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

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MAY 16 2006

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC 98 075 56233

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

IN 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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, California Service Center. On further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with two notices of his intention to revoke the approval of the preference visa petition, and his reasons therefore. The director ultimately revoked the approval of the petition. The matter was then certified to the Administrative Appeals Office (AAO) for review. The AAO will affirm the decision of the director.

After issuing two separate notices of his intent to revoke the approval of the petition, the director issued a revocation on November 3, 2004. The director's decision was based on the following findings: 1) the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity; 2) the petitioner was dissolved on August 27, 2003 and is therefore no longer doing business; and 3) the petitioner failed to establish a qualifying relationship with the foreign entity. Based on the dissolution of the petitioning entity, the director automatically revoked the approval of the employment-based petition pursuant to 8 C.F.R. § 205.1(a)(3)(iii)(D).

Although the petitioner filed an appeal seeking to have the director's decision reviewed and overturned by the AAO, the AAO lacks jurisdiction in the case of an automatic revocation. *See Matter of Zaidan*, 19 I&N Dec. 297 (BIA 1985). The precedent decision noted that 8 C.F.R. § 205.2 allows for an appeal of a decision of the district director revoking approval of a visa petition on any ground other than those listed in 8 C.F.R. § 205.1. *Id.* However, the Board of Immigration Appeals determined that there is no such provision for appellate review when a petition is automatically revoked pursuant to 8 C.F.R. § 205.1. *Id.* As the approval in the instant matter was revoked pursuant to 8 C.F.R. § 205.1(a)(3)(iii)(D), the petitioner cannot seek to appeal this decision. The appeal will be rejected under a separate decision.

As there is no appeal available in the instant matter, the director certified the decision to the AAO, to ensure that the decision receives appellate review. *See* 8 C.F.R. 103.4(a).

Counsel disputes the director's conclusions stating that the approved Form I-140 remains valid pursuant to the provisions of section 204(j) of the Act.[1] However, the beneficiary's new job and the portability considerations of AC21 are separate issues that must be addressed in the adjudication of the beneficiary's I-485 application, not in the Form I-140 revocation decision. No appeal lies from the denial of an application for adjustment of status under section 245 of the Act, 8 C.F.R. 245.2(a)(5)(ii).

The AAO further observes that for the portability provisions to apply, the underlying petition must be "valid" to begin with if it is to "*remain* valid with respect to a new job." Section 204(j) of the Act, 8 U.S.C. § 1154(j)

[1] In 2000, Congress passed the American Competitiveness in the Twenty-First Century Act (AC21), Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000). Section 106(c) of AC21 amended section 204 of the Act. The "portability provision at section 204(j) of the Act provides that "an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated 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." CIS has not issued regulations governing this provision.

(emphasis added). In the instant matter, as discussed in the director's decision, the record does not establish the beneficiary's initial eligibility for this visa classification.

Section 204(b) of the Act, 8 U.S.C. § 1154(b), governs CIS' authority to approve an immigrant visa petition and grant immigrant status:

> After an investigation of the facts in each case, and after consultation with the Secretary of Labor with respect to petitions to accord a status under section 1153(b)(2) or 1153(b)(3) of this title, the Attorney General [now Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is . . . eligible for preference under subsection (a) or (b) of section 1153 of this title, approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.

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."

Accordingly, pursuant to the statutory framework for the granting of immigrant status, any United States employer desiring and intending to employ an alien "entitled" to immigrant classification under the Act "may file" a petition for classification. Section 204(a)(1)(F) of the Act. However, section 204(b) of the Act mandates that CIS approve that petition only after investigating the facts in each case, determining that the facts stated in the petition are true and that the alien is eligible for the requested classification, and consulting with the Secretary of Labor when required. Section 204(b) of the Act. Congress specifically granted CIS the sole authority to approve an immigrant visa petition; an alien may not adjust status or be granted immigrant status by the Department of State until CIS "approves" the petition.

Therefore, to be considered "valid" in harmony with the thrust of the related provisions and with the statute as a whole, the petition must have been filed for an alien that is "entitled" to the requested classification and that petition must have been "approved" by a CIS officer pursuant to his or her authority under the Act. *See generally,* § 204 of the Act, 8 U.S.C. § 1154. A petition is not made "valid" merely through the act of filing the petition with CIS or through the passage of 180 days. Further, if the director determines that an invalid petition was improvidently approved, the director may revoke the approval as a matter of discretion pursuant to section 205 of the Act. To interpret this provision in any other manner would subvert the statutory scheme of the U.S. immigration laws.

Considering the statute as a whole, it would severely undermine the immigration laws of the United States to find that a petition is "valid" when that petition was never approved or, even if it was approved, if it was filed on behalf of an alien that was never "entitled" to the requested visa classification. It would be irrational to believe that Congress intended to throw out the entire statutorily mandated scheme regulating immigrant visas whenever that scheme requires more than 180 days to effectuate. It would also be absurd to suppose that Congress enacted a statute that would encourage large numbers of ineligible aliens to file immigrant visa petitions, if the legislation was actually meant to be an impetus for CIS to reduce its backlogs. Although counsel's assertions rely heavily on the assumed intent of Congress to ameliorate the affects of CIS backlogs,

counsel's construction of section 106(c) would create a situation where ineligible aliens would gain a "valid" visa simply by filing frivolous visa petitions and adjustment applications, thereby increasing CIS backlogs, in the hopes that the application might remain unadjudicated for 180 days.

In the present matter, the petition was filed on behalf of an alien who was not "entitled" to the classification and the petition was ultimately revoked. Section 106(c) of AC21 does not repeal or modify section 204(b) or section 245 of the Act, which require CIS to approve a petition prior to granting immigrant status or adjustment of status. Nor does section 106(c) of AC21 repeal or modify Section 205 of the Act, which allows the director to revoke approval, as a matter of discretion, when she finds good and sufficient cause to do so. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988) (citing *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)). 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. *Id.* at 590. Accordingly, this revoked petition cannot be deemed to have been "valid" for purposes of section 106(c) of AC21.

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. Here, that burden has not been met.

ORDER: The decision of the director is affirmed.