to employ the beneficiary permanently in the United States as a landscape gardener. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the beneficiary met the experience requirements as stated on the Form ETA 750 and revoked the approval of the petition accordingly.

The record indicates that the Immigrant Petition for Alien Worker (I-140) was filed with the Service Center on August 14, 2000. It was initially approved on October 25, 2000. Following the receipt of information from an investigation conducted by the Consulate in Mumbai, India relevant to the beneficiary's experience, the director concluded that the I-140 was approved in error and issued an intent to revoke the petition on October 24, 2002. The director concluded that the petitioner had failed to establish that the beneficiary met the requirements of the labor certification as of the visa priority date as the petitioner failed to respond to its NOIR. It is noted that on appeal, counsel states that she did reply to the NOIR in a timely manner, but the response was mistakenly filed with the response for another alien.

The regulation at 8 C.F.R. § 205.2(d) indicates that revocations of approvals must be appealed within 15 days after the service of the notice of revocation. The appeal was filed on April 7, 2003, 24 days after the decision was rendered. Thus, the appeal was not timely filed.

It is noted that the director erroneously allowed the petitioner 30 days to file the appeal (33 days if by mail). The director's error does not, and cannot, supersede the regulation regarding the time allotted to appeal a revocation.

8 C.F.R. § 103.3(a)(2)(v)(B)(1) states that an appeal which is not filed within the time allowed must be rejected as improperly filed. In such a case, any filing fee CIS has accepted will not be refunded. However, the petition will be returned to the director for consideration as a motion to reopen.

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Since the appeal was improperly filed, the appeal must be rejected.

**ORDER:** The appeal is rejected.