

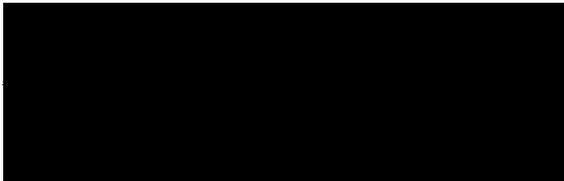
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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services



D2

FILE: SRC 04 057 50347 Office: TEXAS SERVICE CENTER Date: **AUG 25 2006**

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, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was approved by the service center director. Based upon information obtained from the Student Control Division of the Citizenship and Immigration Services (CIS) in Philadelphia, PA, the director determined that the beneficiary was not clearly eligible for the benefit sought. Accordingly, the director served the petitioner with notice of her intent to revoke approval of the visa petition and her reasons therefore, and ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for the director to reopen on service motion.

The petitioner is a software consulting business that seeks to employ the beneficiary as a software trainer. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 determined the petitioner had not established that the beneficiary is eligible for a change of nonimmigrant status from F-1 to H-1B.

The record indicates that the petitioner did not respond to the director's July 2, 2004 Notice of Intent to Revoke. The director therefore revoked approval of the petition. On appeal, counsel submits a brief.

The record of proceeding before the AAO contains: (1) the approved Form I-129 and supporting documentation; (2) the director's notice of intent to revoke (NOIR); (3) the director's October 19, 2004 notice of revocation; (4) a July 2, 2004 CIS motion to reopen (MTR), including a final revocation of the instant petition; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

On December 18, 2003, the petitioner filed Form I-129 to employ the beneficiary in the H-1B visa category for the period December 15, 2003 to December 14, 2006. The petitioner's submission of the Form I-129 constituted both a request to classify the beneficiary as an H-1B temporary employee under 8 C.F.R. § 214.2(h)(2) and for an extension of the beneficiary's stay in the United States under 8 C.F.R. § 214.2(h)(15), with the director required to make a separate determination regarding each. *See* 8 C.F.R. § 214.2(h)(15). The director approved the Form I-129 on December 29, 2003, granting H-1B classification to the beneficiary, as well as an extension of stay.

On July 2, 2004, the director notified the petitioner of her intent to revoke the approval of the petition based on the Philadelphia CIS office's denial of the beneficiary's request for reinstatement to student status and its subsequent affirmation of the denial in response to the beneficiary's motion to reopen and reconsider. The director subsequently revoked the petition in a CIS MTR dated October 19, 2004. The AAO notes that this decision revoked not only the beneficiary's extension of stay but also the director's decision to classify the beneficiary as an H-1B temporary employee.

The director's decision to revoke the beneficiary's extension of stay will not be considered by the AAO. Pursuant to 8 C.F.R. § 214.1(c)(5), there is no appeal from the denial of an application for extension of stay filed on a Form I-129. The only issue before the AAO is whether the director appropriately revoked the approval of the H-1B petition.

The AAO now turns to the basis for the director's denial – the Philadelphia CIS office's denial of the beneficiary's request for reinstatement to student status and its subsequent affirmation of the denial in response to the beneficiary's motion to reopen and reconsider – and whether these actions provided the director

with grounds for revoking the approval of the H-1B petition under the language at 8 C.F.R. § 214.2(h)(11)(iii)(A), the regulation outlining the circumstances under which a Form I-129 petition's validity will be rescinded.

Pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A), a director shall issue a notice of intent to revoke an approved Form I-129 petition if he or she finds that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
- (2) The statement of facts contained in the petition was not true and correct;
or
- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

In her July 2, 2004 NOIR, the director stated that the proposed revocation of the petition under 8 C.F.R. § 214.2(h)(11)(iii)(A) was based on the Philadelphia CIS office's denial of the beneficiary's request for reinstatement to student status and its subsequent affirmation of the denial in response to the beneficiary's motion to reopen and reconsider. She did not indicate that any other issues influenced her decision, and the AAO finds the record to raise no other issues that relate to the director's revocation decision. Accordingly, as the director has not questioned the nature of the petitioner's proffered employment or any of the information it provided concerning the beneficiary's qualifications, the AAO will not conduct a *de novo* analysis of the duties of the proffered position or the beneficiary's qualifications to perform those duties under the regulatory framework set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A) and (C). Instead, it will focus its review on the extent to which the Philadelphia CIS office's denial of the beneficiary's request for reinstatement to student status and its subsequent affirmation of the denial in response to the beneficiary's motion to reopen and reconsider provided the director with a basis for revoking the petition under the grounds at 8 C.F.R. § 214.2(h)(11)(iii)(A).

