



U.S. Department of Justice

Immigration and Naturalization Service

PA

PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



identifying data deleted to
prevent clearly substantiated
invasion of personal privacy

FILE: SRC 01 105 51650

OFFICE: TEXAS SERVICE CENTER

DATE: JAN 10 2003

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 USC 110(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 the Service 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the nonimmigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The decision of the director will be withdrawn, and the petition will be remanded to the director for entry of a new decision.

The petitioner is a bakery with 250 employees and a gross annual income of \$15 million. It seeks to employ the beneficiary as an electrical engineer for three years.

The director denied the petition because he found the beneficiary ineligible to change status from an H-3 nonimmigrant trainee to an H-1B nonimmigrant worker.

On appeal, the petitioner submitted a brief.

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), provides in part for the classification of qualified nonimmigrant 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 the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical knowledge application of a body of highly specialized knowledge, and
- (B) 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.

8 C.F.R. 214.2(h)(4)(ii) further defines the term "specialty occupation" as:

an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

The director cited 8 C.F.R. 214.2(h)(13)(iv) for the proposition that the beneficiary could not change status because he had not spent the previous six months outside of the United States.

8 C.F.R. 214.2(h)(13)(iv) provides, in pertinent part, that:

an H-3 alien trainee who has spent 24 months 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) and/or (L) unless the alien has resided and been physically present outside the United States for the immediate prior 6 months.

On appeal, counsel asserts that the pertinent regulation does not apply because the beneficiary has been present in the United States as an H-3 trainee for only 16 months, from September 27, 1999 until the petition was filed on February 12, 2001.

Counsel's assertions have merit. According to a copy of the beneficiary's I-94 card, he entered the United States in H-3 status on September 27, 1999. The petitioner filed the petition on February 12, 2001, less than 24 months after the beneficiary's entry. The director's decision of June 4, 2001 is also prior to the 24 month period that would make the beneficiary ineligible to change his status to an H-1B nonimmigrant. Accordingly, the director's decision is withdrawn. The director must determine whether the proffered position is a specialty occupation and, if so, whether the beneficiary is qualified to perform the duties of that position. The director may request any evidence he deems necessary to assist him in a determination. As always, the burden of proof rests with the petitioner.

ORDER: The decision of the director is withdrawn. The matter is remanded to him for further action and consideration consistent with the above discussion and entry of a new decision which, if adverse to the petitioner, is to be certified to the Associate Commissioner for review.