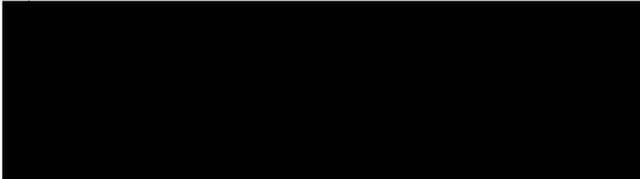


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02

FILE: WAC 04 078 50995 Office: CALIFORNIA SERVICE CENTER Date: DEC 04 2006

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

SELF-REPRESENTED

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 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. The director's revocation of the approved petition will be withdrawn.

The petitioner is an information technology consulting firm, with six employees. It seeks to extend its employment of the beneficiary as a computer programmer/analyst 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 director revoked the approval of the petition based on his determination that the petitioner had failed to comply with the terms and conditions set forth in the Form I-129.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's notice of intent to revoke; (3) the petitioner's response to the notice; (3) the director's letter of revocation; and (4) Form I-290B, with new and previously submitted evidence. The AAO reviewed the record in its entirety before issuing its decision.

The only issue before the AAO is whether the petitioner has overcome the grounds on which the director based the revocation of the petition.

Pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A), a director shall issue a notice of intent to revoke a 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 the instant case, the director approved the instant petition on February 4, 2004. Subsequently, he became aware of information that he found to indicate that the petitioner was not in compliance with the terms of the Labor Condition Application (LCA) submitted in support of the Form I-129, Petition for a Nonimmigrant Worker, as required by the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(2). Accordingly, he issued a notice of intent to revoke (NOIR) the petition's approval informing the petitioner that the quarterly wage reports it had submitted in support of other petitions indicated that the beneficiary worked no consistent schedule, even though the job that had been offered to him was a full-time position. The petitioner was given 30 days in which to respond with evidence in support of the petition.

The petitioner replied in a November 16, 2005 letter, asserting that it had consistently paid the beneficiary above the wage rate set in the LCA and that the lower wage totals that concerned the director were the result of the beneficiary's absences from the United States. The petitioner submitted copies of the beneficiary's W-2s, Wage and Tax Statements, for 2003 and 2004; his payroll records and pages from his passport to document his time outside the United States.

The director found the petitioner's evidence failed to overcome the grounds for revocation, determining that it had not paid the beneficiary the proffered wage or established that it had an employer/employee relationship with the beneficiary. Therefore, he revoked the approved petition on December 2, 2005.

The regulation at 8 C.F.R. § 214.2(h)(11)(iii)(B) specifies that a NOIR must provide a detailed statement of the grounds for revocation. In the instant case, the director's NOIR indicates that the ground for the proposed revocation is the petitioner's failure to comply with the wage rate listed in the LCA. However, the revocation of the approved petition quotes language from a NOIR other than that in the record and concludes that the petitioner has not only failed to pay the proffered wage but to establish an employer/employee relationship with the beneficiary. As the NOIR issued by the director does not reference the employer/employee relationship between the petitioner and the beneficiary, it may not serve as a ground for revocation. Accordingly, the director's finding that the approved petition must be revoked based on the petitioner's failure to establish an employer/employee relationship with the beneficiary is withdrawn.

Moreover, based on its review of the evidence of record on appeal, the AAO finds the petitioner to have overcome the director's concerns with regard to the fluctuations in the beneficiary's quarterly earnings. The submitted pages from the beneficiary's passport, which reflect various admissions to Canada, India and the United States and establish the dates on which his U.S. visas were issued, as well as the petitioner's payroll records, establish by a preponderance of the evidence that the beneficiary's reduced earnings were the result of his absences from the United States, not the petitioner's failure to comply with LCA requirements.

For the reasons just discussed, the AAO concludes that the petitioner has effectively refuted the ground for revocation specified in the NOIR. Accordingly, the AAO will sustain the petitioner's appeal and withdraw the director's revocation of the petition.

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 met that burden.

ORDER: The appeal is sustained. The revocation is withdrawn. The petition is approved.