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**U.S. Citizenship
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File: EAC 03 067 51246

Office: VERMONT SERVICE CENTER

Date:

JUN 01 2006

IN RE:

Petitioner:

Beneficiary:



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:



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, after issuing a notice of intent to revoke the employment-based petition, denied the petition due to abandonment. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be affirmed.

On December 23, 2002, the petitioner filed Form I-140, Immigrant Petition for Alien Worker, to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. (EAC-03-067-51246). The petition was approved on June 26, 2003, and subsequently forwarded to the National Visa Center at Portsmouth, New Hampshire. On October 22, 2003, the beneficiary filed Form I-485 to adjust his status to that of permanent resident (EAC-04-017-51097).

On January 13, 2005, the Director, Vermont Service Center, issued a notice of intent to revoke the previously approved I-140 petition on the basis that the petition was incorrectly approved. Specifically, the director noted that the record was insufficient to establish that the beneficiary had been employed abroad and that he would be employed in the United States in a capacity that was primarily managerial or executive, and asked the petitioner to submit additional evidence in support of the beneficiary's employment capacity for both entities. With regard to the revocation, the director stated: "[t]he service will not make a final decision regarding the revocation of your petition's approval for thirty (30) days. During that time, you may submit any evidence that you feel will overcome the reasons for the revocation."

On May 10, 2005, the director denied the petition due to abandonment pursuant to 8 C.F.R. § 103.2(b)(13). Specifically, the director noted that "[p]ursuant to Title 8, Code of Federal Regulations, part 103.2(b)(8), you were granted 12 weeks to respond. It does not appear that you have responded within the allowable period of time."

Meanwhile, the director notified the beneficiary in a letter dated May 10, 2005 of his intent to deny the pending I-485 petition. Specifically, the director noted that the previously approved I-140 petition had been revoked on May 4, 2005, and consequently, the beneficiary did not appear to be eligible to adjust his status to that of a lawful permanent resident since there was no longer an immigrant visa immediately available to him.

On May 23, 2005, the petitioner filed a motion to reopen and reconsider the denial by abandonment of the I-140 petition. In the motion, the petitioner claimed that the evidence requested by the director in his January 13, 2005 notice of intent to revoke had been forwarded to the service on February 10, 2005, and was received by the service on February 11, 2005. In support of this contention, the petitioner submitted a copy of the FedEx Delivery Confirmation Receipt. The petitioner further explained in its cover letter dated January 28, 2005 that in addition to responding to the director's January 13, 2005 request, it had also included documentation to amend the petition to reflect the corporate restructuring that the U.S. petitioner had undergone in April 2004. The petitioner simultaneously submitted a new Form I-140 along with a check for \$190.

It is noted that 8 C.F.R. § 103.2(b)(15) states that there is no appeal from the denial of an application due to abandonment. Furthermore, the regulation at 8 C.F.R. § 205.2(b) provides that the petitioner must be given

the opportunity to offer evidence in support of the petition and in opposition to the grounds alleged for the revocation of the petition. In this matter, it appears the petitioner timely provided the evidence requested by the director in the January 13, 2005 notice of intent to revoke. However, as the petitioner's response to the notice was submitted simultaneously with a new I-140 petition and appropriate filing fee to reflect the amendment of its corporate structure, the amendment was treated as a new petition and not as a response to the notice of intent to revoke. It is noted that the joint filing of a response and a new I-140 petition, together with a newly executed Form G-28 and filing fee, precluded the director from taking two separate actions in this matter. Therefore the director committed no error in treating the I-140 amendment request as a new petition.¹ The AAO notes that according to CIS records, the new petition recorded under receipt number EAC-05-093-50784 was subsequently approved on October 9, 2005.²

Generally, the director's decision to revoke the approval of a petition will be affirmed, notwithstanding the submission of evidence on appeal, where a petitioner fails to offer a timely explanation or rebuttal to a properly issued notice of intention to revoke. *See Matter of Arias*, 19 I&N Dec. 568, 569 (BIA 1988). While counsel's method of responding to the notice of intent to revoke precluded the petitioner's timely response from reaching this record of proceeding, it appears that the subsequent approval of the petition in EAC-05-093-50784 renders the issue moot.

For this reason, the decision of the director will be affirmed and the appeal will be dismissed.

ORDER: The appeal is dismissed.

¹ A petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Instead of seeking to amend a petition to make it approvable under a new set of facts, the petitioner should simply refile. A petitioner may not make material changes to a petition in an effort to make a different petition conform to Citizenship and Immigration Services (CIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

² It is noted that the I-485 petition contained in this file has not yet been linked to the recently approved I-140 petition under EAC-05-093-50784. The recommended form of action in this matter is to link the beneficiary's A file (A97-852-819) with the recently approved I-140 petition (EAC-05-093-50784) to ensure that the I-485 petition is properly adjudicated.