As discussed above, CIS is authorized to revoke H-1B petitions approved in error or on the basis of incorrect information. Revocation is also justified if the conditions under which CIS approved the H-1B petition have altered, either because of a change in the beneficiary's employment or because the petitioner violated the language of section 101(a)(15)(H) of the Act, 8 U.S.C. § 1101(a)(15)(H), or 8 C.F.R. § 214.2(h), or the terms of the approved H-1B petition. A review of the NOIR indicates that the director revoked her approval of the instant petition based on her determination that the Philadelphia CIS office's denial of the beneficiary's request for reinstatement to student status, and its subsequent affirmation of the denial in response to the beneficiary's motion to reopen and reconsider, had stripped him of a lawful status. Accordingly, she found the beneficiary to have failed to maintain a valid nonimmigrant status and CIS to have erred in approving the instant petition. The AAO finds the Philadelphia CIS office's denial of the beneficiary's request for reinstatement to student status and its subsequent affirmation of the denial in response to the beneficiary's motion to reopen and reconsider

insufficient to support a revocation of the director's approval of the H-1B petition under 8 C.F.R. § 214.2(h)(11)(iii)(A).

The Philadelphia CIS office's denial of the beneficiary's request for reinstatement to student status, which occurred on September 2, 2003, and its subsequent affirmation of the denial in response to the beneficiary's motion to reopen and reconsider, which occurred on May 7, 2004, do not, in themselves, satisfy any of the regulatory requirements for revocation of an H-1B petition, nor does the AAO find these actions to have resulted in any circumstances that would allow for revocation of the petition's validity. They did not alter the employment relationship between the petitioner and beneficiary, as required for revocation under the first criterion at 8 C.F.R. § 214.2(h)(11)(iii)(A). At the time the director revoked the instant petition, the beneficiary was still employed in the same specialty occupation by the same employer. The Philadelphia CIS office's denial of the beneficiary's request for reinstatement to student status and its subsequent affirmation of the denial in response to the beneficiary's motion to reopen and reconsider did not result in a finding that the information provided on the Form I-129 at the time of filing was untrue or incorrect, the basis on which revocation is authorized under the second criterion. The Philadelphia CIS office's denial of the beneficiary's request for reinstatement to student status and its subsequent affirmation of the denial in response to the beneficiary's motion to reopen and reconsider did not indicate that the petitioner had committed any violations with regard to the conditions of the Form I-129 or of related law or regulation, the third and fourth criteria allowing for revocation. Nor did they establish that CIS had erred or violated its own regulations in approving the petitioner's H-1B petition on December 29, 2003. The adjudication of the H-1B petition considered whether the employment offered by the petitioner was in a specialty occupation and the qualifications of the beneficiary to perform that employment. It did not rest on any determination regarding the beneficiary's reinstatement to student status. As a result, the AAO concludes that the Philadelphia CIS office's denial of the beneficiary's request for reinstatement to student status and its subsequent affirmation of the denial offers no basis on which to revoke the approval of the H-1B petition. It finds the director to have erred in revoking the petition. As indicated above, that regulation may only be used to revoke the validity of the petition. Thus, the director's decision revoking the petition based on the beneficiary's failure to maintain status will be withdrawn.

In this case, the petition may not be approved because, at the time of filing, the beneficiary was ineligible for a change of status under 8 C.F.R. § 248. Pursuant to 8 C.F.R. § 248.3(g), there is no provision for an appeal from the denial of a change of status. As this office does not have jurisdiction over the director's decision regarding the beneficiary's request for a change of status, the matter will be remanded to the director. It is also noted that the beneficiary is inadmissible for misrepresenting material facts under §§ 212(a)(6)(C)(i) and (7)(B)(i)(II) of the Act. For the reasons discussed above, the decision of the director will be withdrawn and the petition will be remanded for the director to reopen on service motion. The director may request any additional evidence she deems necessary, allowing the petitioner to provide additional documentation within 30 days. Upon receipt of all evidence and representations, the director will enter a new decision.

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