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Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536



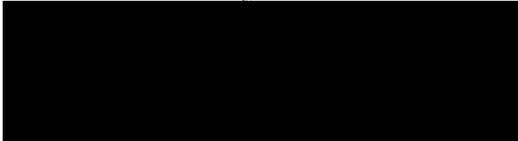
DEC 30 2003

File: LIN-02-104-50643 Office: NEBRASKA SERVICE CENTER Date:

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:



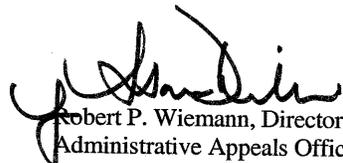
INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director. In a subsequent motion to open, the director affirmed his previous decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an educational institution with 19 employees and a gross annual income of \$350,000. It seeks to employ the beneficiary as a kindergarten teacher for a period of three years. The director determined that the beneficiary has been in the United States in L and H nonimmigrant status for a period of six years. The director further determined that the beneficiary has not been physically present outside the United States for the immediate prior year, and therefore is ineligible for a change of status or readmission to the United States under section 101(a)(15)(H) of the Immigration and Nationality Act (the Act).

On appeal, counsel states, in part, that the provision cited by the director is not applicable because time spent previously in derivative L-2 should not be included in calculating the six-year cap on the beneficiary's H-1B status.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In the denial letter, the director stated that the beneficiary was admitted into the United States as an L-2 nonimmigrant on August 1, 1996. The director noted further that, on February 14, 1999, the beneficiary departed the United States and reentered on February 27, 1999 in H-1B nonimmigrant status. The director

determined that, because the beneficiary has spent more than six years in L or H status, the beneficiary is, therefore, ineligible to extend her period of stay as an H-1B nonimmigrant worker.

On appeal, counsel notes that the beneficiary was admitted to the United States as an L-2 nonimmigrant - the dependent of an L-1 nonimmigrant. Counsel claims that the provisions of section 101(a)(15)(L) of the Act apply only to the L-1 visa holder, not to the dependents of such a nonimmigrant. Counsel states that the approximate 30.5 months that the beneficiary spent in L-2 status should not count towards her six-year period of stay in the United States in L or H status.

Counsel also states that the director's decision failed to address the petitioner's submission of an amended petition that was allegedly filed in April 2002. Counsel asserts that the beneficiary is not seeking to change employers; she is seeking "new concurrent employment."

Counsel's assertion that the beneficiary is not subject to the limitations on admission as a result of her stay as an L-2 dependent is without merit. The spouses and unmarried children of an alien classified under section 101(a)(15)(L) of the Act, 8 U.S.C. § 11184(a)(15)(L), may derive status as dependents if accompanying or following to join the L-1 visa holder. Pursuant to 8 C.F.R. § 214.2(l)(7)(ii), the spouse and unmarried children of an L nonimmigrant are "subject to the same period of admission and limitations as the [L visa holder]." Thus, Citizenship and Immigration Services (CIS) must calculate the beneficiary's 30.5 months of stay in L-2 nonimmigrant status towards her six-year period of authorized stay as an L or H visa holder.

Pursuant to 8 C.F.R. § 214.2(h)(13)(iii)(A):

An H-1B alien in a specialty occupation or an alien of distinguished merit and ability who has spent six years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under section 101(a)(15)(H) or (L) of the Act unless the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.

The record indicates that the beneficiary has been in the United States under section 101(a)(15)(H) and (L) of the Act for over six years, and has not left the United States for a period of

one year or more. As the beneficiary has been continually residing in the United States, the exception noted above does not apply to her. As such, the record demonstrates that the beneficiary has completed her six-year limit in H or L status. For this reason, the petition may not be approved.

Counsel also states on appeal that the director failed to address the amended petition that the petitioner allegedly submitted to CIS in April 2002. However, as the appeal is being dismissed because the beneficiary has spent the maximum allowable period in H and/or L status, this issue does not need to be examined further.

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 sustained that burden. Accordingly, the decision of the director will not be disturbed.

ORDER: The appeal is dismissed.