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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: NOV 1 8 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(iii)

ON BEHALF OF PETITIONER:

[redacted]

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California Service Center revoked the previously approved nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. Approval of the petition is not revoked.

The petitioner is engaged in emergency department management and it employed the beneficiary as a trainee. The beneficiary was classified as a nonimmigrant worker trainee pursuant to section 101(a)(15)(H)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(iii) from March 30, 2008 until December 30, 2009.

On August 26, 2009, the director revoked the petition in accordance with the provisions of 8 C.F.R. § 214.2(h)(11)(iii)(A)(1). The director determined that the petitioner did not submit sufficient evidence in rebuttal to the USCIS' Notice of Intent to Revoke and did not overcome the grounds for revocation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's notice of intent to revoke (NOIR); (3) the director's notice of revocation; and (4) the Form I-1290B. The AAO reviewed the record in its entirety before issuing its decision.

On March 6, 2008, the petitioner filed the Form I-129 (Petition for Nonimmigrant Worker) to employ the beneficiary in H-3 classification for the period from March 30, 2008 until December 30, 2009. The director approved the petition. On July 14, 2009, the director notified the petitioner of her intent to revoke approval of the H-2B petition. In the notice of intent to revoke, the director stated the reason for revocation as follows:

> It now appears that the beneficiary is no longer receiving the training as specified in the petition. This beneficiary was to receive training on [the petitioner's] business practices to fulfill an agreement with the [redacted] On 27 April 2009 a petition was filed for this beneficiary to change status to H-1B nonimmigrant classification. This indicates that the beneficiary is no longer in a trainee status. Consequently, the beneficiary would no longer [be] eligible for classification under this section of law.

The notice also stated that the petitioner was in violation of 8 C.F.R. § 214.2(h)(7)(iii)(F). The director noted that the petitioner for the H-1B petition is at the same address as the prior approved H-3 trainee location. The director concluded that the beneficiary has been trained with the purpose of staffing the U.S. petitioner on a permanent basis.

In a letter in response to an intent to revoke, dated August 10, 2009, counsel for the petitioner stated that the petitioner and the company that filed the H-1B petition have different FEIN numbers and are separate companies. Counsel further stated that the "Service cannot reasonable [*sic*] infer the intentions of [the petitioner's] H-3 training program on the occurrence of a second, separate company's filed petition regardless of the beneficiary." However, counsel for the petitioner stated that "subsequent to [the petitioner] filing the H-3 petition on behalf of the beneficiary and implementing the program, [the petitioner] has become and is now a fully owned

subsidiary of [the company that petitioned for H-1B status on behalf of the beneficiary]. Counsel further stated the petitioner's intention in filing the H-3 petition as follows:

> [The petitioner's] original intent was not to use the H-3 program to staff its U.S. operations, but rather implement its IT capabilities with its Philippine vendor, [redacted] The relationship with [redacted] continues today, and the project has proven to be successful. In addition, [the petitioner], in their attached correspondence is clear that if the subsequent H1B petition is not approved, or approvable, that they expect the beneficiary to return to the Philippines in the capacity originally envisioned.

Finally, counsel for the petitioner contends that the company that petitioned for H-1B status on behalf of the beneficiary was not involved with the petitioner at the time they filed for H-3 status and "thusly could not influence the training program, let alone the intent of creating it is the first place." Furthermore, counsel stated that the H-1B petition on behalf of the beneficiary was filed for a separate business decision "made in recognition of the beneficiary's exemplary performance demonstrated in her current position, and not a changed intent of the purpose, implementation or continuation of the H-3 training program." Counsel's assertions are further corroborated by the petitioner's response letter, dated August 10, 2009.

The petitioner's response letter stated that at the time it petitioned for an H-3 classification on behalf of the beneficiary, it was not affiliated with the company that petitioned for H-1B status on behalf of the beneficiary. Given that the petitioner and the new company were not affiliated at the time the H-3 petition was filed, it is difficult to conclude that the petitioner had the intention of training the beneficiary with the purpose of staffing the U.S. petitioner on a permanent basis. The petitioner has overcome the director's concerns and the AAO will withdraw this portion of the decision.

The petitioner also explained that the beneficiary would remain in H-3 status until she was approved for a change of status to H-1B classification. The petitioner asserts that if the H-1B petition was not approved, the beneficiary would complete the training program and work abroad for the affiliated company as stated in the initial H-3 petition.

The petitioner presented sufficient evidence to overcome the revocation. For the reasons discussed above, the appeal will be sustained. Accordingly, the director's revocation decision will be withdrawn, and the petition remains approved.

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

ORDER: The appeal is sustained. The director's August 26, 2009 decision is withdrawn. The approval of the petition is not revoked.