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20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
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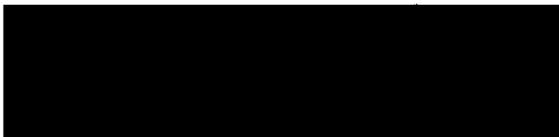


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: MAR 28 2007
WAC 98 239 51548

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

PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the employment-based immigrant visa petition. Upon further review, the director determined that the petition had been approved in error. The director properly served the petitioner with a notice of intent to revoke, and subsequently revoked the approval of the petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be dismissed.

The petitioner is a church. It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), to perform services as a pastor. The director determined that the petitioner had not established that the beneficiary had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition or that it had extended a qualifying job offer to the beneficiary. The AAO affirmed the director's decision and dismissed the appeal, with the additional finding that the petitioner had failed to establish its ability to compensate the beneficiary as required by 8 C.F.R. § 204.5(g)(2).

On motion, counsel alleges that ineffective assistance by prior counsel (attorney Marshall G. Whitehead) has foreclosed avenues of relief that would otherwise remain available to the petitioner.

Section 205 of the Act, 8 U.S.C. § 1155, 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 204."

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)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*. The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.* at 582.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The motion relies on *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988), which permits appeals and motions based on allegations of ineffective assistance of counsel under certain circumstances. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada* at 637 (BIA 1988).

To support the assertion that she received ineffective assistance of counsel, the petitioner submits an affidavit, jointly signed by the beneficiary and by [REDACTED], indicating that prior counsel advised the petitioner to "fight the case and pay him," and that prior counsel "never told us that we should simply withdraw the case to protect our right to pay [the] \$1000 fine that would allow [the beneficiary] to stay here in the future." This affidavit complies with the first of *Lozada's* three prongs.

Counsel asserts that the petitioner and the beneficiary "filed a complaint with the state bar" and sent a copy of the complaint to prior counsel. The record, however, contains no evidence to corroborate either of those claims. Therefore, the record does not show that the petitioner has complied with *Lozada's* second and third prongs. Accordingly, the petitioner has failed to establish a claim of ineffective assistance of counsel.

Furthermore, even if we had determined that the petitioner had sufficiently established a claim of ineffective assistance of counsel against prior counsel, this claim does not guarantee or compel the reopening of a proceeding. We must weigh the claim and the relief sought.

In this instance, the present motion alleges no new facts relating to the grounds for revocation or the AAO's decision. Instead, counsel argues that the ineffective assistance of prior counsel prejudiced the petitioner on procedural grounds:

The attorney only advised the beneficiary that she should appeal the case and charged her \$1500. The attorney did not advise the beneficiary or the petitioner of the consequences of pursuing an appeal. He also neglected and failed to advise the beneficiary and the petitioner of the other option of simply withdrawing the petition before it was revoked and starting anew since they would be able to retain the 1998 priority [date] for any future filings for purposes of 245(i). The attorney did not advise the beneficiary or the petitioner that their priority date would be lost if the appeal is dismissed and the case is ultimately revoked by notice. . . . Had the petitioner and the beneficiary been properly, fully, and completely advised, the petitioner would have withdrawn the I-360 and started anew when the organization could establish eligibility. Instead, the petitioner and the beneficiary cannot start anew because the priority date is now lost forever due to the ineffective assistance of their prior attorney. . . .

[The petitioner] asks that you reopen your decision and remand the case to the director so that he may withdraw the petition as he originally should have but for attorney error in response to the intent to revoke.

The petitioner submits a new letter, signed by [REDACTED] Pastor of the petitioning church, stating in part: "Please let your records reflect that the petition was withdrawn before it was revoked." The petitioner thus asks not only to withdraw the petition, but to withdraw it retroactively.

For several reasons, the above assertions do not provide valid grounds for reopening the proceeding. 8 C.F.R. § 103.2(b)(6) states that a petitioner may withdraw a petition at any time until a decision is issued. Here, the director had already issued a decision on the petition; it is too late to withdraw the petition. There is no provision to allow retroactive withdrawal of a petition after a decision has been rendered.

