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**U.S. Citizenship
and Immigration
Services**



D2

FILE: LIN 03 266 53680 Office: NEBRASKA SERVICE CENTER Date: **SEP 27 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:

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, Chief
Administrative Appeals Office

DISCUSSION: The director of the Nebraska Service Center revoked the previously approved nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a computer consulting company. It seeks to employ the beneficiary as a computer support engineer 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 petition in accordance with the provisions of 8 C.F.R. § 214.2(h)(11)(iii)(A), after determining that the petitioner no longer employs the beneficiary in the capacity specified in the petition and pursuant to the terms of the petition.

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 petitioner's response to the director's NOIR; and (4) the director's January 21, 2005 notice of revocation. The AAO reviewed the record in its entirety before issuing its decision.

On September 11, 2003, the petitioner filed Form I-129 to employ the beneficiary in the H-1B visa category for the period September 10, 2003 to September 9, 2006. The director approved the Form I-129 on September 24, 2003.

On October 21, 2004, the director notified the petitioner of his intent to revoke the petition based on his receipt of information regarding the beneficiary's continued qualification for the classification. The director noted that petitioner previously provided CIS with copies of the petitioner's State of California Employment Development Department (EDD), quarterly wage reports, Form DE-6 for the last eight quarters encompassing years 2002 and 2003. The director found that these documents established that the petitioner failed to pay the beneficiary the full proffered wage as was stated on the Form I-129 petition. The director noted that the information on the Form DE-6 Quarterly Wage Report indicated that the beneficiary was paid \$5,625.00 for the quarter ending December 2003. The director noted that the petitioner indicated that the proffered position was a full-time position with the yearly wage of \$40,500. The director determined that the petitioner no longer employs the beneficiary in the capacity specified in the petition and pursuant to the terms of the petition.

In response, the petitioner noted that the petition was approved on September 23, 2003. The petitioner stated that the beneficiary obtained his visa and entered the United States in November 2003. The petitioner stated that the beneficiary joined the petitioner on November 11, 2003 and that the beneficiary was paid \$2,250.00 for the month of November 2003. The petitioner stated that it paid the beneficiary a full month salary of \$3,375.00 for December 2003. The petitioner noted that the two months totaled \$5,625.00 as indicated on the submitted Form DE-6 for the quarter ending December 2003. The petitioner submitted the beneficiary's pay stubs from November 2003 until May 2004. The petitioner explained that the beneficiary had taken a leave of absence to return home for family business in May 2004. Additionally, the petitioner submitted Forms DE-6, quarterly wage reports for 2004.

In his decision, the director noted the petitioner's explanation of the beneficiary's pro-rated pay for November 2003. The director found that the quarterly wage reports submitted by the petitioner conflict with the monthly salary the petitioner claims to have paid the beneficiary. The director notes that the quarterly wage reports consist

of three months, issued four times per year. The director found that the petitioner erred in its calculation and understanding of the DE-6 Wage Reports. The director stated that the petitioner indicated that the beneficiary had been in Russia since May 2004 and therefore should not be included the quarterly wage report ending September 30, 2004. The director found discrepancies in the record and noted that CIS records reflect that the beneficiary left the United States in July 2004.

The AAO now turns to the basis for the director's denial, that the petitioner no longer employs the beneficiary in the capacity specified in the petition and pursuant to the terms of the petition.

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.

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), 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 his approval of the instant petition based on his determination that the petitioner no longer employs the beneficiary in the capacity specified in the petition and pursuant to the terms of the petition.

On appeal, the petitioner asserts that the beneficiary worked for the petitioner from November 11, 2003 until May 31, 2004 during which time he was paid the proffered wage of \$40,500 per annum. The petitioner provides an explanation of the paycheck dates and the quarterly wage reports. The petitioner stated that it has a practice of running the payroll and paying wages of all employees on the first working day of the following month, e.g the wages of January are paid on February 1. The petitioner states that the federal Form 941 and state Form DE-6 are prepared on the basis of paycheck dates, therefore, with respect to the petitioner, its first quarter reports reflect wages paid for January and February. The petitioner's March wages fall within the second quarter. The petitioner states that the second quarter reflects the wages of March, April, and May and the third quarter reflects wages for June, July, and August. The petitioner states that the December payroll is run on December 31 so that its fourth quarter reports reflect wages for September, October, November, and December. The petitioner stated that

because of its accounting practices, the beneficiary's May paycheck would be included in the third quarter report and not the second quarter report. The petitioner noted that the beneficiary went on leave after May 31, 2004 but that because the petitioner gave him a salary advance requiring additional calculations, the May paycheck was generated on July 1, 2004.

The petitioner also addresses the director's concern that the petitioner asserted that the beneficiary went to Russia in May in which the director noted that CIS records show the beneficiary left the United States in July 2004. The petitioner responded by stating that it never claimed that the beneficiary went to Russia in May 2004 but that the beneficiary had taken a leave of absence after May 2004. The record reflects that the petitioner did not state that the beneficiary went to Russia in May 2004. Further, the petitioner provides a copy of an extract from the CIS website pertaining to clarifications concerning the leave of absence for H-1B workers and asserts that the beneficiary is allowed to take a leave of absence from his place of employment.

The petitioner has provided financial records evidencing that the beneficiary received the minimum proffered wage as indicated in the Labor Condition Application, and the petitioner has reasonably explained the amounts paid to the beneficiary as indicated on the Form DE-6. The records reflect that the petitioner employs the beneficiary in the capacity specified in the petition and pursuant to the terms of the petition and the regulation at 20 C.F.R. §655.731(c)(7)(iii).

For the reasons discussed above, the AAO shall sustain the appeal. Accordingly, the AAO will withdraw the director's decision.

The petitioner has the burden of proving eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The director's January 21, 2005 revocation of the instant petition is withdrawn. The petition is approved.