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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

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BC



FILE:



Office: TEXAS SERVICE CENTER

Date:

MAR 24 2009

EAC 02 264 50220

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, Vermont Service Center. In connection with the beneficiary's Form I-130, Petition for Alien Relative, the Officer-in-Charge of the Providence, Rhode Island, district office served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the Officer-in-Charge of the Providence, Rhode Island, district office ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter was appealed to the Administrative Appeals Office (AAO).¹ The matter will be remanded to the Texas Service Center.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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 July 22, 2005 notice of revocation, the Officer-in-Charge 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.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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).

¹ The petitioner improperly filed the appeal on Form EOIR-29. The correct form for filing this appeal is Form I-290B. Because the Providence, Rhode Island office of United States Citizenship and Immigration Services (USCIS) improperly instructed the petitioner to file its appeal with the Board of Immigration Appeals (BIA), this office sent a fax to the petitioner's counsel on February 23, 2009, requesting that the petitioner complete a Form I-290B and submit a request for a waiver of the additional \$475.00 filing fee pursuant to 8 C.F.R. §103.7, which represents the difference between the \$110.00 that the petitioner paid when filing Form EOIR-29 and the \$585.00 filing fee for Form I-290B. We asked the petitioner to submit the I-290B and the fee waiver request to the AAO. In response, counsel stated that the petitioner has not been in business since 2007 and, therefore, that the petition may be automatically revoked. We note that the regulation at 8 C.F.R. § 205.1(a)(3)(iii) provides for automatic revocation of petitions approved under section 203(b) of the Act upon termination of the employer's business in an employment-based preference case.

Upon review of the record, the AAO has determined that the petition's approval must be revoked by the Texas Service Center.² Therefore, the AAO will remand the case to the director for further action.

In view of the foregoing, the previous decision of the 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 Providence, Rhode Island district office is withdrawn. The petition is remanded to the director of the Texas Service Center for further action in accordance with the foregoing and entry of a new decision.

² See Memo. from ██████████, 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.