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U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

D2

[redacted]

FILE: LIN 02 151 50250 Office: NEBRASKA SERVICE CENTER Date: FEB 24 2005

IN RE: Petitioner: [redacted]
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:

[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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center revoked the nonimmigrant petition on April 25, 2003 and the Administrative Appeals Office (AAO) subsequently withdrew the director's decision and remanded the petition to the director for further action. Pursuant to 8 C.F.R. § 103.5(a)(5)(ii), the AAO reopens the petition on its own motion, and withdraws the previous decision of the AAO. The approval of the petition is not revoked, and the revocation proceedings to date are terminated. The petition is approved.

The petitioner is a corporation that distributes and installs interior and exterior water control systems and structural problem solutions for both residential and commercial locations. In order to employ the beneficiary as a management analyst, the petitioner filed a visa petition 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 petition was approved. However, as related below, the director has attempted to revoke the approval.

After a consular officer at the U.S. Consulate in Moscow, Russia, returned the petition with a memorandum that recommended revocation of its approval, the director initiated revocation proceedings.

In a December 9, 2002 letter to the petitioner, the director stated that "it appears that the petition should be revoked" on the basis of the consular officer's memorandum. The director's letter described the memorandum as having "provided additional information from the beneficiary's interview indicating that she is not qualified for the specific duties outlined in the [petition's] job description." The letter further stated that, in light of the memorandum, the director was serving notice of his intent to revoke approval of the petition "pursuant to Title 8 Code of Federal Regulations, Part 214.2(h)(11)(iii)." There was no discussion about the details of the memorandum. The petitioner was granted "thirty days in which to submit to [the director] evidence in support of the petition and in opposition to the revocation." This notice was followed by a February 18, 2003 decision to revoke approval of the petition.

When the petitioner filed an appeal in March 2003, the director treated it as a motion to reconsider. On April 25, 2003, the director acted upon the motion by issuing a second decision to revoke approval of the petition, and he certified this decision to the AAO for review.[1] In a decision dated October 1, 2003, the AAO determined that the director's April 25, 2003 revocation decision was based on a ground not identified in the December 2002 letter, namely, the petitioner's failure to establish that the proffered position is a specialty occupation. Accordingly, the AAO withdrew the director's April 25, 2003 revocation decision, and remanded the petition to allow the director to issue a new Notice of Intent to Revoke (NOIR) that would specify the petition's failures to establish (1) a specialty occupation, and (2) the beneficiary's qualifications to serve in a specialty occupation. The AAO also directed that a new decision be entered, which, if adverse to the petitioner, was to be certified to the AAO for review.

In response to the AAO decision, the director issued a November 13, 2003 letter to the petitioner that enclosed a copy of the certified April 25, 2003 decision that the AAO had withdrawn. For the petitioner's

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[1] Paragraphs six and seven of the April 25, 2003 decision indicate that the director intended it to supercede the February 2003 revocation decision, even though he did not expressly withdraw it. For administrative clarity, the AAO acknowledges that the April 25, 2003 decision withdrew the February 2003 decision.

"convenience," the letter also included a copy of the AAO decision and the initial revocation decision of February 2003. The letter notified the petitioner that it had 30 days in which it "may rebut the determination that the proffered position does not qualify as a specialty occupation," and that thereafter "the record of proceeding [would] be returned to the Administrative Appeals Office so that that office may make a final decision." This letter does not constitute a Notice of Intent to Revoke under 8 C.F.R. § 214.2(h)(11)(iii).

On December 12, 2003 the petitioner filed a response to the director's November 2003 letter.[2] However, by a letter dated December 15, 2003, the director returned the response to the petitioner, without consideration of its contents.[3] The pertinent part of the director's letter states:

> It appears that we will not be able to accept the enclosed motion/appeal because the U.S. Citizenship and Immigration Services will not accept a motion/appeal for a case that has one pending.
>
> Therefore, the Service cannot accept your enclosed motion/appeal until a decision has been made on your previously filed motion/appeal.

In April 2004, the director returned the record of proceeding to the AAO for a decision. The director neither made nor certified a new decision as ordered in the AAO remand decision of October 2003.

The regulation at 8 C.F.R. § 214.2(h)(11)(iii), which governs revocations that must be preceded by notice, states:

> (A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part 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

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[2] The petitioner has submitted FedEx package-tracking information that establishes that the petitioner timely filed this response with the service center on December 12, 2003 (29 days after date of mailing of the director's letter.)

