



U.S. Citizenship  
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FILE:



EAC 98 204 50081

Office: VERMONT SERVICE CENTER

Date: APR 10 2006

IN RE:

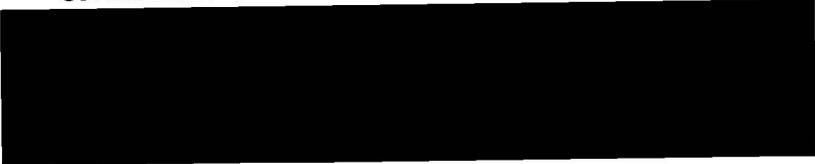
Petitioner:

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:

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, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, initially approved the employment-based preference visa petition. Subsequent to an adjustment interview, 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 sustained.

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 the 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 petitioner is a roofing company. It seeks to employ the beneficiary permanently in the United States as a roofer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner failed to demonstrate that the beneficiary had a bona fide intent to work for the company, because the beneficiary was, at the time of the adjustment interview, employed by his own company. The director revoked the approval of the petition accordingly.

The record indicates that the Immigrant Petition for Alien Worker (I-140) was filed with the Service Center on July 13, 1998. It was initially approved on November 18, 1998. Following the receipt of information from the district office, relevant to the beneficiary's intent, the director concluded that the I-140 was approved in error and issued a notice of intent to revoke the petition on June 19, 2001.

In response to the NOIR, counsel submitted a brief in support of the beneficiary's intent to work for the petitioner. Counsel states that “there is no requirement under the law that an alien must maintain his employment with his petitioner, from the time his petition or labor certification is filed, until final approval of his I-485, in order to sustain the approval of his I-140 petition.” In addition, counsel maintains that there are no “regulation or precedent that justifies [Citizenship and Immigration Services (CIS)] in concluding that intention does not exist simply because the alien has taken other employment after his labor certification has been approved, but prior to the approval of his adjustment application.” Counsel cites *Pei-Chi Tien v. INS*, 638 F.2d 1324 (5<sup>th</sup> Circuit 1981) in support of his claim.

The director concluded that the petitioner had failed to establish that the beneficiary intended to work for the petitioner. The director revoked the petition's approval on October 29, 2001 pursuant to section 205 of the Act, 8 U.S.C. § 1155.

On appeal, counsel provides previously submitted documentation, copies of payroll checks for the beneficiary for the period November 9, 2001 through December 7, 2001, and a copy of a bank statement for [REDACTED] for the period November 1, 2001 through November 30, 2001 showing a balance of \$17.78. Counsel states:

[CIS] has revoked the I-140 petition that is the subject of this appeal solely on the ground that at the time the petition was approved, the beneficiary was working for an entity (his own company) other than the petitioner. This clearly contravenes established BIA precedent holding that an alien's employment by an entity other than his petitioner does not, by itself, demonstrate a lack of intent to work for that petitioner. In fact, the totality of the circumstances surrounding this appeal clearly shows the beneficiary's intent to work for his petitioner upon approval of his adjustment application. Under these circumstances, the petition should be approved.

Counsel cites *Matter of Cardoso*, 13 I&N Dec. 228 (BIA 1969); *Matter of Marcoux*, 12 I&N Dec. 827 (BIA 1968); and *Matter of Klein*, 12 I&N Dec. 819 (BIA 1968) in support of his contention. In addition, counsel explains that the beneficiary, subsequent to the revocation, has liquidated his business and points to the beneficiary's bank statement as proof of that liquidation.

The AAO is in agreement with counsel. First, there is nothing in the record that supports the district office and the director's assertion that the beneficiary cannot accept the job offer or that the beneficiary is unemployable. The fact that the beneficiary lacks employment authorization does not make him unable to accept the petitioner's job offer as approval of the instant petition and subsequent Form I-485 would render the beneficiary employment authorized. Second, neither the district office nor the director has provided conclusive evidence that the beneficiary does not intend to work for the petitioner. Finally, the fact that the beneficiary was self-employed at the time of the interview does not, in itself, exclude him from accepting the position that is still open, available, and covered by the labor certification. There is no requirement that the beneficiary be employed by the petitioner prior to becoming a lawful permanent resident. The fact that he is not should not affect the petitioner's intent to hire the beneficiary. At this time, the AAO has no reason to doubt that the petitioner is making a valid job offer. If the director deems it necessary, he may request additional evidence or an investigation of the beneficiary's intent to work for the petitioner before the Form I-485, Application to Register Permanent Resident or Adjust Status, is adjudicated.

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 met that burden.

**ORDER:** The director's October 29, 2001 decision is withdrawn. The petition is approved.