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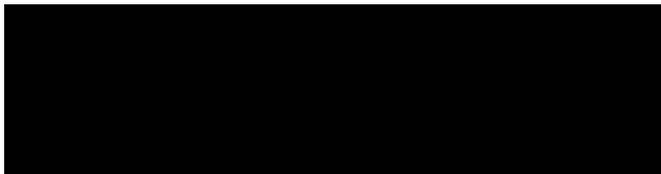
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U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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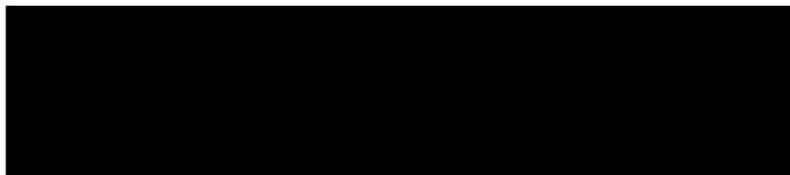
IN RE:

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, Chief
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was initially approved by the Director, California Service Center. On further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. The director served the petitioner with notice of intent to revoke the approval of the preference visa petition. The director subsequently revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, “ [REDACTED],” is a firm that sells and repairs antique rugs. It sought to employ the beneficiary permanently in the United States as a rug restorer.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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 or seasonal nature, for which qualified workers are not available in the United States.

The record indicates that the petition was initially accompanied by only Part A of the individual labor certification approved by the Department of Labor, Form ETA 750. The record also indicates that evidence establishing the petitioner’s ability to pay the proffered wage of \$17.50 per hour, annualized to \$36,400 per year, was additionally absent.¹

The record further indicates that the Immigrant Petition for Alien Worker (I-140) was filed on July 15, 1998, supported by the ETA 750A reflecting a priority date of September 25, 1996. The I-140 was initially approved on April 16, 1999. The beneficiary of the I-140 subsequently filed an Application to Register Permanent Residence or Adjust Status (I-485) on July 17, 2000.

According to the director’s July 19, 2005, recitation of the background of the case set forth in his notice of intent to revoke the I-140:

On September 25, 2001, upon review, the reviewing officer at the California Service Center placed a processing hold on the case after determining that the underlying I-140 petition had been approved in error. Based on the Processing Hold Placed on the I-485 adjustment of status application, the file was placed on the California Service Center’s I-140 Petition Revocation Hold Shelf for further review and action.

¹ The regulation at 8 C.F.R. § 204.5(g)(2) provides that:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In issuing the notice of intent to revoke the approval of the I-140, the director determined that the petitioner's eligibility had not been established at time of filing because the statement of qualifications of the alien set forth on Part B of the I-140 had not been submitted with Part A of the ETA 750. The director also determined that the petition lacked any evidence showing that the petitioner had the continuing financial ability to pay the proffered wage. He further concluded that the documents submitted in support of the I-485 suggested that the beneficiary's employment history was questionable and that he did not qualify as skilled worker or professional under section 203(b)(3)(a)(i) of the Act. The petitioner was afforded thirty days to offer such evidence or argument in opposition to the proposed revocation. The petition's approval was subsequently revoked on December 8, 2005, pursuant to section 205 of the Act, 8 U.S.C. § 1155.

By way of background, it is noted that in response to a December 11, 2000, request for evidence relating to the adjudication of the beneficiary's I-485, an employment verification letter, dated January 30, 2001, from [REDACTED] of the "5th Rug Gallery" in Scottsdale, Arizona confirmed that the beneficiary had been employed by this firm since January 2000 as a rug repair specialist and was currently earning \$2,000 per month. It is noted that the firm name and street address given on this letter is somewhat different from the one listed on the original I-140 petition. It is not clear whether this is the same petitioner, although the author's name appears to be the same individual as Nasrollah Khan who signed the I-140 on behalf of the petitioner.

In response to the notice of intent to revoke the I-140 petition, the petitioner, through counsel, included a copy of the ETA 750B, signed by the beneficiary on April 4, 1997, a copy of the beneficiary's Canadian travel document, but did not provide any documentation related to its ability to pay the proffered wage. Referring to the I-485 request for evidence from the beneficiary, counsel's transmittal letter notes that only an employment verification letter had been requested. Counsel's transmittal letter also states that the Service response to inquiries about the status of the case had been only that the matter was "pending," not that the case had been put "on hold."

An additional request for evidence related to the I-485 was issued by the director on September 30, 2005. He stated that the petitioner's response to the notice of intent to revoke the I-140 had generated additional questions and requested that the beneficiary provide a current employment verification letter from the I-140 petitioner detailing the beneficiary's position and type of employment, copies of the last Wage and Tax Statement (W-2) issued, evidence of the petitioner's ability to pay the proffered wage, copies of the beneficiary's Iranian passport, the beneficiary's most current residential address, as well as an explanation of the beneficiary's Canadian travel document.

