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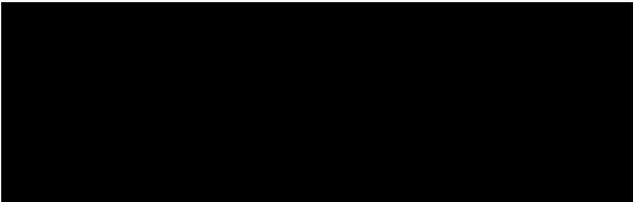


FILE: SRC 04 160 51617 Office: TEXAS SERVICE CENTER Date: AUG 03 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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, Director
Administrative Appeals Office

DISCUSSION: The director of the Texas Service Center revoked the previously approved nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a business conglomerate, with stated interests in the management, marketing and operation of a range of business ventures, including real estate investments. It seeks to extend its employment of the beneficiary as a director of marketing research and development pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director revoked the petition in accordance with the provisions of 8 C.F.R. § 214.2(h)(11)(iii)(A), following the Department of State's revocation of all visas issued to the beneficiary.

The record of proceeding before the AAO contains: (1) the approved Form I-129 and supporting documentation; (2) the director's notice of intent to revoke (NOIR); (3) the director's May 9, 2005 notice of revocation; (4) current counsel's response to the director's NOIR; and (5) a May 12, 2005 Citizenship and Immigration Services (CIS) motion to reopen (MTR), including a final revocation of the instant petition. The AAO reviewed the record in its entirety before issuing its decision.

On May 14, 2004, the petitioner filed Form I-129 to extend its employment of the beneficiary in the H-1B visa category for the period May 17, 2004 to May 17, 2007. The petitioner's submission of the Form I-129 constituted both a request for an extension of the validity of the petition under 8 C.F.R. § 214.2(h)(14) and for an extension of the beneficiary's stay in the United States under 8 C.F.R. § 214.2(h)(15), with the director required to make a separate determination regarding each. *See* 8 C.F.R. § 214.2(h)(15). The director approved the Form I-129 on May 20, 2004, extending the validity of the petitioner's H-1B petition, as well as the beneficiary's extension of authorized stay.

On April 7, 2005, the director notified the petitioner of her intent to revoke the extension of the beneficiary's stay based on the Department of State's invalidation of any and all visas previously issued to him. The director subsequently revoked the petition in a CIS MTR dated May 12, 2005. The AAO notes that this decision revoked not only the beneficiary's extension of stay but also the director's decision to extend the H-1B petition.

The director's decision to revoke the beneficiary's extension of stay will not be considered by the AAO. Pursuant to 8 C.F.R. § 214.1(c)(5), there is no appeal from the denial of an application for extension of stay filed on a Form I-129. The only issue before the AAO is whether the director appropriately revoked the extension of the H-1B petition.

The AAO now turns to the basis for the director's denial – the Department of State's invalidation of the visas previously issued to the beneficiary in the instant case – and whether this action provided the director with grounds for revoking the extension of the H-1B petition under the language at 8 C.F.R. § 214.2(h)(11)(iii)(A), the regulation outlining the circumstances under which a Form I-129 petition's validity will be rescinded.

Pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A), a director shall issue a notice of intent to revoke an approved Form I-129 petition if he or she finds that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
- (2) The statement of facts contained in the petition was not true and correct; or
- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

In her April 7, 2005 NOIR, the director stated that the proposed revocation of the petition under 8 C.F.R. § 214.2(h)(11)(iii)(A) was based on the Department of State's revocation of any and all visas previously issued to the beneficiary. She did not indicate that any other issues influenced her decision, and the AAO finds the record to raise no other issues that relate to the director's revocation decision. Accordingly, as the director has not questioned the nature of the petitioner's proffered employment or any of the information it provided concerning the beneficiary's qualifications, the AAO will not conduct a *de novo* analysis of the duties of the proffered position or the beneficiary's qualifications to perform those duties under the regulatory framework set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A) and (C). Instead, it will focus its review on the extent to which the State Department's revocation of the visas previously issued to the beneficiary provided the director with a basis for revoking the petition under the grounds at 8 C.F.R. § 214.2(h)(11)(iii)(A).

As discussed above, CIS is authorized to revoke H-1B petitions approved in error or on the basis of incorrect information. Revocation is also justified if the conditions under which CIS approved the H-1B petition have altered, either because of a change in the beneficiary's employment or because the petitioner violated the language of section 101(a)(15)(H) of the Act, 8 U.S.C. § 1101(a)(15)(H), or 8 C.F.R. § 214.2(h), or the terms of the approved H-1B petition. A review of the NOIR indicates that the director revoked her approval of the instant petition based on her determination that the Department of State's revocation of the beneficiary's visas had stripped him of a lawful status. Accordingly, she found the beneficiary to have failed to maintain a valid nonimmigrant status and CIS to have erred in approving the instant petition. The AAO finds the State Department's action in revoking the visas insufficient to support a revocation of the director's extension of the H-1B petition's validity under 8 C.F.R. § 214.2(h)(11)(iii)(A).

The State Department's revocation of all visas previously issued to the beneficiary, which occurred on September 2, 2003, does not, in itself, satisfy any of the regulatory requirements for revocation of an H-1B petition, nor does the AAO find it to have resulted in any circumstances that would allow for revocation of the petition's validity. It did not alter the employment relationship between the petitioner and beneficiary, as required

for revocation under the first criterion at 8 C.F.R. § 214.2(h)(11)(iii)(A). At the time the director revoked the instant petition, the beneficiary was still employed in the same specialty occupation by the same employer. It did not result in a finding that the information provided on the Form I-129 at the time of filing was untrue or incorrect, the basis on which revocation is authorized under the second criterion. The State Department's revocation of the beneficiary's visas did not indicate that the petitioner had committed any violations with regard to the conditions of the Form I-129 or of related law or regulation, the third and fourth criteria allowing for revocation. Nor did it establish that CIS had erred or violated its own regulations in approving the petitioner's original H-1B petition on January 7, 2002 or in extending the validity of that petition on May 20, 2004. The adjudication of the original H-1B petition considered whether the employment offered by the petitioner was in a specialty occupation and the qualifications of the beneficiary to perform that employment. The director's extension of the validity of the H-1B petition on May 20, 2004 did not rest on any determination regarding the beneficiary's visa status. As a result, the AAO concludes that the Department of State's invalidation of the visas previously issued to the beneficiary offers no basis on which to revoke the extension of the H-1B petition. It finds the director to have erred in revoking the petition.

For the reasons discussed above, the AAO shall sustain the appeal. Accordingly, the AAO will withdraw the director's decision.

The AAO notes that, in withdrawing the decision of the director revoking the petition, the director's decision revoking the beneficiary's extension of stay will also effectively be withdrawn. While there is no appeal from the denial of an application for extension of stay under 8 C.F.R. § 214.1(c)(5), the director incorrectly cited 8 C.F.R. § 214.2(h)(11) to revoke the extension of stay. As indicated above, that regulation may only be used to revoke the validity of the petition. Thus, the director's decision revoking the petition based on the beneficiary's failure to maintain status will be withdrawn. The regulations are silent regarding the basis on which an extension of stay may be revoked.

The petitioner has the burden of proving eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The director's May 12, 2005 revocation of the instant petition is withdrawn.