U. S. Department of Justice

Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

July 6, 1998

MEMORANDUM FOR DAVID M. DIXON
DEPUTY GENERAL COUNSEL
IMMIGRATION AND NATURALIZATION SERVICE

From: Todd David Peterson
Deputy Assistant Attorney General

Re: INS Authority to Remove Conditions Under Section 216A of INA When an Alien Fails to Meet Statutory and Regulatory Requirements for Removal of Conditions

You have requested our advice as to whether the Immigration and Naturalization Service ("INS") has the authority to grant a petition to remove conditions for an alien entrepreneur under section 216A of the Immigration and Nationality Act ("INA"), where the alien's initial petition for conditional resident status under section 203(b)(5) of the INA was approved by the INS, but the INS has now determined, as a factual matter, that the section 203(b)(5) petition was deficient. See Memorandum for Randolph D. Moss, Deputy Assistant Attorney General, Office of Legal Counsel, from David M. Dixon, Deputy General Counsel, INS (Apr. 1, 1998) ("Request letter"). It is your conclusion that the INS lacks such authority. We agree.

Under section 203(b)(5) of the INA, an alien entrepreneur may file a petition for an immigrant visa if he or she seeks to enter the United States to engage in a new commercial enterprise. In order to qualify for such a visa, the alien must satisfy the following three statutory conditions: (1) the alien must establish the enterprise; (2) the alien must have invested, or must be in the process of investing, $1,000,000 (or, in the case of so-called "target employment areas," $500,000) in the enterprise; and (3) the enterprise will benefit the U.S. economy and create ten full-time jobs. 8 U.S.C. § 1153(b)(5). If the alien's petition is approved by the INS, the alien is granted "conditional permanent resident status." In order to remove the conditional basis of his or her resident status, the alien must file a second petition, within a 90-day period before the second anniversary of the alien's obtaining such status, under section 216A of the INA. 8 U.S.C. § 1186b(c)(1). In this second petition, the alien must request removal of the conditional basis and must assert, under

penalty of perjury, that throughout his or her two-year residence in the United States, the alien established a commercial enterprise and invested the requisite capital in that enterprise. Id. §§ 1186b(c)(1)(A), 1186b(d)(1). The alien must also appear for a personal interview before the INS. Id. § 1186b(c)(1)(B).

If the Attorney General determines that the facts and information described in the section 216A petition are "true," she "shall so notify the alien involved and shall remove the conditional basis of the alien's status." Id. § 1186b(c)(3)(B). If, however, she determines that the facts and information are "not true," she "shall so notify the alien involved and . . . shall terminate the permanent resident status" of the alien. Id. § 1186b(c)(3)(C). The alien is then subject to removal by the Attorney General.

Even where an alien has not filed a petition for removal of conditions under section 216A(c), section 216A requires the Attorney General to terminate the alien's conditional resident status if, at any time prior to the second anniversary of the granting of such status, she determines that the alien is not conforming to the requirements of section 203(b)(5). Id. at § 1186b(b)(1).

It is our understanding that in a number of cases involving section 203(b)(5) petitions based upon complex investment plans, the INS granted the initial petitions but subsequently came to the conclusion that these plans did not in fact meet the requirements of sections 203(b)(5) and 216A and the INS's implementing regulations. Request letter at 3. The question you have posed is whether, if the INS is correct in its conclusion that the plans do not satisfy statutory and regulatory requirements,[1] the INS has any authority to grant an alien's petition to remove conditions under section 216A.[2] We turn now to that question.

Under section 216A(c)(3)(C), the Attorney General "shall terminate" the conditional resident status of an alien entrepreneur who has petitioned her for removal of the conditions, if she determines that the "facts and information" in the alien's petition are "not true." 8 U.S.C. § 1186b(c)(3)(C). The language of this provision leaves no room for the exercise of discretion by the Attorney General. Upon determining the falsity of any of the "facts and information" represented in the petition -- i.e., that a commercial enterprise was established by the alien, that the alien invested or was actively in the process of investing the requisite

[1] You have not asked us to review the propriety of the INS's determination that the investment plans in question do not satisfy the requirements of sections 203(b)(5) and 216A, nor have you provided us with sufficient facts regarding the nature of these investments to enable us to conduct such a review. We therefore base our analysis on the assumption that these investment plans do not in fact meet the statutory and regulatory requirements.

[2] We have not been asked to evaluate the scope of the INS's authority to revoke petitions erroneously granted under section 203(b)(5); rather, you have presented us with the more limited question of the scope of the INS's authority to grant petitions to remove conditions under section 216A. It is the latter question that we address herein. We also do not address the situation where the initial petition was erroneously granted, but appropriate funding was thereafter obtained.

capital, and that the alien sustained these actions throughout the period of residence in the United States, see id. § 1186b(d)(1) -- the Attorney General must deny the petition and terminate the permanent resident status of the alien. The legislative history of section 216A offers no contradictory interpretation of this provision.

