



U.S. Citizenship
and Immigration
Services

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FILE:

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LIN 03 028 51012

Office: NEBRASKA SERVICE CENTER

Date: JUL 17 2007

IN RE:

Petitioner:

Beneficiary:



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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, Nebraska Service Center. On further review of the record and following an investigation, the District Director, Chicago, Illinois determined that the beneficiary was not eligible for the benefit sought. The District Director served the petitioner with notice of intent to revoke the approval of the preference visa petition, together with his reasons therefore. The District Director subsequently revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed.^{1 & 2}

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 District 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).

¹ In addition to being summarily dismissed, the petition could also have been rejected as untimely filed. 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 October 27, 2005, 27 days after the decision was rendered. Thus, the appeal was not timely filed.

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

The regulation at 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.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii). The District Director declined to treat the late appeal as a motion and forwarded the matter to the AAO.

² It is noted that even if the appeal was not rejected as being untimely, it would have been rejected as being abandoned.

The regulation at 8 C.F.R. § 103.2(b)(15) provides that:

A denial due to abandonment *may not be appealed* but an applicant or petitioner may file a motion to reopen under § 103.5. Withdrawal or denial due to abandonment does not preclude the filing of a new application or petition with a new fee. However, the priority or processing date of a withdrawn or abandoned application or petition may not be applied to a later application [or] petition. Withdrawal or denial due to abandonment shall not itself affect the new proceeding; but the facts and circumstances surrounding the prior application or petition shall otherwise be material to the new application or petition. (Emphasis added.)

In this matter, the District Director's decision to revoke the petition was based on the lack of response from the petitioner. As such the revocation was based on the abandonment of the petition. As set forth above, a denial due to abandonment may not be appealed. Therefore such an appeal must be rejected.

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 un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Notwithstanding Citizenship and Immigration Services' (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).

Section 203(b)(3)(A)(i) of 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 204(c) of the Act states:

Notwithstanding the provisions of subsection (b) no petition shall be approved if (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

The regulation 8 C.F.R. § 204.2(a)(1)(ii) states in pertinent part:

Fraudulent marriage prohibition. Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The Director will deny a petition for immigrant visa classification filed on behalf of any alien whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

Section 212(a)(6)(C)(i) the Act states:

[Misrepresentation] IN GENERAL. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The petitioner is a car and truck repair business. It seeks to employ the beneficiary permanently in the United States as a diesel mechanic. The District Director determined that the beneficiary is ineligible for the benefit sought due to marriage fraud under section 204(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(c). The District Director denied the petition accordingly.

Counsel submitted a Form I-290B appeal in this matter. In the section reserved for the basis of the appeal, counsel stated:

The I-140 Denial is based on a previous I-130 denial (based on fraud) of a Petition for Alien Relative filed on [the beneficiary's] behalf. However, neither my office³ (as attorney or [sic] record) nor [the beneficiary] received a Notice of Intent to Deny Petition for Alien Relative nor a Decision to Deny Petition for Alien Relative. Therefore, proper notice in this case did not occur. Furthermore, [CIS] allegedly makes a finding of fraud based on a series of three investigations performed, however the evidence collected at this investigation that leads to a finding of fraud is unclear without the actual decision to deny petition for alien relative. My office has requested a FOIA with the US Department of Homeland Security (see attached sheet). So far, we have only received an acknowledgement receipt with USDHS. The FOIA is needed to obtain a copy of the Notice of Intent to Deny Petition for Alien Relative and the Decision to Deny Petition for Alien Relative. Only upon receipt of these decisions in the requested FOIA will our office be able to adequately respond to the fraud allegations made by [CIS]. Therefore, we are asking for this file to be held in abeyance until the FOIA is received by our office. We will submit a brief in support of the Notice of Appeal within 30 days of receipt of the FOIA. Or, in the alternative, if [CIS] will re-issue copies (to my office) of the Notice of Intent to Deny Petition for Alien Relative and the Decision to Deny Petition for Alien Relative, a written brief can be submitted within 30 days of its receipt. Therefore, I am requesting that [the beneficiary's] appeal be held in abeyance until my office receives the decision from [CIS] rendered in March 2000 and December 2000.

No further information, argument, or documentation was submitted.

On the appeal form counsel indicated that a brief or additional evidence would be submitted within 90 days. In a brief, received on December 30, 2005, counsel again notes that his office requested a FOIA to obtain copies of the Notice of Intent to Deny Petition for Alien Relative and the Decision to Deny Petition for Alien Relative and states that the "ability to supplement this brief within thirty days of the receipt of the FOIA is being requested."

The record does not contain any additional evidence. On July 2, 2007, this office sent a fax to counsel, inquiring about the promised brief or evidence and informing counsel that the FOIA request was sent in CD format to counsel of record in November 2006. More than seven months elapsed after the FOIA information was sent to counsel and no brief or evidence has been submitted to the AAO. Counsel did not respond to a courtesy reminder fax. The appeal will be adjudicated based on the evidence of record.

Counsel's statement on appeal contains no specific assignment of error. Alleging that the District Director erred in some unspecified way is an insufficient basis for an appeal.

The regulation at 8 C.F.R. § 103.3(a)(1)(v) states, in pertinent part: "An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal."

Counsel has failed to identify specifically an erroneous conclusion of law or a statement of fact as a basis for the appeal and the appeal must be summarily dismissed.

ORDER: The appeal is summarily dismissed. The petition's approval will remain revoked.

³ It is noted that counsel was not the counsel of record when the beneficiary's prior wife filed the Form I-130, Petition for Alien Relative. Therefore, counsel would not have automatically received a copy of the Notice of Intent to Deny the Petition for Alien Relative or the Decision to Deny the Petition for Alien Relative.