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02

FILE: WAC 02 092 53865 Office: CALIFORNIA SERVICE CENTER Date: **JAN 25 2008**

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, approved the visa petition classifying the beneficiary as an H-1B nonimmigrant on January 23, 2002. Upon subsequent review of the petition, the director issued a notice of intent to revoke approval and ultimately revoked approval of the Form I-129 petition on December 11, 2006. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as moot.

The petitioner operates continuing care retirement homes. It claims to employ ten personnel and to have had \$400,000 in gross annual income when the petition was filed. It seeks to employ the beneficiary as a financial manager. Accordingly, the petitioner endeavors to classify the beneficiary 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 includes: (1) the Form I-129 filed January 22, 2002; (2) a Form I-797, Notice of Action approving the beneficiary's classification as an H-1B nonimmigrant, valid from February 1, 2002 to October 30, 2004; (3) a Notice of Intent to Revoke (NOIR) approval of the petition issued on September 18, 2006; (4) an October 18, 2006 rebuttal to the NOIR with documentation; (5) the director's December 11, 2006 decision revoking approval of the petition; and (6) the Form I-290B, Notice of Appeal, and counsel's brief in support of the appeal.

In the September 18, 2006 NOIR, the director observed: (1) that the petitioner in Part 5 of the Form I-129 stated that the beneficiary's wages would be \$27,414 and the Form I-129W listed the beneficiary's wages as \$29,625; (2) that the Labor Condition Application (LCA) stated the prevailing wage in Moreno Valley, California to be \$15.43 per hour (annualized to be \$32,094) and that the petitioner indicated it would pay the beneficiary the prevailing wage; and (3) that the employment agreement between the petitioner and the beneficiary indicated the beneficiary's salary would be \$527 per week (annualized to be \$27,404). The director also noted that the petitioner's phone number appeared to be a private line rather than a business line. In the NOIR, the director further noted the discrepancies in the record and the burden on the petitioner to resolve any inconsistencies in order to establish eligibility for classification of the beneficiary as an H-1B nonimmigrant.

In rebuttal, counsel for the petitioner indicated that the discrepancies in the reported wages to be paid to the beneficiary resulted from a change in the petitioner's employment arrangements with the beneficiary. Counsel asserted that some time after the beneficiary received her employment authorization in 2002, the petitioner decided to have the beneficiary work less than full-time each week. Counsel claimed that the petitioner had reported this change in employment by filing an amendment on a Form I-129 submitted in April 2002. Counsel explained that the petitioner sometimes used the residence phone number of its owner and submitted business licenses and permits to establish that the petitioner's family care business continued to be operational.

On December 11, 2006, the director revoked approval of the petition. The director repeated the observations made in the NOIR and counsel's statements and assertions in rebuttal to the NOIR and then concluded without further discussion that the petitioner had not submitted sufficient evidence to overcome the grounds of revocation.

On appeal, counsel for the petitioner asserts the discrepancies in the record are insufficient to revoke an otherwise validly-approved petition. Counsel contends that the beneficiary was paid at least 95 percent of the prevailing wage at the time of filing the initial petition. Counsel submits a copy of the amended petition filed April 2002 and approved December 30, 2002 and notes that an extension of the beneficiary's classification as an H-1B nonimmigrant was approved October 29, 2004 for a period beginning October 31, 2004 and ending October 30, 2007. Counsel concludes that the petitioner has submitted sufficient evidence establishing it is a qualified petitioner and that the beneficiary is qualified for the position.

The AAO reviewed the record in its entirety before issuing its decision.

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.

In this matter, the petitioner properly filed a request to amend this petition on April 26, 2002. The petitioner noted that the beneficiary would work 25 hours per week. The petition was approved on December 30, 2002 for a valid period to October 30, 2004. While the director correctly found that the petitioner violated terms and conditions of the approved petition (WAC 02 092 53865), in that the beneficiary was paid for part-time work, the approval of the amended petition for this same beneficiary on December 30, 2002 effectively made any issues on appeal in this proceeding moot. The beneficiary appears to be in valid H-1B status under the approvals by the director (WAC 02 171 53158 and WAC 04 238 50799).¹

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 not sustained that burden.

¹ The AAO notes that the position of finance manager for residential retirement homes is not established in the record as a specialty occupation. While the subsequent approvals are not currently before the AAO, the two cited petitions appear to be revocable on proper notice by the director that the position is not a specialty occupation.

ORDER: The appeal is dismissed as moot.