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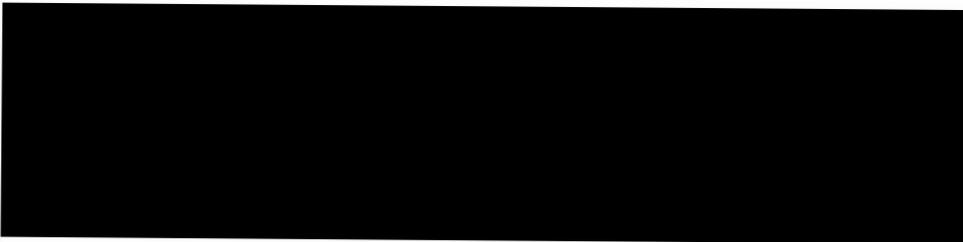
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FILE: WAC 00 115 51988 Office: CALIFORNIA SERVICE CENTER Date: NOV 02 2006

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

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 director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision is withdrawn and the petition remanded for entry of a new decision.

The petitioner is an architectural practice. It seeks to employ the beneficiary as an architectural designer. The petitioner, therefore, endeavors 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 denied the I-129 petition on the ground that the beneficiary is ineligible to receive visas and ineligible for admission based on a finding of misrepresentation pursuant to section 212 of the Act, 8 U.S.C. § 1182(6)(C)(i). Counsel submitted a timely appeal.

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 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The regulation at 8 C.F.R. § 214.1(f) relates to false information; it states:

False Information. A condition of a nonimmigrant's stay in the United States is the full and truthful disclosure of all information requested by the Service. Willful failure by a nonimmigrant to provide full and truthful information requested by the Service (regardless of whether or not the information requested was material) constitutes a failure to maintain nonimmigrant status under section 241(a)(1)(C)(I) of the Act.

Section 212 of the Act, 8 U.S.C. § 1182(6)(C)(i), pertains to illegal entrants and immigration violators. It states, in part:

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.

The director denied the petition. The denial letter reflects that the director found conflicting accounts in the beneficiary's statements and resume regarding when she resigned from ██████████ Consultancy, Inc. The director found that the beneficiary's resume indicated that she was employed with ██████████ in the Philippines from 1997 until 1999; and that her January 15, 2001 letter, written in response to the Notice of Intent to Deny (NOID), indicated that on September 1999 she asked her employer for extended leave until April 2001. The director stated that the beneficiary claimed that in January 2000 she prepared a resume to begin her employment search. Because of these conflicting accounts, the director requested an investigation into the matter. According to the denial letter, on August 28, 2001, the U.S. Consulate in Manila contacted ██████████. The consulate was told that the beneficiary had telephonically resigned from her position on October 1999, and that the reason given by the beneficiary for the termination was that she had found a job. As a result of the consulate's information the director concluded that the beneficiary intentionally misrepresented material facts concerning her prior employment and her true intention for coming to the United States. The AAO notes that in the NOID the director stated that he possessed the beneficiary's Form I-539 application, which the beneficiary filed with the Texas Service Center on March 9, 2000 for an extension of nonimmigrant status. The director stated that the beneficiary's resume reflected employment with ██████████ in Manila from 1997 to 1999, and her educational evaluation from Globe Language Service, Inc. was issued on February 15, 2000. The director concluded that the beneficiary filed for an extension of stay on Form I-539 in order to maintain B-2 status until the Form I-129 petition, which would have changed her status to H-1B, was approved.

On appeal, counsel states that the denial of the petition was based on the premise that the beneficiary had misrepresented material facts pertaining to her employment with ██████████ Inc. and her true intention for coming to the United States. Counsel states that he has not been provided with the consulate's complete investigative report. Counsel submits into the record two letters from ██████████, and a January 21, 2003 letter from ██████████ director of the U.S. Department of Justice, Immigration and Naturalization Service, regarding the Freedom of Information Act (FOIA) request **pertaining to the beneficiary**. Counsel states that in the January 14, 2002 and May 22, 2003 letters Mr. ██████████ states that he did not converse with the consulate regarding the beneficiary's employment at his firm, and that one of his employees provided the consulate with the incorrect date of the beneficiary's termination of employment there. Counsel states that ██████████ stated that the beneficiary was employed at his firm

on a full-time basis from July 1997 to January 2000. Counsel states that the beneficiary's employment termination date of 1999 with [REDACTED], as shown in her resume is a typographical error. Counsel asserts that the issue of the beneficiary's intention arose because of her termination of employment with [REDACTED]

The evidence of record includes the following: (1) the Form I-129 and supporting documentation; (2) the NOID; (3) the petitioner's response to the NOID; (4) the director's denial letter; and (5) the Form I-290B, the brief, and supporting documentation. The AAO notes that the following documents were submitted in the petitioner's response to the NOID: (1) the receipt notice for the Form I-129 petition, which reflects the receipt date of March 9, 2000; (2) the beneficiary's January 15, 2001 letter; (3) the Form I-539 receipt notice with the received date of September 27, 1999 and the notice date of October 20, 1999; (4) the Form I-539 approval notice with the receipt date of October 20, 1999, the notice date of March 6, 2000, and the period of validity from October 1, 1999 to May 4, 2000; (5) copies of photographs; (6) a September 6, 1999 letter from [REDACTED] and [REDACTED] (7) the beneficiary's I-94 departure record reflecting entry into the United States on August 29, 1999 and admitted in B-2 status until October 1, 1999; (8) copies of pages from the beneficiary's passport; (9) an airline boarding pass; and (10) counsel's January 17, 2001 letter.

The grounds for the director's decision are not appealable and are not before the AAO.

The director denied the petition because the beneficiary failed to maintain valid nonimmigrant status under 8 C.F.R. § 214.1(f) and because she is inadmissible under Section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182(a)(6)(C), based on his finding that the beneficiary had willfully provided false information to CIS. 8 CFR § 214.1(a)(3)(i) provides that any nonimmigrant alien who applies for an extension of stay in the United States must be admissible to the United States. 8 C.F.R. § 214.1(c)(5) provides that there is no appeal from the denial of an application for extension of stay. Under the regulation at 8 C.F.R. § 248.1(b)(2) the director may not approve a change of status for an alien who has violated his or her nonimmigrant status. 8 C.F.R. § 248.3(g) states that there is no appeal from the denial of a change of status. Thus, the AAO has no jurisdiction to review the director's denial of the petition based on the beneficiary's inadmissibility, failure to maintain status, and ineligibility to change status from B-2 to H-1B.

The appeal will not be rejected however, as the director must issue separate decisions as to the petitioner's eligibility for the underlying visa and the beneficiary's eligibility to extend or change status. *See* 8 C.F.R. § 214.2(h)(15). The director has not ruled on the petitioner's eligibility for the H-1B visa classification. Thus the petition will be remanded in order for the director to make a determination on whether the proffered position is a specialty occupation and whether the beneficiary is qualified to perform the services of a specialty occupation. The director may afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the proffered position is a specialty occupation and whether the beneficiary is qualified to perform the duties of a specialty occupation, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record at it relates to the regulatory requirements for eligibility. The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

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 January 2, 2002 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.