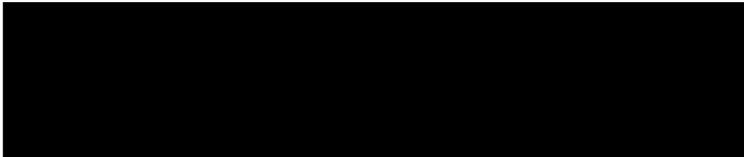


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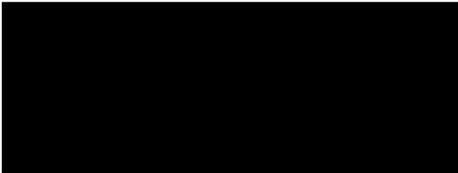
FILE: WAC 07 053 50407 Office: CALIFORNIA SERVICE CENTER Date: DEC 20 2007

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 Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is a martial arts organization that employs two personnel and had \$100,000 in gross annual income when the petition was filed. It seeks to employ the beneficiary as a graphic designer. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 petition determining that the beneficiary was not in a valid H-1B status when the petition was filed.

The record of proceeding before the AAO contains: (1) the Form I-129 filed December 13, 2006 with supporting documentation; (2) the director's December 26, 2006 denial decision; and (5) the Form I-290B. Counsel for the petitioner did not file a brief or supporting documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner on the Form I-129, Part 2, Question 2, checked box (e) noting the basis for the request of nonimmigrant classification was a "change of employer." The petitioner did not check box (a) "New employment (including new employer filing H-1B extension)." As the petitioner did not check box (a) in response to Question 2 of Part 5, it appears the petitioner in this matter was relying on the beneficiary's past-approved Form I-129 that would have been valid until January 5, 2007 if approval had not been revoked. The petitioner also checks box (c) in response to Question 5 of Part 2 of the Form I-129, requesting that the director extend the stay of the beneficiary as the beneficiary now holds that status. Other facts pertinent to this matter include: (1) the revocation of the beneficiary's approved H-1B classification (WAC 04040 51134) on March 9, 2006; and (2) the beneficiary's parole into the United States to November 4, 2007.

The director in this matter cited the regulation at 8 C.F.R. § 214.1(c)(4) that states in pertinent part:

An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed....

The director denied both the extension of stay and the Form I-129 petition under this regulation. The director failed to properly cite or provide a basis for the denial of the Form I-129 in this matter. While a visa extension petition may be denied if the validity of the previous petition has expired under 8 C.F.R. § 214.2(h)(14), the petition in this case is not a visa extension petition filed by the same employer and may not be denied on the basis that the beneficiary is out of status. 8 C.F.R. § 214.2(h)(15) provides that "[e]ven though the requests to extend the petition and the alien's stay are combined on the petition, the director shall make a separate determination on each." Thus, the petition must be separately adjudicated from the extension of stay request.

As the director failed to adjudicate the merits of the Form I-129 petition, the director's decision will be withdrawn and the petition will be remanded for adjudication of the Form I-129 petition. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility.

The AAO makes no finding with respect to the petitioner's extension of stay request on behalf of the beneficiary. This issue rests within the exclusive jurisdiction of the director.

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 December 26, 2006 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.