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U.S. Citizenship  
and Immigration  
Services

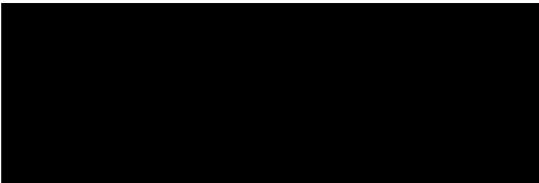


FILE# SRC 02 129 53642 Office: TEXAS SERVICE CENTER Date: **NOV 20 2004**

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, Director  
Administrative Appeals Office

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prevent clearly unwarranted  
invasion of personal privacy**

**DISCUSSION:** The nonimmigrant visa petition was approved by the Texas Service Center on March 28, 2002. A Notice of Intent to Revoke (NOIR) was thereafter served on the petitioner. The director then revoked approval of the Form I-129 petition on November 18, 2002. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The petition will be remanded to the director for entry of a new decision.

The petitioner is a restaurant. It seeks to employ the beneficiary as a restaurant and catering manager, and endeavors 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 revoked the Form I-129 petition following an interview with the beneficiary's wife by the Third Secretary and Vice Consul of the United States Embassy in New Delhi, India. The vice consul notified Citizenship and Immigration Services that during the course of an interview with the beneficiary's wife [REDACTED] when applying for an H-4 visa, [REDACTED] stated that her husband entered the United States in November of 2001 on a B-2 visa, and began working for the petitioner in December of 2001, prior to the approval of the Form I-129 petition. The director determined that the petitioner willfully misrepresented his intentions when entering the United States as a visitor, by beginning work within a brief period of time thereafter. The director cited "Title 8, Code of Federal Regulations, Part 205.2" as authority for revoking the petition. The citation is in error and provides no authority to revoke the Form I-129 petition in that the cited authority pertains to immigrant petitions, not non-immigrant petitions such as the one presently before the AAO.

Under Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), an alien is inadmissible to the United States who by fraud or misrepresentation has procured or sought to procure a visa, other documentation, or admission into the United States. Once CIS has approved the Form I-129 nonimmigrant visa petition and the alien has been admitted into the United States in H-1B visa status, however, the director may only revoke the petition under one of five stated grounds listed in 8 C.F.R. § 214.2(h)(11)(B)(iii), after giving proper notice of intent to revoke the petition. In this instance the director gave proper notice of intent to revoke the Form I-129 petition. The petition was not properly revoked, however, pursuant to the provisions of 8 C.F.R. § 214.2(h)(11)(B)(iii). As such, this matter must be remanded to the director to enter a new decision pursuant to the provisions of above cited regulation.

Beyond the decision of the director, the duties of the proffered position appear to be those of a food service manager, as referenced by the petitioner in support of the Form I-129 petition. The U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* notes that a bachelor's degree in restaurant and food service management provides strong preparation for a career in this occupation. Candidates are also recruited, however, from two and four-year college hospitality management programs, as well as from technical institutes and other institutions offering programs leading to associate degrees or other formal certification. A minimum of a bachelor's degree is not, therefore, the minimum requirement for entry into the proffered position and the proffered position does not appear to qualify as a specialty occupation. The director shall consider the record in its entirety in determining whether the proffered position qualifies as a specialty occupation. If the director determines that the proffered position is not a specialty occupation, then the approval of the Form I-129 petition violated paragraph (h) of 8 C.F.R. § 214.2, and/or involves gross error, and should be revoked pursuant to 8 C.F.R. § 214.2(h)(11)(B)(iii)(A)(5).

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director to enter a new decision commensurate with the directives of this opinion.