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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: **JAN 14 2014** OFFICE: TEXAS SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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 (director). In connection with the beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status, the director served the petitioner with a Notice of Intent to Revoke (NOIR) the approval of the Form I-140, Immigrant Petition for Alien Worker. On November 21, 2011, the director revoked the approval of the visa petition. The petitioner has appealed this decision to the Administrative Appeals Office (AAO). The director's decision will be withdrawn and the matter remanded to the Texas Service Center director for action consistent with the following discussion.

The petitioner describes itself as a clinical psychology practice. It seeks to permanently employ the beneficiary in the United States as a medical scientist. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

The record reflects that, on September 25, 2009, the beneficiary filed a Form I-485 (MSC 09 363 15891) seeking adjustment of status as the spouse of a Cuban citizen previously granted lawful permanent residence under the Cuban Adjustment Act, Pub.L. 89-732, November 2, 1966, as amended. On May 26, 2010, the Field Office Director, Miami, United States Citizenship and Immigration Services (USCIS), denied the application, finding the beneficiary in this matter to have married his spouse for "the primary purpose of circumventing the immigration laws of the United States." Although the applicant incorrectly appealed the Field Office Director's decision to the AAO on June 24, 2010,¹ the Field Office Director considered the appeal as a Motion to Reopen, affirming her prior decision on August 10, 2010. On September 9, 2010, the applicant filed a

¹ The AAO does not have jurisdiction over an appeal from the denial of a Form I-485 adjustment application filed under section 245 of the Act. The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the U.S. Department of Homeland Security (DHS). See DHS Delegation No. 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). See DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.). It cannot exercise appellate jurisdiction over additional matters on its own volition, or at the request of an applicant or petitioner. As a "statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy," the creation of appeal rights for adjustment application denials meets the definition of an agency "rule" under section 551 of the Administrative Procedure Act. The granting of appeal rights has a "substantive legal effect" because it is creating a new administrative "right," and it involves an economic interest (the fee). "If a rule creates rights, assigns duties, or imposes obligations, the basic tenor of which is not already outlined in the law itself, then it is substantive." *La Casa Del Convaleciente*, 965 F.2d at 1178. All substantive or legislative rule making requires notice and comment in the Federal Register.

Motion to Reconsider. No response to this motion is found in the record.

On September 13, 2010, the beneficiary concurrently filed a second Form I-485 (SRC 10 901 92266) and a Form I-140, Immigrant Petition for Alien Worker (SRC 10 901 92263) as an alien of exceptional ability under section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2). On November 18, 2010, the petitioner filed the instant Form I-140 (SRC 11 900 57310) and the beneficiary filed a third Form I-485 (SRC 11 900 57307) based on the visa petition.

On January 20, 2011, the director approved the instant Form I-140.² However, on or about June 13, 2011, the director issued a NOIR to the petitioner, indicating that he intended to revoke the approval of the Form I-140 based on the Field Office Director's May 26, 2010 finding of marriage fraud. On November 21, 2011, the director revoked the approval of the petition under section 204(c) of the Act, 8 U.S.C. § 1154(c), concluding that the Field Office Director's finding that the beneficiary had married his spouse to circumvent U.S. immigration laws established "good and sufficient cause" for revocation.³ On December 14, 2011, the petitioner appealed the director's decision to the AAO.

On appeal, counsel for the petitioner contends that the director's revocation of the approval of the Form I-140 petition on November 21, 2011 based on marriage fraud was premature. He asserts that as USCIS has not yet adjudicated the Motion to Reconsider filed by the beneficiary on September 8, 2010, it has not issued a final decision in connection with the Field Office Director's section 204(c) finding and, therefore, lacks good and sufficient cause to revoke the petition's approval. The AAO agrees and will withdraw the director's November 21, 2011 decision.

Moreover, until such time as the Field Office Director has issued a decision in response to the Motion to Reconsider filed by the beneficiary, the AAO finds that no purpose will be served by its further consideration of the record. Accordingly, this matter will be remanded to the director for return to the Field Office Director.

² On April 29, 2011, the beneficiary withdrew the Form I-140 he had filed on September 13, 2010 (SRC 10 901 92263). The beneficiary's withdrawal of this visa petition resulted in the denial of the relating Form I-485 (SRC 10 901 92266) on January 19, 2012.

³ Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, 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 204. Such revocation shall be effective as of the date of approval of any such petition.

The realization by a 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).

Once the Field Office Director has adjudicated the Motion to Reconsider, the director shall issue a new decision with respect to the visa petition, which if adverse to the petitioner, shall be certified to the AAO for review. The director may request any additional evidence considered pertinent to the adjudication of the current Form I-140 petition. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all evidence, the director will review the record and enter a new decision.

In seeking additional evidence in this matter, the director should request documentation establishing the petitioner's continued existence. Online records maintained by the Division of Corporations, Florida Department of State (see attached) appear to reflect that the petitioner's business was dissolved on or about September 27, 2013. If the petitioner is no longer in business, then no *bona fide* job offer exists, and the petition is moot. Moreover, if the petitioner's business has been dissolved, any reinstatement of the approval of the petition would be subject to automatic revocation. See 8 C.F.R. § 205.1(a)(iii)(D).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The matter is remanded to the director for further action, consistent with the preceding discussion and the issuance of a new decision that, if adverse to the petitioner, is to be certified to the AAO for review.

Attachment