In the case of the section 216A petitions at issue here, the INS General Counsel's office recently reviewed the facts of the underlying investment plans, and concluded that they did not constitute an "investment" within the meaning of section 203(b)(5) and its implementing regulations because they involved debt arrangements between the alien investor and the new commercial enterprise. See Memorandum for Paul W. Virtue, Acting Executive Associate Commissioner, Office of Programs, INS, from David A. Martin, General Counsel, INS, Re: Sections 203(b)(5) (EB-5) and 216A of the Immigration and Nationality Act at 5-6 (Dec. 19, 1997), . The General Counsel further concluded that the use of promissory notes under these arrangements failed to meet the requirement that an alien invest "capital" having a fair market value equal to or greater than the amount required in the statute. Id. at 3-4. The General Counsel urged INS adjudicators undertaking review of similar investment plans in the context of section 216A petitions to adhere to the analysis in its memorandum in determining whether the alien had met current statutory and regulatory requirements. Id. at 34. To the extent that these adjudicators determine that the facts and information in such Section 216A petitions do not meet statutory and regulatory requirements -- i.e. that the facts and information are "not true" -- the Attorney General would have no statutory authority to grant the petitions.

You have raised the possibility that an alien might seek to estop the INS from denying his or her section 216A petition based upon the initial grant of conditional resident status under section 203(b)(5). While the Supreme Court has not foreclosed the possibility that equitable estoppel may lie against the United States, "it is well settled that the Government may not be estopped on the same terms as any other litigant." Heckler v. Community Health Servs., 467 U.S. 51, 60 (1984); INS v. Hibi, 414 U.S. 5, 8 (1973) (per curiam). Although the doctrine of equitable estoppel may be flexible in disputes between private parties, "its application to the government must be rigid and sparing." ATC Petroleum, Inc. v. Sanders, 860 F.2d 1104, 1111 (D.C. Cir. 1988).

A party seeking to assert estoppel against the government must do more than establish the traditional private law elements of the doctrine, which include "'false representation, a purpose to invite action by the party to whom the representation was made, ignorance of the true facts by that party, and reliance.'" See id. The litigant must also demonstrate that the government engaged in some sort of "affirmative misconduct." OPM v. Richmond, 496 U.S. 414, 421 (1990). In analyzing claims of estoppel asserted against the INS, the Supreme Court has applied the "affirmative misconduct" standard and concluded that the standard has not been met, thus not reaching the question of whether the United States would be estopped if the INS's behavior did in fact constitute "affirmative misconduct." See, e.g., INS v. Miranda, 459 U.S. 14, 16-18 (1982) (per curiam) (INS's "unreasonable delay" of 18 months in acting upon alien's petition for adjustment of status did not constitute "affirmative

misconduct"); INS v. Hibi, 414 U.S. 5, 8-9 (1973) (per curiam) (government's failure to notify aliens serving in the U.S. Armed Forces abroad of certain naturalization rights accorded to them by Congress did not constitute "affirmative misconduct" and did not estop government from rejecting alien's untimely application for naturalization); see also Tan v. Waters, No. 92-16731, 1994 WL 87578 (9th Cir. Mar. 18, 1994) (INS's failure to expedite aliens' visa petitions was "mere negligence" that did not estop INS from revoking prior approval of visa petitions); Bae v. INS, 706 F.2d 866, 870-71 (8th Cir. 1983) (INS's failure to warn applicants for adjustment of status that marriage would alter preference classification for immigration visas did not estop INS from rescinding prior approval of alien's application for adjustment of status, under "affirmative misconduct" standard).

We agree with your conclusion that the INS's mistake of fact in analyzing the complex investment plans involved here would not constitute "affirmative misconduct" under these precedents. To qualify as "affirmative misconduct," the government's conduct must amount to "more than mere negligence, delay, inaction, or failure to follow an internal agency guideline." Ingalls Shipbuilding, Inc. v. Department of Labor, 976 F.2d 934, 938 (5th Cir. 1992) (quoting Mangaroo v. Nelson, 864 F.2d 1202, 1204-05 (5th Cir. 1989)). Courts look for evidence that an official misstatement was made with "knowledge of its falsity or with intent to mislead." United States v. Marine Shale Processors, 81 F.3d 1329, 1350 (5th Cir. 1996). The most that could be said in this case is that the INS failed to understand the true nature of the investment plans it reviewed under the aliens' section 203(b)(5) petitions and that it therefore misapplied its own statute and regulations. We have been made aware of no evidence that the INS's error was intentional, or that it was made in order to mislead the alien investors. Although the application of equitable estoppel to any specific case would depend upon the unique facts of that case, we conclude that, based upon the facts represented to us, a claim of estoppel would not be available to these aliens.