

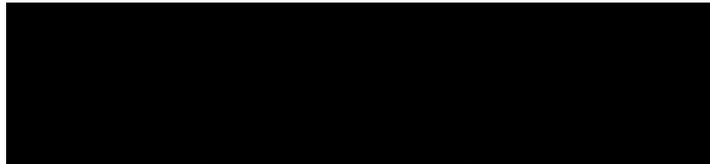
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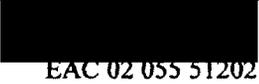
U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: JUL 25 2006

EAC 02 055 51202

IN RE:

Petitioner:
Beneficiary



PETITION: Immigrant Petition for Other Worker Pursuant to § 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 Director, Vermont Service Center, initially approved the employment-based preference visa petition. Subsequent to an interview by the Providence, Rhode Island District Office in regard to the beneficiary's Form I-485, Application to Register Permanent Resident or Adjust Status, the Director served the petitioner with a 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 dismissed.

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 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 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 record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's March 4, 2005 denial, the issue in this case is whether the position offered is full-time and permanent.

The record indicates that the Immigrant Petition for Alien Worker (I-140) was filed with the Service Center on December 3, 2001. It was initially approved on February 21, 2002. Following the receipt of information from the district office, relevant to the beneficiary's employment, the director concluded that the I-140 was approved in error and issued a notice of intent to revoke the petition on July 13, 2004.

In response to the NOIR, counsel submitted a brief in support of the beneficiary's full-time, permanent employment with the petitioner. Counsel states that "first of all the information obtained is not accurate since the employee is back to work at the same company performing his regular job as indicated in the visa petition. The employee collects unemployment for three or four months, during the winter, and is called back to work once the weather gets warmer since this job is outside and it depends on the weather." In addition, counsel maintains that the beneficiary continues to work and will continue to work for the petitioner after his adjustment of status is granted and that the petitioner is the employer, not Genesis, who is the payroll company for the petitioner.

The director concluded that the petitioner had failed to establish that the beneficiary would be employed in a full-time, permanent position, since the beneficiary was currently laid off, and that it was unlikely that the beneficiary would begin working for the petitioner after his adjustment of status. The director revoked the petition's approval on March 4, 2005 pursuant to section 205 of the Act, 8 U.S.C. § 1155.

On appeal, counsel provides documentation that she claims was submitted in response to the director's NOIR that include a letter from the petitioner, dated July 30, 2004, stating that it had employed the beneficiary since 1999, that Genesis Consolidated Services, Inc. is its payroll service, that the beneficiary is not employed by Genesis, and that the petitioner continues to employ the beneficiary and will continue to do so after the beneficiary's adjustment of status is granted. Counsel also submits a letter, dated August 3, 2004, that was sent in response to the director's NOIR. Counsel further submits a letter from Genesis Consolidated Services, Inc. reaffirming that it is an employee leasing company that does not employ the beneficiary. Counsel provides copies of payroll records for the beneficiary for the time period 2002 through August 2, 2004.

Permanent alien labor certification is governed by 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. § 656. The regulation at 20 C.F.R. § 656.3 states in pertinent part:

"Employment" means *permanent* full-time work by an employee for an employer other than oneself.

(Emphasis Added).

In the instant case, counsel states that the beneficiary collects unemployment for three or four months, during the winter, and is called back to work once the weather warms up. The AAO does not consider the position offered the beneficiary of installer as permanent, full-time employment. In order to demonstrate that a position is full-time and permanent in nature, the petitioner must demonstrate that the job duties are performed on a continuing basis and that the beneficiary will not be financially dependent on unemployment or other work during the winter when the beneficiary is not working. In *Vito Volpe Landscaping*, 1991-INA-300 (Sept. 29, 1994)(en banc), the Board of Alien Labor Certification Appeals¹ (BALCA) denied certification for a landscaping position because the job duties could only be performed ten months during the year. See also *Crawford & Sons*, 2001-INA-121 (Jan. 9, 2004)(en banc) (reaffirming *Vito Volpe*). The Board found in that case that the position fell into the definition of "seasonal employment" and therefore could not be certified as "permanent" employment. Consistent with *Vito Volpe* and based on counsel's statement that the beneficiary collects unemployment for three or four months during the winter, the AAO considers the position offered to the beneficiary as temporary. Although the installer position may be considered full-time during nine or ten months of the year, and the need for the job occurs year after year, it cannot be considered permanent employment, as it is a temporary job that is exclusively performed during the warmer seasons of the year, and from its nature, may not be continuous or carried on throughout the year. See *Sharp Cut Corp.*, 2003-INA-116 (June 22, 2004)(en banc). Because the petitioner fails to provide compelling justification that the position is permanent, full-time and that the duties of the position can be performed on a year-round basis, the AAO has determined that the position cannot be considered a permanent position.

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.

¹ It is noted that while BALCA decisions are not binding on the AAO, their reasoning may be considered when determining the petitioner's ability to pay the proffered wage.

ORDER: The director's March 4, 2005 decision is affirmed. The petition is denied.