

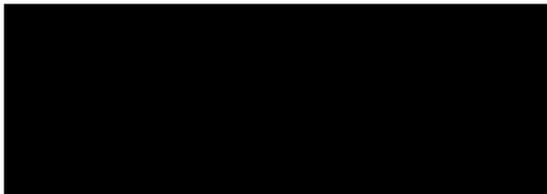
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**U.S. Citizenship  
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Services**

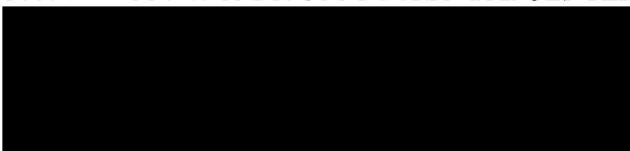
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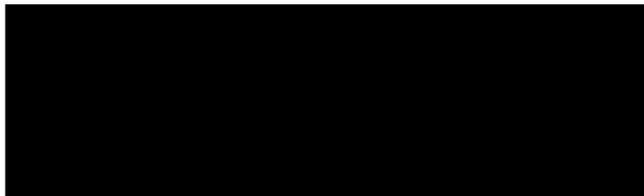
**FILE:** WAC 06 165 50674 Office: CALIFORNIA SERVICE CENTER Date: OCT 29 2007

**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 The director's decision will be withdrawn and the matter remanded for entry of a new decision.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 freight forwarding company that claims six employees, a gross annual income of \$1,711,911, and a net annual income of \$44,781. It seeks to extend the employment of the beneficiary as a management analyst. 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 record of proceeding before the AAO contains: (1) the Form I-129 filed April 5, 2006 with supporting documentation; (2) the director's July 21, 2006 request for further evidence (RFE); (3) counsel's October 3, 2006 response to the director's RFE; (4) the director's October 26, 2006 denial decision; and (5) the Form I-290B, counsel's statement, and documentation. The AAO reviewed the record in its entirety before issuing its decision.

On October 26, 2006, the director denied the petition. The director observed that the Form I-129 and the Department of Labor's (DOL) Labor Condition Application (LCA) submitted with the Form I-129 listed the wage for the position as \$41,588 annually. The LCA also listed the prevailing wage in the Miami, Florida area for a management analyst position as \$41,588. The Form I-129 indicated that the petition was filed for a continuation of previously approved employment without change with the same employer. The director noted that the beneficiary's Internal Revenue Service (IRS) tax records showed the beneficiary had received \$12,480 in 2003, \$28,600 in 2004, and \$28,600 in 2005. The director determined that the petitioner had misstated the wage on the Form I-129 petition and based on the discrepancies in the record, the petitioner had failed to demonstrate that there is a credible offer of employment. The director noted that the petitioner's ability to pay the beneficiary's wage, although not dispositive, may be considered a relevant line of inquiry bearing upon the totality of the circumstances and whether the petitioner had sufficient work involving the application of a body of theoretical knowledge. The director concluded that the record lacked a reliable evidentiary basis to determine that the petitioner's proffer is authentic.

On appeal, counsel for the petitioner submits an LCA certified by the DOL on April 15, 2003 for a management analyst in the Miami, Florida area. The April 15, 2003 LCA indicates that the petitioner's rate of pay for this position is \$21,600 and that the prevailing wage in the Miami, Florida area is \$16,390. Counsel notes that the beneficiary began his employment in April 2003 and had been paid the full wage as required by both the old LCA (certified April 15, 2003) and the new LCA (certified March 29, 2006). Counsel asserts that the change in salary from the previous petition does not reflect a significant change in duties or responsibilities and that there has been no substantive change in employment; thus, the petitioner was not required to indicate on the Form I-129 that there had been a change in the previously approved employment. Counsel asserts further that as the beneficiary was actually paid in accordance with the certified LCAs, the petitioner's failure to indicate a change in employment would constitute harmless error.

The AAO finds that the director insufficiently articulated the basis for denying the petition. The AAO observes that the director questioned whether the beneficiary had sufficient work involving the application of a body of theoretical knowledge and the director observed that this question opened up a relevant line of inquiry; however, the director only noted the difference in salary the beneficiary received in 2003, 2004, and 2005 and the proffered

salary as indicated in the 2006 Form I-129 and speculated that the petitioner had misstated the wage in the Form I-129. It is for this reason, the director's October 26, 2006 decision will be withdrawn and the matter remanded for the entry of a new decision.

The director's decision does not address the regulatory requirements for eligibility. The director did not make a determination as to whether the proffered position is a specialty occupation or whether the beneficiary is qualified to perform services in a specialty occupation. The AAO observes that the current record raises significant questions regarding the actual duties and responsibilities of the proffered position as those duties and responsibilities relate to the petitioner's business operations. The AAO notes that in response to the director's request for the beneficiary's past work product, the petitioner submitted documents that had not been translated and appeared to be a simple list of clients. The current record does not establish that the proffered position is a specialty occupation. Further, the current record does not contain an evaluation of the beneficiary's foreign education and the transcript submitted shows the beneficiary obtained a three-year degree. The record does not establish the beneficiary's eligibility to perform the duties of a specialty occupation.

Accordingly, the matter will be remanded for the director to render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. The director may afford the petitioner reasonable time to provide evidence pertinent to the issues of: (1) the nature of the proffered position and whether the duties and responsibilities of the position as they relate to the petitioner's business establish the position as a specialty occupation; (2) the beneficiary's qualifications and whether he is eligible to perform the duties of a specialty occupation; and (3) any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. If the new decision is adverse to the petitioner, the director shall certify it to the AAO for review.

**ORDER:** The director's October 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.