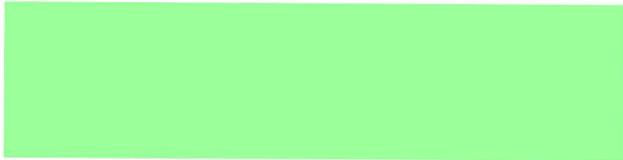


(b)(6)

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090

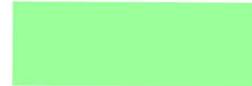


U.S. Citizenship  
and Immigration  
Services



DATE: DEC 24 2013 OFFICE: TEXAS SERVICE CENTER

FILE:

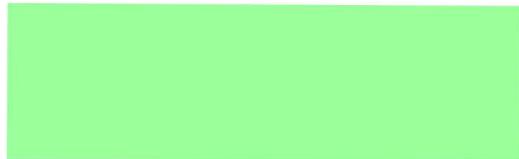


IN RE: Petitioner:  
Beneficiary:



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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

*Elizabeth McCormack*

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was initially approved by the Director, Texas Service Center. The director subsequently 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 Form I-140, Immigrant Petition for Alien Worker. The petitioner then filed a motion to reopen and to reconsider with the director. The director dismissed the motion as untimely filed. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision dismissing the motion to reopen and reconsider will be withdrawn. The petition will be remanded.

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).

The petitioner describes itself as an imaging services processor. It seeks to permanently employ the beneficiary in the United States as a senior web developer. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A).

The director approved the petition on August 30, 2008. On March 7, 2012 the director issued a Notice of Intent to Revoke (NOIR) notifying the petitioner that the petition was approved in error. Specifically, the director noted that the beneficiary failed to meet the requirements of the labor certification in that he did not have a master's degree, did not have eight years of university education, and did not have four years of work experience. The director also notified the petitioner that the evidence did not establish the ability to pay the beneficiary the proffered wage.<sup>1</sup> Upon receipt and consideration of the petitioner's response to the NOIR, on May 23, 2012, the director issued a Notice of Revocation (NOR) notifying the petitioner that the approval of the petition had been revoked pursuant to 8 C.F.R. § 205.2 because the petitioner failed to establish that the beneficiary has the equivalent of a United States master's degree and that he has eight years of college as required by the labor certification. The director found that the beneficiary has the four years of required work experience. The director also found that the petitioner failed to establish the ability to pay the beneficiary the proffered wage in 2003, 2004 and 2005.

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<sup>1</sup> The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for “good and sufficient cause” when the evidence of record at the time of issuance, 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 director's NOIR sufficiently detailed the evidence of the record, that would warrant a denial if unexplained and un rebutted, and thus was properly issued for good and sufficient cause.

In his decision dated May 23, 2012, the director notified the petitioner that an appeal or motion must be filed on Form I-290B, Notice of Appeal or Motion within 15 days of the date of revocation. The petitioner filed a motion to reopen and reconsider on June 22, 2012, 30 days after the director's decision. The director dismissed the motion to reopen and reconsider, finding that it was untimely filed. The AAO withdraws the decision of the director.

The regulation at 8 C.F.R. § 205.2(d) provides that;

Appeals . The petitioner or self-petitioner may appeal the decision to revoke the approval within 15 days after the service of notice of the revocation. The appeal must be filed as provided in part 3 of this chapter, unless the Associate Commissioner for Examinations exercises appellate jurisdiction over the revocation under part 103 of this chapter. Appeals filed with the Associate Commissioner for Examinations must meet the requirements of part 103 of this chapter.

The regulation at 8 C.F.R. § 103.5 provides that:

Any motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner. (Paragraph (a)(1)(i) amended 4/29/96; 61 FR 18900 )

On appeal, counsel asserts that the director erred in dismissing the motion to reopen and reconsider as untimely based on 8 C.F.R. § 205.2 because this regulation only applies to appeals. Counsel is correct that the regulatory language limits the period of time within which a petitioner may appeal the revocation of approval of the petition to 15 days from the date of the director's decision. Counsel is also correct that the regulation allows a motion to reopen and to reconsider the decision revoking the approval of the petition to be filed within 30 days of the decision. As the director erred in dismissing the motion as untimely filed, the AAO withdraws the director's decision.

The AAO will not reinstate the approval of the petition, however, as the director has not considered the merits of the motion. In view of the foregoing, the decision of the director dismissing the motion to reopen and reconsider is withdrawn. The petition is remanded to the director for consideration of the merits of the motion to reopen and reconsider. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, if requested, the director will review the entire record and enter a new decision.

(b)(6)



*NON-PRECEDENT DECISION*

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**ORDER:** The director's decision dismissing the motion to reopen and reconsider as untimely filed is withdrawn; the petition is remanded to the director for consideration of the motion to reopen and reconsider. The director shall issue a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.