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**U.S. Citizenship  
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Services**

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[REDACTED]

FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date: JUN 06 2007

SRC 03 251 52093

IN RE:

Petitioner:

[REDACTED]

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)

ON 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 Director, Texas Service Center, initially approved the employment-based visa petition. Upon subsequent review of the record, the director issued a Notice of Intent to Revoke and ultimately revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the instant petition seeking 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. The petitioner is a corporation organized in the State of Texas in February 2002. It claims to be engaged in the manufacture, import and distribution of textiles. The petitioner seeks to employ the beneficiary as its business development manager.

The director approved the immigrant petition on January 19, 2005. On August 3, 2006, subsequent to an interview of the beneficiary conducted in connection with her concurrently filed Form I-485, Application to Register Permanent Resident or Adjust Status, the director issued a notice of intent to revoke approval of the petition. The director instructed the petitioner to submit additional evidence to establish: (1) that a qualifying relationship between the petitioner and the beneficiary's last foreign employer existed at the time of filing and continues to exist; (2) that the U.S. company continued to do business from September 2003 to the present; (3) that the foreign company continued to do business from September 2003 to the present; (4) that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity prior to her entry to the United States as a nonimmigrant; (5) that the United States entity would employ the beneficiary in a primarily managerial or executive capacity; and (6) that the petitioner had the ability to pay the beneficiary's proffered annual wage of \$30,000 at the time the petition was filed. The director afforded the petitioner 30 days to offer evidence in support of the petition and in opposition to the proposed revocation.

The evidence of record clearly shows that the notice of intent to revoke was properly sent to counsel for the petitioner's address of record. *See* 8 C.F.R. § 103.5a. Therefore, the AAO concludes that the notice of intent to revoke the petition was properly issued and delivered to the appropriate parties.

On September 27, 2006, the director revoked the approval of the petition, noting the petitioner's failure to respond to the notice of intent to revoke. The director's decision cited the following multiple and alternative grounds for the revocation: (1) the petitioner failed to establish that the U.S. company and the beneficiary's foreign employer enjoyed a qualifying relationship at the time of filing or that they currently maintain the claimed parent-subsidiary relationship; (2) the petitioner failed to establish that the petitioner would employ the beneficiary in a primarily managerial or executive capacity; (3) the petitioner failed to establish that the foreign entity employed the beneficiary in a primarily managerial or executive capacity; (4) the petitioner failed to establish that the United States and foreign entities continue to do business; and (5) the petitioner did not establish its ability pay the beneficiary's proffered wage of \$30,000 as of the date of filing.

On appeal, counsel for the petitioner takes issue with the director's determination that the petitioner did not respond to the notice of intent to revoke. Counsel asserts that the petitioner mailed its response to the Texas Service Center on September 1, 2006, and that such response was timely received on September 5, 2006. Counsel provides a copy of a Federal Express shipment tracking record indicating that a package of unknown origin was

delivered and signed for in "Garland, Texas" on the stated date, but does not offer a copy of the petitioner's response to the notice of intent to revoke.

Counsel further states: "We have submitted this I-290B in order to preserve our right to appeal this case. However, we believe that the I-485 will be adjudicated under AC21 guidelines.<sup>1</sup> Therefore, please do not forward this appeal to the AAO until the I-485 in this case has been adjudicated." Counsel indicated his intention to submit a brief and/or evidence in support of the appeal to the AAO within 30 days.

On April 27, 2007, as no brief or evidence has been incorporated into the record, the AAO contacted counsel by facsimile to determine whether counsel timely submitted the promised brief and/or evidence, and, if applicable, to afford counsel an opportunity to re-submit such documents. Counsel responded with a letter dated May 2, 2007, in which he notes that he "had originally filed the I-290B in order to protect [the beneficiary's] options, despite the fact that she had ported to same or similar employment well before the purported grounds for revocation arose. We had asked the Service Center to hold onto the appeal as a matter of procedure." Counsel asserts that the revocation of the Form I-140 approval "arose because of the confusion that was caused by the similarity of names of the two corporations involved,<sup>2</sup> and because USCIS was still adjudicating the I-140 almost a year after [the beneficiary] had ported to a second same or similar employer."

Counsel further contends that the beneficiary had a valid, approved I-140 when she ported to a new employer, and that for this reason, "at the time of revocation, the entire I-140 case should not have been adjudicated because [the beneficiary] had already ported to self-employment in 2005." Counsel requests that the AAO "issue a clarification" and remand the case to the Texas Service Center to approve the beneficiary's Form I-485 "on the grounds that [the beneficiary] has properly ported to new employment under AC21."

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

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<sup>1</sup> 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." U.S. Citizenship and Immigration Services (USCIS) has not issued regulations governing this provision.