[3] It appears that the response material is now included in the record of proceedings, after the petitioner included it among the documents that the petitioner filed with the AAO.

> *(5)* The approval of the petition violated paragraph (h) of this section or involved gross error.
>
> (B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

The director's revocation attempts have not complied with the notice, opportunity-to-respond, and decision requirements of the Citizenship and Immigration Services (CIS) regulations on revocation.

To comply with the notice requirements of 8 C.F.R. § 214.2(h)(11)(iii), a director's decision to revoke a previously approved petition must be preceded by a NOIR. This document should: (1) specify the section or sections of 8 C.F.R. § 214.2(h)(11)(iii)(A) under which the director proposes to revoke the approved petition; (2) for each section of 8 C.F.R. § 214.2(h)(11)(iii)(A) specified as a basis for revocation, present a detailed statement of the factual grounds that justify the proposed revocation; and (3) specify the time period (of at least 30 days) allowed for the petitioner to submit a response to the NOIR.

The letter of December 9, 2002 conveyed that the director intended to revoke the petition under 8 C.F.R. § 214.2(h)(11)(iii) and that the petitioner had 30 days to rebut the information in the consular officer's memorandum. However, this letter did not constitute an adequate NOIR. It did not specify the particular provisions of 8 C.F.R. § 214.2(h)(11)(iii)(A) upon which the director proposed to act. It also failed to present a detailed statement of the factual grounds upon which the director proposed to act, and attachment of the consular officer's memorandum did not remedy this defect.

The AAO specifically directed the issuance of a new and adequate NOIR, and that this NOIR include both the specialty occupation and the beneficiary qualification aspects of the petition:

> [A]s the director failed to comply with the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(B), this matter shall be remanded to the director for issuance of a Notice of Intent to Revoke as described at 8 C.F.R. § 214.2(h)(11)(iii)(B). The director must afford the petitioner reasonable time to provide evidence pertinent to the issues of (1) the nature of the proffered position, including the duties and level of authority within the organizational hierarchy; and (2) the beneficiary's qualifications. . . .

However, the director did not comply. Instead, as indicated above, the director issued a letter that merely attached a copy of the decision that the AAO had withdrawn and also copies of the director's decisions of February and April 2003. The letter neither identifies itself as a NOIR, nor cites the provisions of 8 C.F.R. § 214.2(h)(11)(iii)(A) under which the director proposed to revoke approval of the nonimmigrant petition.

Accordingly, the AAO has determined that the substantive procedural requirement of an adequate NOIR has not been met. As the issuance of an adequate NOIR is a necessary condition precedent to making a decision to revoke an approved petition, the record lacks the substantive procedural basis for the director to make a revocation decision.

In addition to failing to meet the procedural requirements for a revocation decision, the director has erred by attempting to transfer the decision-making responsibility to the AAO. The letter's statement that after 30 days the record would be forwarded to the AAO for decision (1) is antithetical to a petitioner's right to have its rebuttal matters considered by the director prior to his/or her issuing a revocation decision, and (2) ignores the director's obligation to make a decision to revoke or not revoke after consideration of the petitioner's rebuttal evidence. The pertinent part of 8 C.F.R. § 214.2(h)(11)(iii)(B) states:

> [T]he petitioner may submit evidence in rebuttal within 30 days of receipt of the notice [i.e., the NOIR]. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. . . .

As already noted, the director forwarded the report of proceedings to the AAO without a decision on whether or not to revoke the approved petition. This action is contrary to 8 C.F.R. § 214.2(h)(11)(iii), which squarely places the authority and responsibility for revocation decisions exclusively with the director, and disregards the AAO's instruction to forward the proceeding (by certification) if the director made a decision to revoke the approved petition.

The AAO notes further that by refusing to consider the rebuttal matters that the petitioner submitted in response to the director's November 2003 notification letter, the director denied the petitioner its right under 8 C.F.R. § 214.2(h)(11)(iii)(B) to have those matters considered before the director issues a revocation decision.

As a consequence of the substantive procedural defects that permeate the revocation proceeding: the approval of the petition is not revoked, and the revocation proceedings are terminated. The petition is approved.

ORDER: The October 1, 2003 decision of the AAO and the director's April 25, 2003 decision are withdrawn. The approval of the petition is not revoked. The petition is approved.