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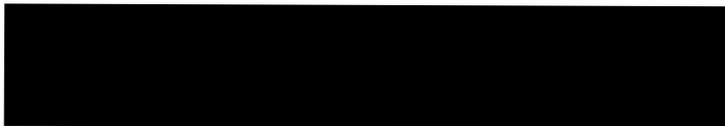


FILE: WAC 06 218 52879 Office: CALIFORNIA SERVICE CENTER Date: **APR 15 2008**

IN RE: Petitioner:   
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act.

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.

*for Michael T. Kelly*  
Robert P. Wiemann, Chief  
Administrative Appeals Office

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 The director's decision will be withdrawn.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

The petitioner is engaged in the business of engineering inspection and testing, structural and architectural design and steel detailing, and seeks to employ the beneficiary as a computer systems analyst. 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 record reflects that the beneficiary was approved for H-1B status (SRC 04 224 50941) on January 6, 2005, with the petition being valid from January 6, 2005 – August 1, 2007. That petition was filed by a different petitioner than the present petitioner. The present petitioner filed a Form I-129 on the beneficiary's behalf on July 3, 2006, and the beneficiary began working for the petitioner at that time. The director notes that approval of the original petition was revoked on September 8, 2006. The record reflects that by this date the present petition had been filed for more than two months and the beneficiary had been working for the present petitioner for more than two months. The director denied the petition stating that an extension of status could not be granted because the prior petition had been revoked. The director further found that the present petition could not be accepted for filing due to cap limitations for fiscal year 2007.

The director's decision will be withdrawn, and the matter remanded for entry of a new decision.

The director erred in finding that the present petition could not be approved because the prior H-1B approval had been revoked and the petition was subject to cap limitations for fiscal year 2007. The prior petition was revoked after the beneficiary had accepted new employment with the present petitioner and a new Form I-129 had been filed on her behalf. Under these facts, the previously approved H-1B status afforded the beneficiary ported to the present petitioner and the beneficiary is deemed to be in valid H-1B status while the new petition is adjudicated. The beneficiary was granted H-1B status with the previous employer on January 6, 2005. As such, the present petition is not subject to cap limitations because the beneficiary had been granted H-1B status within 6 years of the filing date of the petition, and the record does not establish that the beneficiary left the United States for more than one year after obtaining that status. 8 U.S.C. § 1184(g)(7). The director's decision to the contrary is withdrawn.

This matter shall be remanded to the director to determine whether the proffered position qualifies as a specialty occupation. If the director determines that the proffered position qualifies as a specialty occupation, the director shall then determine whether the beneficiary is qualified to perform the duties of a specialty occupation. The director shall consider all evidence of record in rendering her decision, and may request such additional evidence as she deems necessary.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

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