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U.S. Citizenship
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FILE: EAC 05 158 52343 Office: VERMONT SERVICE CENTER

Date: **SEP 26 2008**

IN RE: Petitioner:
Beneficiary:



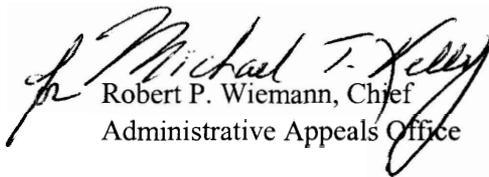
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (VSC), approved the visa petition requesting the beneficiary's classification as an H-1B nonimmigrant on May 16, 2005. On November 7, 2006 the director revoked approval of the Form I-129. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded to the director to issue a new decision.

The petitioner operates a pharmacy. On May 13, 2005 it filed an H-1B petition for the employment of the beneficiary in a programmer-analyst position as a nonimmigrant worker in a specialty occupation 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 Form I-129 (Petition for Nonimmigrant Worker) indicated that the petitioner employed three personnel and had \$600,000 in gross annual income when the petition was filed. The petition was approved on May 15, 2005.

On October 6, 2005 a United States Consular Officer in Chennai issued a memorandum to VSC that stated the belief that the beneficiary "is ineligible to obtain an H-1B visa because the petitioner is unable or unwilling to provide qualifying employment." On the basis of this memorandum, VSC issued a Notice of Intent to Revoke (NOIR), on August 11, 2006. On September 7, 2006 VSC received the petitioner's response to the NOIR. On November 7, 2006, the VSC director issued his decision to revoke approval of the petition. The petitioner filed a timely appeal on December 5, 2006.

On appeal, the petitioner asserts: that the director's determination that the petitioner is not able to sustain employment for the specialty occupation is baseless; that the petitioner is able to obtain office space for the beneficiary's work; that although the petitioner could use profits from other companies under the same ownership, the petitioner did not mean that the beneficiary would work for the other companies; that the director's determination that the proffered position does not require specialization or complexity because the petitioner only has three employees is arbitrary; and that the petitioner's business plan shows a "complex and specialized project involving not merely a website, but functional [sic] which involves CRM (customer resource management) and ERP (enterprise resource planning)."

The record includes in pertinent part: (1) the Form I-129 filed May 13, 2005, with supporting documentation and a stamp showing the Form I-129 was approved on May 16, 2005; (2) an October 6, 2005 memorandum from the Consulate General of the United States of America in Chennai, India; (3) an August 11, 2006 NOIR; (4) the petitioner's August 31, 2006 rebuttal to the NOIR; (5) the director's November 7, 2006 revocation decision; and (6) the Form I-290B and the petitioner's statement in support of the appeal.

The AAO reviewed the record in its entirety before issuing its decision.

The regulation at 8 C.F.R. § 214.2(h)(11)(iii), which governs revocations that must be preceded by notice, states:

- (A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part 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.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

The following paragraphs from the consular officer's memorandum state the basis of the officer's belief that the petitioner "is unwilling or unable to offer [the beneficiary] qualifying employment as a programmer analyst at this time:"

On 29-SEP-2005, the beneficiary appeared for her first visa interview, and claimed that she would be developing online applications to support on [sic] online pharmaceutical business for the petitioner. Because the I-129S only claimed three employees, the consular officer had concerns about the petitioner's ability to provide qualifying employment. As a result, the consular officer requested additional information concerning the petitioner's business and plans to employ [the beneficiary].

On 06-OCT-2005, the beneficiary returned for her second interview. Photographs submitted by [the beneficiary] clearly showed the pharmacy to be a small operation in Brooklyn with no workspace available for [the beneficiary] to conduct computer programming. In its letter to USCIS supporting the beneficiary's application for an H-1B petition, [the petitioner] claimed the company was one of six pharmacies under the same ownership. The letter also claimed the corporation only had four employees, however[.] So Post believes the five additional pharmacies mentioned in the letter may not in fact be owned by the petitioner. Furthermore, when asked where she would be working, the beneficiary said that she would be working out of her residence, which her supervisor would help her find when she reached the United States. The beneficiary signed an affidavit to this effect on 06-OCT-2005.