In response, counsel replied that, as the petitioner's concerns as to why his case had been put on hold had not been addressed by the director, then the request for further evidence would not be honored.

The director revoked the approval of the I-140 on December 8, 2005, noting that in his view, the delay for the adjudication of the alien's case was addressed in his intent to revoke, in that Part B of the ETA 750 and evidence of the petitioner's ability to pay the proffered wage had been omitted in the underlying record. The director noted that the petitioner had not submitted evidence of its ability to pay the proffered wage. He made additional observations related to the beneficiary's Canadian travel document, and questioned the beneficiary's intent to have commenced employment with the I-140 petitioner since the evidence revealed his residential address as still being in California.

The sole issue raised on appeal by the petitioner, through counsel, is whether the director should be estopped and that a *laches* defense should be invoked against Citizenship and Immigration Services (CIS) for delaying to notify the petitioner of the questions raised in the approved visa petition until 2005, when it revealed that the file had been placed in a local revocation processing hold in 2001. Counsel asserts that the petitioner was misled and prejudiced by the lengthy delay in issuing the notice of intent to revoke because “especially in light of the LIFE Act eligibility standards, [the beneficiary] would have pursued other avenues to legally remain and work in the United States.” Counsel maintains that this delay constitutes gross misconduct on the part of CIS and that the director should be estopped from revoking the petition’s approval or should retract the revocation of the I-140 as a discretionary matter. Counsel cites *Matter of Onal*, 18 I&N Dec. 147, 149 (BIA 1983) and *Pierno v. INS*, 397 F.2d 949 (2nd Cir. 1968) in support of the petitioner’s position.

Section 205 of the Act, states: “[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.”

For the purpose of a *laches* defense, a party must show that there was inexcusable delay in asserting a known right and that this delay has caused the moving party prejudice. Prejudice usually refers to the lack of available witnesses or of evidence no longer available due to the passage of time or that a party has altered its position in reliance on the other party’s inaction. See *Wauchope v. U.S. Dept. of State*, 985 F.2d 1407, 1411-12 (9th Cir. 1993). [No prejudice or inexcusable delay in asserting the unconstitutionality of a pre-1934 statute]. In *Matter of Onal*, the BIA rejected an assertion that the (former) INS was estopped to rescind an alien’s permanent residency because he was not prejudiced by the three-year delay in commencing the proceedings. Counsel asserts that in this matter, the beneficiary was prejudiced in that he did not pursue other opportunities for legalization, relying on the approved visa petition for his status. In *Pierno v. INS*, the (former) INS’ inquiry into the applicant’s application for adjustment of status based on her marriage to a U.S. citizen was stayed pending an annulment suit brought by her stepson. The suit was ultimately deemed groundless by the state court, however, the applicant’s husband died seven days later, causing the Service to automatically revoke the approval of the petition for nonquota status under former section 206 of the Act. The court found that the Service had erroneously revoked the petition’s approval and should have exercised discretion to refrain from such action in the unusual circumstances presented by the case.

In this matter, counsel’s assertions are not persuasive. In noting that once the (former) INS has produced some evidence to show cause for revoking the visa petition, the alien still bears the ultimate burden of proving eligibility in a revocation proceeding, the court in *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984), additionally stated that “[I]t is important to note that a *visa petition* is not the same thing as a *visa*. An approved visa petition is merely a preliminary step in the visa application process. It does not guarantee that a visa will be issued, nor does it grant the alien any right to remain the United States.” (Citations omitted) (Original emphasis).

It is further noted that the traditional position is that courts have generally opposed claims based on a theory of equitable estoppel against the federal government particularly where a public right or interest is implicated. See *Utah Power & Light Co. v. United States*, 243 U.S. 389, (1917) (The Court disregarded the government’s

acquiescence because “laches or neglect of duty ...is no defense to a suit [the government] to enforce a public right or protect a public interest.”); *also Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, (1947) (The Court upheld the Federal Crop Insurance Corporation (FCIC) decision to refuse to pay for a crop loss even though it had erroneously approved an application under a regulation that prohibited insuring reseeded crops. The Court rejected the farmer’s theory of recovery based on an analogy to a private insurance company renegeing on a contract, concluding that the government was not akin to a private litigant and that the farmer had the obligation not to submit an application for benefits for which he did not qualify); *INS v. Miranda*, 459 U.S. 14, 19, (1982). [Eighteen month delay involving spousal immigrant visa; court did not apply estoppel] Gross negligence and incompetence are not sufficient to support a finding of affirmative misconduct as required for estoppel against the government. Such affirmative misconduct requires that the government either intentionally or recklessly misled the claimant. *U.S. v. Wang*, 2005 WL 2671383 (N.D. Cal., 2005). [revocation of naturalization] The issue as to what circumstances would justify the application of an estoppel claim against the government has been left open. In *Heckler v. Community Health Services of Crawford*, 467 U.S. 51, 104 S.Ct. 2218, 2224, 81 L.Ed.2d 42 (1984), Justice Stevens noted that:

[I]t is well-settled that the Government may not be estopped on the same terms as any other litigant. . . . We have left the issue open in the past, and do so again today. Though the arguments that the Government advances for the rule are substantial, we are hesitant, when it is unnecessary to decide this case, to say that there are *no* cases in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor and reliability in their dealings with their Government. (Original emphasis).

