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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 206 54343

Office: CALIFORNIA SERVICE CENTER

Date: **JAN 04 2005**

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:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is a chiropractic and acupuncture health clinic that seeks to employ the beneficiary as a software programmer and to classify him 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 director denied the petition on August 7, 2003, on the ground that the beneficiary had not submitted copies of grade and attendance transcripts of colleges and schools to show he remained in legal status while in the United States. The director states that the beneficiary failed to maintain legal status, and denied the Form I-129 petition for failing to answer questions which precluded a material line of inquiry, citing 8 C.F.R. § 103.2(b)(14). On his appeal form counsel asserts that the petitioner's failure to submit the requested evidence was not willful and therefore not grounds for the petition's dismissal.

The director's questions about whether the beneficiary is maintaining his student visa status are material only to the change of status application, and not to the underlying visa classification. The AAO notes that the director's decision to deny the beneficiary's change of status is not properly on appeal to the AAO. 8 C.F.R. § 248.3(g) provides that the petitioner cannot appeal from a denial of an application to extend a beneficiary's existing nonimmigrant status.

The regulation at 8 C.F.R. § 214.2(h)(15) requires the director to make a determination on both the visa classification and the extension of stay application. The regulation provides: "Even though the requests to extend the petition and the alien's stay are combined on the petition, the director shall make a separate determination on each." In his decision, the director failed to determine whether the proffered position qualifies as a specialty occupation, or whether the beneficiary is qualified to perform the services of a specialty occupation under section 214(i) of the Act, 8 U.S.C. § 1184(i), 8 C.F.R. § 214.2(h)(4)(iii)(A), 8 C.F.R. § 214.2(h)(4)(iii)(C).

The case must therefore be remanded for a decision on whether to classify the beneficiary's visa status under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director shall afford the petitioner a reasonable amount of time to provide evidence pertinent to such classification as well to provide any other evidence the director may deem necessary. The director shall then issue a new decision based on the evidence of record as it relates to the statutory and regulatory requirements for H-1B eligibility.

As always, the burden of proof rests with the petitioner. *See*, section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision of August 7, 2003 is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, shall be certified to the AAO for review.