Federal Court Prevents DHS From Revoking An Approved Immigrant Visa Petition When Beneficiary Is Already In The U.S.

by Cyrus Mehta

One of the greatest nightmares for a potential immigrant is to appear for the final adjustment of status interview and be told that the case is being recommended for revocation. Take for example a foreign national who successfully petitions for an immigrant visa under the "person of extraordinary ability" category for conducting significant research in an important scientific area for a university. After the approval of the petition, this individual leaves the research facility in the university and is employed by a pharmaceutical company performing research that is different from what was established in the extraordinary ability petition and is less active with respect to publishing articles and being quoted in the press. At the adjustment of status interview, the officer determines that the applicant may no longer be working in the area of extraordinary ability and sends a recommendation to the Service Center that approved the petition to revoke the petition. Although the applicant can argue that he/she is still considered "extraordinary" within the scientific community, the Service Center revokes the petition. This individual is truly in a bind.

§ 205 of the Immigration and Nationality Act (INA) authorizes the Department of Homeland Security (DHS) to revoke the approval of an immigrant visa petition based on "good and sufficient cause." § 205 cautions, however, that such revocation is only effective if notice is communicated "to the beneficiary of the petition before such beneficiary commences his journey to the United States."

A federal appeals court in *Firstland International, Inc. v. Ashcroft*, docket no. 03-6139 (Second Cir. August 2, 2004), ruled that the DHS cannot revoke a petition after the foreign national was already inside the US. In *Firstland International, Inc. v. Ashcroft*, a Chinese company sponsored its president, Shao Zeng Chai, on an L-1A nonimmigrant visa. Two years later, Firstland filed with the INS an I-140 immigrant visa petition, under the multi-national executive/manager category, which was approved in 2000. As a result of the approval, Chai applied for adjustment of status in the US. While his adjustment application was pending, the INS issued a notice of intent to revoke its approval of the I-140 visa petition on grounds that he was not employed in primarily a managerial or executive capacity, and ultimately revoked the petition and denied Chai's adjustment of status application. Firstland appealed the visa petition revocation to the Administrative Appeals Office, which denied the appeal on 2002. Chai then challenged the denial in federal district court. The district court held that INA § 242(a)(2)(B)(ii) precluded it from exercising subject matter jurisdiction and dismissed the action.

The 1996 Immigration Act sought to strip federal courts off their ability to review negative immigration decisions. Thus, INA § 242(a)(2)(B)(ii), which was enacted in 1996, precludes judicial review of certain decisions that are "in the discretion of the Attorney General." The lower district court ruled that the revocation of Chai's I-140 petition was the type of discretionary decision that a federal court was unable to review after 1996.

The Second Circuit Court of Appeals disagreed with the district court. The Court of Appeals reasoned that the issue before it did not involve a discretionary decision as § 205 made it a mandatory requirement that notice of revocation be served on the beneficiary "before departing for the US" and not after the beneficiary was already inside the US.

Earlier, in 1967, the Board of Immigration Appeals in *Matter of Vilos*, 12 I&N Dec. 61, 64 (BIA 1967), interpreting Section 205, reasoned that Congress could not have intended to limit the INS' ability to revoke immigrant visa petitions against individuals in the US. Although federal courts pay a great deal of deference to the decisions of a government agency, such as the BIA, the Second Circuit held that such a deference was not necessary as § 205 notice requirements were clear and unambiguous, in that notice of revocation should be provided to people before they depart the US.

Firstland International, Inc. v. Ashcroft was a case of first impression with respect to interpreting § 205. As a result of this decision, the DHS would now only be able to revoke an immigrant visa petition, whether family or employment-based, if the beneficiary is overseas and awaiting immigrant visa processing at a US consulate, at least in parts of the country where this court's decision has precedential value. Unless Congress modifies Section 205 to encompass revocation of a petition before and after entry, the Second Circuit decision is a sensible one. Revoking the immigrant visa petition of a person within the US, after the person has already developed substantial ties to this country, will cause much greater hardship than revoking the petition of an individual who is still waiting overseas for the immigrant visa and has yet to enter the US.

About The Author

Cyrus D. Mehta, a graduate of Cambridge University and Columbia Law School, practices immigration law in New York City. He is the Chair of the Board of Trustees of the American Immigration Law Foundation (AILF) and recipient of the 1997 Joseph Minsky Young Lawyers Award. He is also Secretary of the Association of the Bar of the City of New York (ABCNY) and former Chair of the Committee on Immigration and Nationality Law of the same Association. The views expressed in this article do not necessarily represent the views of ABCNY or AILF. He frequently lectures on various immigration subjects at legal seminars, workshops and universities and may be contacted in New York at 212-425-0555.