

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: **OCT 05 2012** OFFICE: VERMONT SERVICE CENTER FILE:

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:

PAMELA GENISE, ESQ.  
MURTHY LAW FIRM  
10451 MILL RUN CIRCLE  
OWINGS MILLS, MD 21117

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was initially approved by the Director, Vermont Service Center (Director). The approval was subsequently revoked by the Director. That decision is now on appeal before the Chief, Administrative Appeals Office (AAO). The Director's revocation decision will be withdrawn because the petition had previously been withdrawn by the petitioner. The appeal of the Director's revocation decision will be dismissed on the ground of mootness.

The petitioner is an information technology company.<sup>1</sup> It filed a Form I-140, Immigrant Petition for Alien Worker, on March 29, 2005, seeking to employ the beneficiary permanently in the United States as a software engineer and to classify him as a professional pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii).<sup>2</sup> As required by statute, the petition was accompanied by a Form ETA 750, Application for Alien Employment Certification, which was filed with the Department of Labor (DOL) on May 6, 2002, and certified by the DOL on January 14, 2005.

The petition was approved by the Director on April 11, 2005.

On June 29, 2006, the Vermont Service Center (VSC) received a letter from the petitioner's president, which was written on the letterhead of \_\_\_\_\_ and dated March 10, 2006. It stated that the beneficiary had ceased working for the petitioner on December 31, 2005, and requested that the VSC "cancel" the approved petition. The letter also stated that the beneficiary had "secured his green card," but the records of U.S. Citizenship and Immigration Services (USCIS) show that, in fact, the beneficiary had not secured his green card as of 2006 and has not done so up to the present time. It is unclear from the record why the letter from the petitioner's president bearing a date in March 2006 was not stamped as received by the VSC until late June 2006. In any event, no action was taken on the letter by the VSC.

On November 7, 2007, and July 31, 2008, the Director issued identical Notices of Intent to Revoke (NOIR) the approval of the petition on the ground that the record failed to establish the petitioner's continuing ability to pay the proffered wage from the priority date (May 6, 2002 – the date the labor certification application was received for processing by the DOL) – up to the present.<sup>3</sup> The

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<sup>1</sup> The petition was filed in 2005 by \_\_\_\_\_ On May 31, 2006, a merger was executed between \_\_\_\_\_ whereby the former was merged into the latter and \_\_\_\_\_ was to be the surviving corporation. The effective date of the merger was June 2, 2006, as stipulated in the Certificate of Merger which also bears a stamp of that date by the New Jersey State Treasurer. Although \_\_\_\_\_ was identified as the surviving corporation, the record appears to indicate that \_\_\_\_\_ also continues to exist as a separate corporate entity.

<sup>2</sup> Section 203(b)(3)(A)(ii) of the Act provides for preference classification to "qualified immigrants who hold baccalaureate degrees and who are members of the professions."

<sup>3</sup> Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary,

petitioner responded with a brief from counsel and additional documentation addressing the ability to pay issue.

On January 21, 2009, the Director issued a decision revoking the approval of the petition on the ground that the evidence of record failed to establish the petitioner's ability to pay the proffered wage in the calendar years 2002-2005.

The petitioner filed a Form I-290B, Notice of Appeal or Motion, with the VSC on February 4, 2009, which was forwarded to the AAO. In her appeal brief counsel made a brief reference to the petitioner's prior withdrawal of the Form I-140, but concentrated most of her presentation on the Director's ground for revocation – the ability to pay issue.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The Director's decision to revoke the approval of the petition was incorrect because it ignored the petitioner's prior request to "cancel" the approved petition. The regulation at 8 C.F.R. § 103.2(b)(6) provides as follows with respect to the withdrawal of a petition:

An applicant or petitioner may withdraw an application or petition at any time until a decision is issued by USCIS or, in the case of an approved petition, until the person is admitted or granted adjustment of status, based on the petition. However, a withdrawal may not be retracted.

Even more explicitly, the regulation at 8 C.F.R. § 205.1(a)(3)(iii)(C) provides that a request to withdraw an approved petition has automatic effect. The pertinent language reads as follows:

The approval of a petition . . . is revoked as of the date of approval . . . [for] petitions under section 203(b) [of the Act] . . . upon written notice of withdrawal filed by the petitioner, in employment-based preference cases, with any officer of the Service [USCIS] who is authorized to grant or deny petitions.

USCIS may not deny a petition after it has been withdrawn. *See Matter of Cintron*, 16 I&N Dec. 9 (BIA 1967). Based on the regulatory language above and the pertinent precedent decision, the Director should have acted upon the petitioner's letter request in 2006 by noting the withdrawal of the approved petition. Notwithstanding the Director's failure to do so, the approval of the petition was automatically revoked, as a matter of law, when the petitioner's written notice of withdrawal (the letter from its president) was filed at the VSC (stamped received on June 29, 2006).

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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. *See Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Since the petitioner's request to withdraw the approved petition subjected it to automatic revocation in June 2006, there was no longer a valid petition in play at the time the Director issued the NOIRs in 2007-2008 and the revocation (for cause) decision in 2009. Thus, the entire revocation proceeding initiated by the Director in 2007 is moot. The Director's revocation decision will therefore be withdrawn.

With the withdrawal of the Director's revocation decision on the ground of mootness, there is no legal basis for the petitioner's appeal. It will also be dismissed as moot.

**ORDER:** The approved petition was automatically revoked, by operation of law, on June 29, 2006. Therefore, the director's revocation for cause decision of January 21, 2009, is withdrawn. The petitioner's appeal of the revocation decision is dismissed as moot.