<sup>2</sup> The petitioner in this matter is "[REDACTED]" while the beneficiary's new U.S. employer is the beneficiary doing business as "[REDACTED]". The notice of intent to revoke did reflect the director's belief that the petitioning company had changed ownership, when in fact the petitioner claims that she established a new business. However, as discussed above, there were multiple grounds for the revocation of the petition that were separate and apart from the issue of whether the petitioner maintained its claimed parent-subsidiary relationship with the foreign employer.

\* \* \*

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

Section 205 of the Act, 8 U.S.C. 1155 (2005), 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 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition."

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)).

USCIS regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed. *See* 8 C.F.R. § 245.1(a). If the beneficiary of an approved visa petition is no longer eligible for the classification sought or if the petition was approved in error, the director

may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for "good and sufficient cause." Notwithstanding the USCIS 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).

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). The petitioner has not submitted sufficient evidence on appeal to support counsel's claim that a timely response to the notice of intent to revoke was in fact received by the Texas Service Center on September 5, 2006. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

As discussed above, the director raised several issues in the notice of intent to revoke, based on the eligibility requirements set by the applicable statute and regulations. *See generally*, section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j). Contrary to counsel's assertions on appeal, the revocation proceeding was not entirely based on "confusion that was caused by the similarity of names of the two corporations involved, i.e., the petitioner, [REDACTED], and the beneficiary's new employer, a sole proprietorship owned by the beneficiary and doing business as [REDACTED]". The director ultimately denied the petition on five separate grounds, found that the beneficiary was ineligible for the benefit sought as of the date of filing, and determined that the petition was approved in error on January 19, 2005. Therefore, in the present case, the director did raise sufficient factual issues to support the revocation. The notice of intent to revoke and the subsequent revocation were based on evidence that was in the record at the time the notice was issued. The petitioner did not offer a timely explanation or rebuttal to the notice of intention to revoke and has not overcome the evidentiary deficiencies contained in the record.

The record does not contain evidence that the beneficiary qualifies for this visa classification. Based on the record of proceeding, the director's initial approval of this petition was contrary to the statute and plainly in error. Here, the petitioner failed to offer a timely explanation or rebuttal to the multiple issues raised in the director's properly issued notice of intention to revoke. Further, neither counsel nor the petitioner addresses the substantive legal grounds for the revocation of the petition on appeal. The director's decision will be affirmed and the appeal will be dismissed.

Of note, 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 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).

However, the AAO 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) (emphasis added). In this matter, 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 USCIS' 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.

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 USCIS 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 USCIS 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 USCIS "approves" the petition. As in the present case, Congress also granted USCIS the sole authority to revoke the approval of an immigrant visa petition for good and sufficient cause. Section 205 of the Act.

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 USCIS 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 USCIS or through the passage of 180 days. And if the approval of a petition is ultimately revoked, the revocation serves as USCIS's notice that the petition was not valid, effective as of the date of the initial approval. To interpret this provision in any other manner would subvert the statutory scheme of the U.S. immigration laws.<sup>3</sup>

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<sup>3</sup> The problematic issues presented by this case are primarily the result of immigration procedures that have arisen since the enactment of section 106(c) of AC21. CIS implemented the "concurrent filing" process on July 31, 2002 whereby an employer may file an employment-based immigrant visa petition and an application for adjustment of status for the alien beneficiary at the same time. *See* 8 C.F.R. § 245.2(a)(2)(B) (2004); *see also* 67 Fed. Reg. 49561 (July 31, 2002). CIS implemented the concurrent filing process as a convenience for aliens and their U.S. employers; CIS in no way suggested that an unadjudicated I-140 could be the basis for I-485 approval under the portability provisions of section 106(c). Prior to this date, only immediate relatives and family-based preference cases could concurrently file a visa petition and an adjustment application.

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. Counsel's implication that the merits of the instant petition became irrelevant because it was approved and assumed valid as of August 2005 when the beneficiary took advantage of the portability provisions of AC21 are not persuasive. The fact that the beneficiary ported to a new employer prior to the commencement of revocation proceedings does not absolve the petitioner from establishing that the underlying immigrant petition was valid at the time of filing, and remained valid as of the date it was approved. 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 USCIS to reduce its backlogs. To construe section 106(c) to include unadjudicated, denied, and revoked petitions would create a situation where ineligible aliens would gain a "valid" visa simply by filing frivolous visa petitions and adjustment applications, thereby increasing USCIS 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's approval was ultimately revoked pursuant to the statutory authority of USCIS. Section 106(c) of AC21 does not repeal or modify section 204(b), section 205, or section 245 of the Act, which all require an approved petition prior to USCIS granting immigrant status or adjustment of status and further provide that USCIS may revoke the approval at any time for good and sufficient cause. Accordingly, this 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 appeal is dismissed.

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Accordingly, at the time that Congress enacted AC21, no alien could assert that a denied or unadjudicated immigrant visa petition "shall remain valid" through the passage of 180 days, since the application for adjustment could not be filed until after the petition was approved by CIS. It is presumed that Congress is aware of INS regulations at the time it passes a law. See *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).