Second Circuit Rules that DHS Cannot Revoke Approved IV Petitions When Beneficiaries are Already in the United States

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***Firstland International, Inc. v. Ashcroft*, (2d Cir. August 2, 2004)**
http://www.ca2.uscourts.gov, docket no. 03-6139 under "Decisions"/ "Search All"

Plaintiff Firstland International, Inc. (Firstland) is a Chinese company. Plaintiff Shao Zeng Chai (Chai) is the president of Firstland. He first entered the United States in 1997 on an L-1A nonimmigrant visa as an intracompany executive transferee. Two years later, Firstland filed with the INS an I-140 immigrant visa petition, which was approved in 2000. Chai subsequently filed an adjustment of status application based on the approved I-140 petition. While his adjustment application was pending, the INS issued a notice of intent to revoke its approval of the I-140 visa petition and ultimately revoked the petition and denied Chai's adjustment application. Firstland appealed the visa petition revocation to the Administrative Appeals Office, which denied the appeal on 2002.

Plaintiffs Firstland and Chai challenged the INS's revocation of the I-140 visa petition in district court pursuant to INA § 205. The district court held that INA § 242(a)(2)(B)(ii) precluded it from exercising subject matter jurisdiction and dismissed the action. Plaintiffs appealed to the Second Circuit.

As a background, INA § 242(a)(2)(B)(ii) precludes judicial review of certain decisions that are "in the discretion of the Attorney General." INA § 205 provides that the Attorney General (through his agents) may revoke the approval of any visa petition in the exercise of discretion upon a showing of good cause; however, § 205 mandates that notice of the revocation be communicated to the beneficiary of the petition "before such beneficiary commences his journey to the United States."

At issue before the Second Circuit was whether INA § 242(a)(2)(B)(ii) precluded the district court from reviewing the INS' decision to communicate its intent to revoke its prior I-140 approval *after* the beneficiary of the I-140 petition commenced his journey to the United States (and was already inside the United States). INA § 242(a)(2)(B)(ii) does not preclude district court review in this situation, the court concluded.

The court reasoned that INA § 205's notice requirements were mandatory - not discretionary - under the plain language of that provision. Thus, as INA § 242(a)(2)(B)(ii) precludes review of discretionary decisions only, the court found that it retained jurisdiction to review whether INA § 205's mandatory notice requirements were met. Because Plaintiff Chai did not receive notice of revocation until *after* he was inside the country he did not receive such notice "before departing for the United States" as required by INA § 205. Thus, the court concluded that, under the terms of INA § 205, the revocation of his immigrant visa petition was not effective.

In so holding, the court refused to give any deference to the Board of Immigration Appeal's (BIA) contrary interpretation in *Matter of Vilos*, 12 I & N Dec. 61, 64 (BIA 1967), in which the BIA reasoned that Congress could not have intended to limit the INS' ability to revoke immigrant visa petitions against individuals in the United States. The court concluded that INA § 205's notice requirement was clear and unambiguous and, therefore, deference to the BIA's interpretation of the statute was not warranted.

In response to the government stated concerned that the court's interpretation would "'unsettle the adjustment of status process' and result in additional administrative burdens on the agency," the court noted that INS' proper recourse was to petition Congress for an appropriate technical amendment.

Note: The American Immigration Lawyers Association filed an Amicus Curiae brief in this case.