Based on the above findings, Post believes [the beneficiary] is ineligible to obtain an H-1B visa because the petitioner is unable or unwilling to provide qualifying employment.

Accompanying the consular officer's memorandum are (1) a Dunn & Bradstreet business information report on the petitioner and (2) a sworn statement from the beneficiary that is quoted below, verbatim:

My employer will arrange accommodation for me and I have to work full time based weekly 5 days and I have to report every week to my employer. It is a home-based project. I have to sit in the home and do the project.

Review of the consular's officer's memorandum reveals four bases for its adverse conclusion. They are: (1) the relatively small number of people employed by the petitioner; (2) the size of the petitioner's facilities, and its apparent lack of space for the beneficiary to work as a computer programmer; (3) an apparent conflict between the number of the petitioner's employees and what the consular officer perceived to be a claim by the petitioner that it owned the other pharmacies referenced in the petition; and (4) the location where the beneficiary said that she would be working – her apartment.

The substantive content of the NOIR consists of two parts: (1) a summation of the consular officer's memorandum, and (2) the conclusion that the information contained in the memorandum justifies the issuance of the NOIR.

The NOIR's summation of the consular officer's memorandum reads as follows:

It has now come to the attention of the Service that at the time of the beneficiary's first consular interview the consular officer had concerns about your company's ability to provide qualifying employment. As a result, the consular officer requested additional information concerning your business and plans to employ the beneficiary. On October 6, 2005, the beneficiary returned for her second interview. The photographs submitted by the beneficiary showed the pharmacy to be a small operation in Brooklyn with no workspace available for the beneficiary to conduct computer programming. Your letter claimed that your company was one of six pharmacies under the same ownership. Your letter also claimed the corporation had only four employees. However, the consulate believes that the five additional pharmacies mentioned in the letter may not be owned by your company. The consular officer asked the beneficiary where she would be working; the beneficiary said that she would be working out of her residence.

As is readily obvious upon comparison of the two documents, the factual grounds that the director cites for the NOIR are a paraphrase of those cited in the consular officer's memorandum. Further, the director cites no basis for the NOIR other than the consular officer's memorandum. This is evident in the director's statement for the reason for the NOIR, which reads:

Upon consideration of the consular interviews it would appear that valid qualifying employment does not exist for the beneficiary.

Therefore it appears that the beneficiary is not eligible to be the recipient of an H-1B specialty occupation visa.

A copy of the investigative report or memorandum that is the basis of this letter is enclosed.

This letter shall serve as notice that it is the intention of the Service to revoke the approval previously granted for the aforementioned petition.

The AAO notes that the NOIR did not specify that the duties described in the petition failed to comprise a specialty occupation within the meaning of section 214(i)(1) of the Act, 8 U.S.C. § 1184 (i)(1), and the H-1B regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner's response to the NOIR addressed each of the factual points stated in the NOIR. The response referenced two sets of documents that had already been submitted into the record: the petitioner's Business Plan and the petitioner's tax returns and tax related documents. The petitioner cited to the Business Plan as evidence of the nature of the project upon which the beneficiary would be employed, and as demonstrating that the number of its employees did not bear upon the legitimacy of that project and the petitioner's need for the beneficiary's services as a programmer. As evidence of its ability to fund the beneficiary's project and to secure workspace for the beneficiary, the petitioner cited to the tax and financial information that it had already submitted into the record. The petitioner provided a list of pharmacies that are under the same ownership as the petitioner and provided share certificates for six of them. The petitioner suggests that the beneficiary's understanding that she would be working exclusively from her apartment was incorrect, although it is possible that part of the work could be accomplished at home. The petitioner states, however, that "we were explicit with regard to her job description that she will constantly interact with Management, Licensed Pharmacist(s), and staff in order to develop applications that will not compromise the HIPPA rules and rules and regulations in selling prescription medications to the customers."

On November 7, 2006, the director revoked approval of the petition. The director determined that the evidence of record did not establish that the proffered position involved such specialization or complexity as to require the knowledge associated with the attainment of a baccalaureate degree; that the evidence of record did not show how a company of three employees would be able to sustain an employee performing duties at the level required for consideration as a specialty occupation;¹ and that the petitioner did not have adequate workspace for the beneficiary to perform the duties of the offered position.