In this case, this office concludes that it may not estop the director from initiating revocation proceedings against the petitioner as a form of sanction for the delay in the adjudication. The Board of Immigration Appeals (BIA) decision in *Matter of Hernandez*, 20 I&N Dec. 335 (BIA 1991) is instructive in this regard. The court in that case held that an application for adjustment of status could not be rendered on a *nunc pro tunc* basis. Referring to *INS v. Miranda*, the BIA also concluded that although the Court had not yet decided what kind of affirmative misconduct might qualify for an estoppel claim, the federal court in its own Fifth Circuit had found that the doctrine of equitable estoppel might be applied against the Government in some circumstances. *See Fano v. O’Neill*, 806 F.2d 1262 (5th Cir. 1987). The BIA, however, distinguished the judicial application of equitable estoppel from its own application of the doctrine against the Service and determined that it did not have the jurisdiction to apply such a remedy. *Matter of Hernandez* at p.339.

The AAO finds that it is in a similar position. The AAO only has that authority specifically granted to it by the Secretary of the United States Homeland Security (DHS).) *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). The jurisdiction of the AAO extends only to those matters described in 8 C.F.R. § 103.3(a)(iv) and 8 C.F.R. § 103.1(f)(3)(iii)(B) (2003 ed.). It is not in a position to apply a remedy not explicitly authorized by the regulation.

Although in 2001 it was suspected that the I-140 was approved in error, the case was placed in on an internal “hold” status pending further review and action on a revocation proceeding. Initiation of the revocation of the approval of the I-140 subsequently commenced in 2005. Even if the AAO had the authority to apply a remedy

of equitable estoppel, it is not clear from the evidence in the record that the failure to promptly undertake such further review and revocation rose to the level of affirmative misconduct that should preclude CIS from performing its statutorily designated duties in enforcing the eligibility requirements related to employment-based petitions. It is also observed that the evidence fails to clearly establish how the beneficiary was prejudiced by the delay in initiating revocation proceedings so as to preclude him from pursuing other avenues of legalization.

Additionally, it is noted that the factual circumstances present in the *Pierno* case cited by counsel involved a groundless annulment suit brought by a stepson. The facts were acknowledged by the court to be unique when it stated that “[w]e doubt that Congress intended aliens otherwise eligible to the exercise of administrative discretion to be deprived of the opportunity of remaining permanently in this country as a result of groundless suits brought by persons who are not even parties to the immigration proceedings.” *Pierno v. INS* at p.951. In this case, the AAO observes that the circumstances are not sufficiently unusual or analogous to *Pierno* so as to merit the exercise of the director’s discretion in withdrawing the revocation of the approval of the I-140.

As to the petitioner’s eligibility, the AAO finds that the record does not support the petitioner’s continuing ability to pay the proffered wage of \$36,400 as of the priority date of September 25, 1996. The record lacks any evidence of the petitioner’s ability to pay the proffered wage during any of the relevant years prior to the petition’s approval in 1999. The petitioner’s inability or refusal to provide any financial documentation to the record does not mitigate in its favor. It is additionally noted that even if the employment verification letter submitted by [REDACTED] is deemed to be on behalf of the I-140 petitioner, the mention of payment of \$2,000 per month in wages to the beneficiary does not support the petitioner’s ability to pay the certified wage of \$36,400 per year as it amounts to \$24,000 per year or \$12,400 less than the certified wage. Although the provision of the ETA 750B resolved that issue, the AAO concurs with the director’s decision to revoke the petition’s approval based on the petitioner’s lack of ability to pay the proffered wage.

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition 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. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

The AAO finds that it has no jurisdiction to apply an estoppel remedy against the director. As no other issue was raised on appeal in opposition to the director’s revocation, the revocation of the approval of the I-140 remains. At a minimum, the revocation of the petition’s approval is merited by the failure of the petitioner to

demonstrate its continuing financial ability to pay the proffered wage of \$34,600 as of the September 25, 1996, priority date required by the regulation at 8 C.F.R. § 204.5(g)(2).

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 not met that burden.

ORDER: The appeal is dismissed. The revocation of the petition's approval remains.