Furthermore, 8 C.F.R. § 103.2(b)(15) states that the priority date of a withdrawn petition may not be applied to a later petition. Counsel cites no authority to show that, for purposes of adjustment under section 245(i) of the Act, revocation of a petition carries adverse consequences that withdrawal of that petition does not carry.

Counsel argues that, had the petitioner withdrawn the petition prior to the revocation, the petitioner could then have "started anew" by filing a new petition at a later date. 8 C.F.R. § 245.10 concerns "grandfathered aliens" who retain a priority date under section 245(i) of the Act but whose adjustment relies on a later petition. Review of these regulations show that the beneficiary would not qualify as a grandfathered alien, whether or not the petitioner had withdrawn the petition. The mere existence of a petition filed before April 30, 2001 does not automatically entitle the beneficiary of that petition to the status of a grandfathered alien; the petition in question must meet certain specified criteria.

The definition of "grandfathered alien" at 8 C.F.R. § 245.10(a)(1)(i) requires that, for the purposes of section 204.5(i) of the Act, the petition "was approvable when filed," a term defined at 8 C.F.R. § 245.10(a)(3):

Approvable when filed means that, as of the date of the filing of the qualifying immigrant visa petition . . . the qualifying petition . . . was properly filed, meritorious in fact, and non-frivolous. . . . This determination will be made based on the circumstances that existed at the time the qualifying petition . . . was filed. A visa petition that was properly filed on or before April 30, 2001, and was approvable when filed, but later withdrawn, denied or revoked due to circumstances that have arisen after the time of filing, will preserve the alien beneficiary's grandfathered status.

Thus, not every withdrawn visa petition qualifies a given beneficiary as a grandfathered alien. If the petition was not approvable when filed, then withdrawal of the petition would not preserve the beneficiary's rights as a grandfathered alien. The withdrawal must have been based on circumstances that have arisen after the time of filing, a term defined at 8 C.F.R. § 245.10(a)(4): *Circumstances that have arisen after the time of filing* means circumstances similar to those outlined in § 205.1(a)(3)(i) or (a)(3)(ii) of this chapter.

8 C.F.R. § 205.1(a)(3) and its subsections relate to automatic revocation, for reasons such as the bankruptcy of the petitioner in an employment-based petition. In the present case, the revocation was not based on circumstances that arose after the time of filing. Rather, it was based on the finding that the petition should never have been approved in the first place, because the petitioner had not established that the beneficiary engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition or that the petitioner had extended a qualifying job offer to the beneficiary. Both of these findings stemmed from the petitioner's assertion that the beneficiary worked for the church as an unpaid volunteer, while supporting herself through "a small business." Uncompensated work is not qualifying experience. *See Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980). Also, pursuant to 8 C.F.R. § 204.5(m)(4), a religious worker cannot be solely dependent on outside employment for support. We note that counsel, on motion, does not contest these grounds for revocation. Counsel does not state that the petition should have been approved, or that the director lacked justifiable grounds for revocation. Counsel claims only that the petitioner should have withdrawn the petition before the director issued a notice of revocation, and that prior counsel should have advised the petitioner to do so rather than contest the notice of intent to revoke.

The revocation was revoked on notice, a circumstance covered by 8 C.F.R. § 205.2 rather than § 205.1. Thus, even if the petitioner had withdrawn the petition upon receipt of the notice of intent to revoke, that withdrawal would not have been covered by 8 C.F.R. § 245.10(a)(4).

For all the above reasons, we find that the beneficiary would not qualify as a grandfathered alien, whether or not the petitioner had withdrawn the petition prior to its revocation. Counsel, on motion, cites no statute, regulation, or case law to show that withdrawal of the petition would have qualified the beneficiary as a grandfathered alien.

The petitioner has not met the requirements of the *Lozada* test, and counsel's argument that withdrawal of the petition would have qualified the beneficiary as a grandfathered alien is incorrect. Because these claims have not withstood scrutiny, there remain no grounds for reopening the proceeding.

Dismissal of an appeal and withdrawal share one characteristic, in that each ceases all action on a given proceeding. To reopen for the sole purpose of withdrawing the petition would serve no useful or constructive purpose, and therefore the request to withdraw the petition is not a valid basis for reopening the proceeding.

ORDER: The motion is dismissed.