The regulation governing revocations requiring a NOIR, which are at 8 C.F.R. §§ 214.2(h)(11)(iii)(A) and (B), indicate that where, as here, a decision to revoke approval of a petition requires a NOIR, revocation may not be made for reasons other than those detailed in the NOIR.

¹ The director noted that although the petitioner claimed that its owner also owned five other pharmacies, the tax returns submitted showed that each of the pharmacies was a separate corporation with a separate tax identification number; thus, if the beneficiary would be working for each of the six pharmacies, including the petitioner, the petitioner should have submitted a Labor Condition Application (LCA) for each individual business and location.

The AAO finds that the petitioner's response to the NOIR effectively rebutted the reasons for revocation that are stated in the NOIR.

The AAO observes that the NOIR limited its grounds to those stated in the consular officer's memorandum, and that neither the NOIR nor the memorandum provided notice that the record's description of the proposed duties and the allied evidence about them raised an issue about the proffered position's specialization and complexity. Rather, the NOIR, like the consular officer's memorandum on which it was founded, questioned whether the petitioner had sufficient business and sufficient space. The NOIR specifically referenced the size of the petitioner's staff, the lack of space at the petitioner's location, and the nature of the petitioner's relationship with other pharmacies referenced in the by the petitioner. The AAO finds that the petitioner's response to the NOIR effectively addressed these bases for possible revocation, and that the NOIR did not provide notice that the "specialization and complexity" of the position were an issue. The AAO notes that the petitioner has indicated that the beneficiary will only work for it on its project; thus the ownership and income of other pharmacies are not relevant to this matter. Similarly, whether the beneficiary will perform work at her residence as well as communicate and interact with the petitioner at its place of business does not necessarily have a negative impact when considering whether the proffered position is a specialty occupation.

For the reasons discussed above, the director's decision to revoke approval of the petition is withdrawn.

However, the AAO notes that the record of proceedings provide a basis for the issuance of a new NOIR based upon the fact that the evidence of record does not appear to establish that the work to be performed by the beneficiary constitutes a specialty occupation under any of the governing criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). (The previous NOIR did not provide notice of this issue.)

The director should issue a new NOIR. This NOIR should expressly state that it appears that the petition was erroneously approved and that the approval should be revoked under 8 C.F.R. § 214.2(h)(11)(iii)(5), which provides for revocation in cases where the approval "violated paragraph (h) of this section [that is, the specialty-occupation regulations] or involved gross error."

At a minimum, the NOIR should advise the petitioner that the evidence of record does not establish that the beneficiary would be performing programming duties that require the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in a specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States, as required by section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1); that the generic description of the duties of the proposed position and the general statements in the petitioner's Business Plan indicating the petitioner's plan to launch a website do not establish that the beneficiary will be performing duties at the level required of a specialty occupation; that the evidence of record suggests that the beneficiary would be performing the duties of a web developer, an occupation that may be performed by an individual with an associate's degree or certifications (*See* the Department of Labor's *Occupational Outlook Handbook (Handbook)* discussion of the educational requirements for positions associated with the design and development of websites under the heading Computer Scientists and Database Administrators); and that the evidence of record fails to establish that the proffered position qualifies as a specialty occupation under any criterion at 8 C.F.R. §§ 214.2(h)(11)(iii)(A). The NOIR should also expressly note that neither the Business Plan, the descriptions of the beneficiary's

duties, nor any other evidence in the record establishes (1) the specific, substantive work that the beneficiary would perform for the petitioner and (2) that particular work's requirement for at least a bachelor's degree level of knowledge in a specific specialty.

This matter will be remanded for the director to issue a NOIR containing a statement of all the grounds for revocation and according the petitioner 30 days to submit evidence in rebuttal, as provided in 8 C.F.R. § 214.2(h)(11)(iii)(B). If the new decision is adverse to the petitioner, the director shall certify it to the AAO for review.

As always, 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 director's November 7, 2006 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.