



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



D2

FILE: EAC 00 010 52508 Office: VERMONT SERVICE CENTER Date: FEB 20 2007

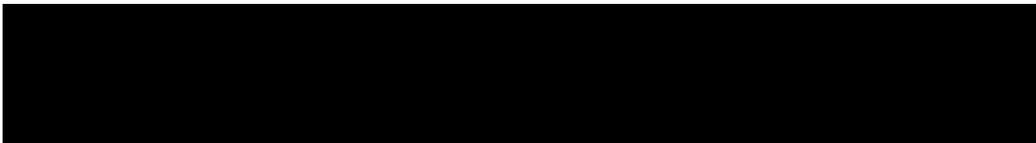
IN RE: Petitioner:



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 service center director revoked the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen or reconsider. The motion will be granted. This matter shall be remanded to the director for proceedings commensurate with the directives of this opinion.

The petitioner is an importer and wholesaler of silk garments, and seeks to employ the beneficiary as a marketing manager. It endeavors to classify her 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 his prior approval of the Form I-129 petition on the ground that the proffered position is not a specialty occupation. On appeal, counsel submitted a brief stating that the revocation was in error, and that the proffered position qualified as a specialty occupation. The AAO then dismissed the appeal stating that the director properly served the petitioner with a notice of Intent to Revoke (NOIR), and that the proffered position is not a specialty occupation. Counsel then filed a motion to reopen or reconsider the AAO decision stating that the revocation by the director was in error and that the matter was procedurally flawed because the petitioner was served with a notice of intent to deny (NOID) subsequent to the director's initial approval of the petition, rather than a NOIR as required by law.

The regulation at 8 C.F.R. § 103.5 provides in pertinent part that "a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." "New" facts are those that were not available and could not reasonably have been discovered or presented in the previous proceeding. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or CIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

The motion to reconsider establishes that the prior decision was based on an incorrect application of law and that the appellate decision was incorrect based on the evidence of record at the time of the initial decision. The petitioner's motion to reconsider is granted.

Once CIS has approved the Form I-129 nonimmigrant visa petition and the alien has been admitted to the United States in H-1B visa status, 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 the petition. In this instance, the petitioner was not given notice of the director's intent to revoke the prior approval of the petition after the beneficiary had been admitted to the United States and was employed in H-1B status. The director issued a Notice of Intent to Deny (NOID) to the petitioner, not a NOIR as required by law. The regulations provide that a NOID shall be issued when an adverse decision is proposed based on derogatory information of which the petitioner is unaware. In such cases the director must notify the petitioner of the intent to deny the petition and the basis of the denial. The petitioner is then permitted to inspect and rebut the evidence within 30 days of receiving the NOID. 8 C.F.R. § 214.2(h)(10)(ii). The issuance of a NOID was improper as the Form I-129 petition had already been approved by the director and the beneficiary had been admitted to the United States. The decision of the director, and the prior AAO decision dismissing the appeal of the petitioner, are withdrawn as the director failed to follow applicable regulations in revoking approval of the petition. 8 C.F.R.

§ 214.2(h)(11)(iii)(B) provides that the director must first issue a NOIR, with a detailed statement of the grounds for revocation, and give the petitioner 30 days to submit evidence to rebut the grounds contained in the NOIR.

This matter is remanded to the director to properly issue a NOIR, giving the petitioner an opportunity to respond to the NOIR as required by regulation. The director shall then issue a new decision. It should be noted, however, that the petition does not appear to be approvable. The duties of the position appear to fall within those normally performed by marketing managers as described in the Department of Labor's *Occupational Outlook Handbook (Handbook)*. The *Handbook* does not indicate that employment as a marketing manager requires a baccalaureate level education or higher in a specific educational discipline. A wide range of educational backgrounds is suitable for employment as a marketing manager. Further, the record does not appear to establish any of the remaining criteria set forth in 8 C.F.R. § 214.2(h)(4)(A). Moreover, the petitioner violated the terms and conditions of the approved petition. The evidence indicates that the petitioner paid the beneficiary \$27,500 in 2000, below the wage specified on the Labor Condition Application (LCA). While the petitioner indicates that the beneficiary was paid a lump sum of \$20,000 to help her with personal expenses, the evidence of record does not establish that the petitioner paid this sum to the beneficiary in her capacity as an employee. The petitioner did not submit amended tax records indicating that it paid the beneficiary \$47,500 in 2000, and withheld the requisite taxes from the beneficiary's pay check. As the record is presently constituted, the petition is revocable upon proper notice, as the petitioner violated the terms and conditions of the approved petition. 8 C.F.R. § 214.2(h)(11)(iii)(A).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for entry of a new decision commensurate with the directives of this opinion, which, if adverse to the petitioner, shall be certified to the AAO for review.