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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B6

FILE:

Office: NEBRASKA SERVICE CENTER

Date: APR 06 2009

LIN-04-054-51411

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.


John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Nebraska Service Center (Director). In connection with the beneficiary's adjustment of status application through the Detroit District Office, the Acting District Director (District Director) served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the district director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter was appealed to the Administrative Appeals Office (AAO). The appeal was filed untimely.¹ However, the matter will be remanded to the Nebraska Service Center.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a project manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). As set forth in the March 15, 2007 NOR, the district director determined that the beneficiary is ineligible for the benefit sought due to marriage fraud under section 204(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(c) and, therefore revoked the petition's approval accordingly.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Section 205 of the Immigration and Nationality Act (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). However, the authorization to revoke an approval of a petition is given to the director who initially

¹ The regulation at 8 C.F.R. § 205.2(d) states in pertinent part: "[t]he petitioner or self-petitioner may appeal the decision to revoke the approval within 15 days after the service of notice of the revocation." 8 C.F.R. § 103.5a(b) provides additional three (3) days if the decision was mailed. The record indicates that the district director issued the NOR on March 15, 2007. A Form I-290B, Notice of Appeal to Administrative Appeals Unit (Form I-290B), was received by the Detroit District Office on April 16, 2007, 32 days after the decision was issued. However, the Form I-290B included the incorrect filing fee of \$110.00. A new filing fee of \$385.00 became effective on September 28, 2005. *See* 70 Fed. Reg. 50954, 50954 (Aug. 29, 2005), found at <http://frwebgate5.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=04921783362+1+0+0&WAISaction+retrieve>; 8 C.F.R. § 103.7. The Detroit District Office returned the Form I-290B to the petitioner and indicated that it included the incorrect filing fee. The District Office received the resubmitted Form I-290B with the proper \$385.00 filing fee on April 23, 2007, 39 days after the decision. Accordingly, the appeal was untimely filed.

approved the petition instead of a district director.² Accordingly, in the instant case, the petition's approval must be revoked by the Nebraska Service Center. Therefore, the AAO will remand the case to the director for further action.

In view of the foregoing, the previous decision of the district director will be withdrawn. The petition is remanded to the director. 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, the director will review the entire record and enter a new decision.

ORDER: The decision of the Detroit District Office is withdrawn. The petition is remanded to the director of the Nebraska Service Center for further action in accordance with the foregoing and entry of a new decision.

² See Memo. from Paul W. Virtue, Executive Associate Commissioner (Acting), Office of Programs, U.S. Immigration & Naturalization Service, to Regional Directors, *et al.*, *Revocation of Employment-Based Petitions (I-140s)* (February 27, 1997), indicating that a petition which is believed by a field office to have been incorrectly approved is to be returned to the service center that approved the petition along with a memorandum of explanation. The service center will then either initiate revocation proceedings or reaffirm the petition and return it to the field office along with a memorandum of explanation for the reaffirmation.