



U.S. Citizenship
and Immigration
Services

D 2



FILE: WAC 02 158 51918 Office: CALIFORNIA SERVICE CENTER Date: AUG 12 2004

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

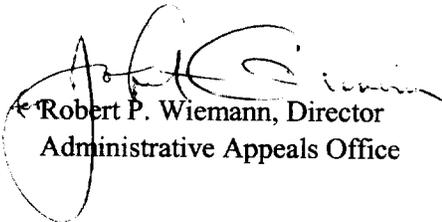
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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.


Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
maintain privacy of information

DISCUSSION: The Director, California Service Center, initially approved the nonimmigrant visa petition. After an investigation revealed new information, the director issued a notice of intent to revoke and ultimately revoked the approval. The matter is now before the Administrative Appeals Office (AAO) on appeal.¹ The appeal will be dismissed. Approval of the petition will be revoked.

The petitioner is a retail convenience store that sells food items and alcoholic beverages. At the time of filing, the petitioner claimed to employ a total of nine employees. In order to employ the beneficiary as a "software programmer," the petitioner filed the current nonimmigrant petition to classify the beneficiary 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 approved the petition on or about March 12, 2003.

On November 5, 2003, a Special Agent of Immigration and Customs Enforcement, a component of the Department of Homeland Security, interviewed the beneficiary at the petitioner's business location. In the interview, the beneficiary reported that he serves as the "manager" of the retail store and that his cousin, the owner of the store, comes into the store once a week.

On January 7, 2004, the director issued a notice of intent to revoke. In the notice, the director noted that the petitioner no longer employs the beneficiary in the capacity specified in the petition. The director specifically informed the petitioner that "the beneficiary was interviewed by an Immigration Special Agent. The beneficiary said that he serves as the manager of the store. He is not working as a software programmer." The director provided the petitioner 30 days to offer a rebuttal to the director's findings.

In response, the petitioner asserted that the beneficiary continued to be employed as a software programmer. The petitioner repeated the original description of the beneficiary's claimed duties and stated that he had installed two new cash registers and monitors the network system. The petitioner also claimed that the beneficiary was working on the petitioner's "ID Buster" project and established "MZ Enterprise" to bring the project to market. The petitioner noted that because the "bulk of [the beneficiary's] work is in the next phase of the project, he is currently splitting his time between the ID Buster project and helping out professional management of all stores."

In support of the rebuttal, the petitioner submitted evidence that includes copies of documents that were purportedly created by the beneficiary in the course of his duties as a software programmer. These documents include a six-page document titled "Identification system [sic] Software Requirements Document." This document appears to have been backdated, since the document is dated "April 24th 2003" yet has a copyright date of 2004. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The petitioner also submitted an affidavit from the beneficiary describing the interview, wherein the beneficiary reports that the store owner "offered me to help in the management of the store" since the ID Buster project was still in development. In addition, the petitioner submitted other documents, such as receipts for unidentified purchases, a "Utility Patent Application Transmittal," and a U.S

¹ Although the record contains materials that appear to have been prepared by an attorney, the file does not contain a Form G-28, Notice of Appearance by Attorney or Representative, and the appeal was prepared by the petitioner. Accordingly, the petitioner will be treated as self-represented.

Patent and Trademark Office credit card payment form. Significantly, the submitted documents do not mention the beneficiary or establish that the beneficiary has been employed as a software programmer. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The director revoked approval of the petition on March 2, 2004. The director noted that the petitioner had conceded that the beneficiary was assisting with the management of the store because the "ID Buster" project was still under development. The director concluded that although the beneficiary "may have performed some computer programming, the evidence shows that much of his time is spent in the day to day management of the store."

On appeal, the petitioner repeats its assertion that it has employed the beneficiary as a software programmer. The petitioner asserts that the beneficiary was not "fired" but instead was "laid off" or "benched," since the petitioner did not have need for his services. The petitioner repeats the original description of the beneficiary's claimed duties, and asserts that the director focused on a "small fraction" of the beneficiary's duties, namely the management of the store.

Upon review, the petitioner's assertions are not persuasive. The issue in this proceeding is not whether the beneficiary was "benched" or "laid off," but instead whether the petitioner employed the beneficiary as a software programmer. By the petitioner's and beneficiary's own admissions, the beneficiary was engaged in the management of the retail food and beverage store. Although the petitioner has submitted evidence of an "ID Buster" project, there is no evidence that the beneficiary was involved in this project. The AAO will not assume that the beneficiary was involved simply because the documents are technical in nature. Instead, the documents list other individuals as the authors and not the beneficiary. Again, going on record without supporting documentary evidence is not sufficient to meet the petitioner's burden of proof. *Matter of Treasure Craft of California*, 14 I&N Dec. at 190.

Despite the director's note that the beneficiary "may have performed some computer programming," there is no evidence that the beneficiary was ever engaged in the duties of a software programmer. By any stretch of the imagination, the installation of two cash registers does not constitute "software programming" duties; the petitioner does not claim that the beneficiary analyzed, designed, modified, or developed the software related to the cash registers. The director's conclusion that the beneficiary "may have performed some computer programming" is not supported by the evidence and must be withdrawn.

Under the regulation at 8 C.F.R. § 214.2(h)(11)(i)(A), the petitioner is required to immediately notify CIS of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(H) of the Act and 8 C.F.R. § 214.2(h). It is undisputed that the petitioner did not have work available for the beneficiary as a "software programmer" and instead offered the beneficiary a position "helping out [the] professional management" of the retail store, or acting as a store manager as originally discovered during the Special Agent's interview. Contrary to the requirements of the regulation, there is no evidence that the petitioner reported this change in the terms and conditions of the beneficiary's employment.

The regulation at 8 C.F.R. § 214.2(h)(11) provides that the director may revoke a petition at any time, on notice, when the beneficiary is no longer employed by the petitioner in the capacity specified in the original petition, or if the petitioner violated requirements of section 101(a)(15)(H) of the Act or 8 C.F.R. § 214.2(h). See 8 C.F.R. § 214.2(h)(11)(iii)(A)(1) and (4). In the present matter, the petitioner has failed to submit evidence to establish that the beneficiary was ever employed in the capacity specified in the original petition, specifically as a software programmer. Furthermore, the petitioner clearly violated the requirements of 8 C.F.R. § 214.2(h)(11)(i)(A) when it failed to immediately notify CIS of the changes in the terms and conditions of the beneficiary's employment. For these reasons, the director properly revoked the approval of the nonimmigrant petition.

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.

ORDER: The appeal is dismissed.