

prevent
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



[Handwritten signature]

FEB 17 2005

FILE: EAC 03 009 51236 Office: VERMONT SERVICE CENTER Date:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was approved by the Vermont Service Center on November 20, 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 May 5, 2003. The matter is now before the Administrative Appeals Office (AAO) on appeal. The revocation will be withdrawn. The petition will be remanded to the director for entry of a new decision.

The petitioner is a wholesale distributor of hair products. It seeks to employ the beneficiary as a business/operations development 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 receipt of a request for revocation of the beneficiary's H-1B status by the nonimmigrant visa section of the American Embassy in Seoul, South Korea. A memorandum dated December 9, 2002 from the embassy indicated that the beneficiary had left his employment in South Korea prior to his entry into the United States on December 13, 2001. The beneficiary's wife then joined him with the couple's children on February 7, 2002. The parties' children then entered language school to study English in March of 2002. A petition to convert the beneficiary's B-2 status to that of an H-1B was filed on May 10, 2002. That petition was denied. The beneficiary then overstayed his B-2 visa, and a new Form I-129 petition was filed on his behalf on October 7, 2002. That petition indicated in Part 2, question 4 that the South Korea consulate should be notified upon approval of the petition so that the beneficiary could be issued a visa. The answer provided in Part 2, question 4 does not indicate that the beneficiary was outside the United States at the time the petition was filed as stated by the American Embassy representative in Seoul, South Korea. It appears from the record that the beneficiary was out of status in the United States when the second petition was filed, and then obtained his visa in Seoul, South Korea, as indicated on the form I-129 petition.

The State Department suggested in its memorandum that when the beneficiary first came to the United States on a B-2 tourist visa, that he did so as an intending immigrant in violation of the immigration laws, and that he misrepresented that he was in the United States when he filed the form I-129 petition. 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 approved the second Form I-129 nonimmigrant visa petition, and the beneficiary entered the United States, he was properly in 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 (NOIR) the petition. In this instance the director gave notice of intent to revoke the Form I-129 petition on the grounds that the petitioner misrepresented that the beneficiary was outside the United States when the petition was filed. In response, the petitioner established that it had not misrepresented the beneficiary's presence in the United States at the time of filing, and overcame the basis of the director's NOIR. As such, the director's revocation is withdrawn.

The petition may not be approved, however, as the proffered position does not appear to qualify as a specialty occupation. The duties are essentially those of an operations manager as set forth in the *Operational Outlook Handbook (Handbook)* which does not require a degree in a specific specialty for entry into the position. A degree in a wide range of educational disciplines will suffice for management positions if the position does in

fact require a degree. This matter shall be remanded to the director to issue a NOIR setting forth a detailed basis for proposed revocation pursuant to 8 C.F.R. § 214.2(h)(11)(B)(iii). The petitioner shall then have an appropriate amount of time to respond as provided by regulation. The director shall then issue a new decision based on the evidence of record.

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 for further proceedings commensurate with the directives of this opinion and the entry of a new decision, which, if adverse to the petitioner, shall be certified to the AAO for review.