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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



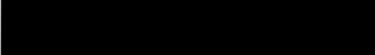
**U.S. Citizenship
and Immigration
Services**

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FILE: WAC 08 147 52965 Office: CALIFORNIA SERVICE CENTER Date: **JAN 14 2010**

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.

Perry Rhew
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director, California Service Center, initially approved the H-1B petition on August 25, 2008, as evidenced by the Form I-797A Approval Notice issued on that date. Subsequently, on September 3, 2008, the director issued a Notice of Decision to deny the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. In light of the approval of this petition, which was operative on the date of the Notice of Decision to deny the petition, the AAO will both withdraw the director's decision to deny the H-1B petition, and also remand the petition for further action commensurate with the discussion below.

The petitioner is an athletic training and rehabilitation facility that seeks to employ the beneficiary as a fitness director. The petitioner, therefore, 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, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The Notice of Decision issued by the director on September 3, 2008 indicates that the director determined that the petition should be denied on two independent grounds, namely, the petitioner's failure to establish (1) that the proffered position is a specialty occupation, and (2) that the petition is based upon a credible offer of employment. However, the record indicates that the Notice of Decision followed a previous notice that the petition was approved for the period October 1, 2008 to September 30, 2011, which was issued to the petitioner's counsel on August 25, 2008 on a Form I-797A.

On appeal, counsel for the petitioner submits a brief and a copy of the Form I-797A petition-approval notice. Counsel acknowledges that U.S. Citizenship and Immigration Services (USCIS) has the authority to revoke a petition that has been approved. However, counsel argues, correctly, that, if this H-1B petition was approved in error, USCIS cannot simply issue a denial of that previously approved petition, but instead must follow the Revocation on Notice procedures outlined at 8 C.F.R. § 214.2(h)(11)(iii).

Notice of Intent to Revoke Required

It appears that USCIS issued the August 25, 2008 Approval Notice by mistake. However, USCIS regulations provide only one avenue for undoing an erroneously issued approval of a petition in the circumstances of this particular case, and that is the Revocation on Notice procedures at 8 C.F.R. § 214.2(h)(11)(iii), which states:¹

(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

¹ As the petitioner has neither gone out of business nor filed a written withdrawal of the petition, the automatic revocation provisions at 8 C.F.R. § 214.2(h)(11)(ii) do not apply.

- (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.

(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.

Accordingly, the director's attempt to deny the petition after its approval is ineffective and will be withdrawn. Further, as it appears that the petition was erroneously approved, the petition is remanded to the director with instructions to pursue the Revocation on Notice procedures at 8 C.F.R. § 214.2(h)(11)(iii).

Specific Instructions on Remand

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 Notice of Intent to Revoke (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 30 days as the time period allowed for the petitioner to submit a response to the NOIR.

The director's NOIR should comply with the notice and decision requirements at 8 C.F.R. § 214.2(h)(11)(iii)(B).

As its detailed statement for the grounds of rebuttal, the NOIR should repeat the grounds stated in the director's Notice of Decision issued by the director on September 3, 2008. The NOIR should include the same reasoning and discussion as found in the director's decision to deny the petition.

Also, the NOIR should state that revocation of approval of the petition is being considered under the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(A)(5), on the grounds that approval of the petition violated the H-1B specialty occupation requirements at 8 C.F.R. § 214.2(h)(4) and involved gross error.

Further, in accordance with the regulation, the NOIR should allow the petitioner 30 days to submit evidence in rebuttal, and "the director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part."

ORDER: The director's September 3, 2008 decision is withdrawn. The petition is remanded to the director for the issuance of a NOIR and the subsequent entry of a new decision, in conformance with the instructions above.