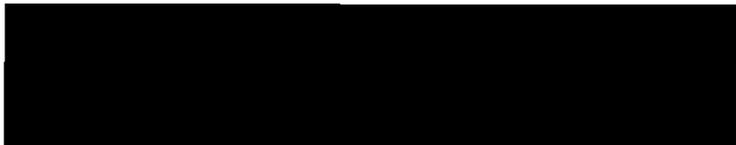


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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



D2

SEP 17 2012

DATE:

OFFICE: VERMONT SERVICE CENTER

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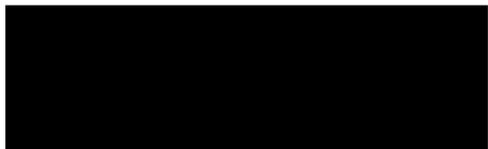
IN RE:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director revoked the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The director's decision to revoke the petition is withdrawn. The appeal will be remanded to the service center director to consider the petitioner's response to the Notice of Intent to Revoke (NOIR).

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on August 6, 2009. In the Form I-129 visa petition, the petitioner describes itself as a software consulting and development company established in 1998. In order to continue to employ the beneficiary in what it designates as a programmer analyst position, the petitioner seeks to classify him 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 director approved the petition on September 14, 2009. Subsequent to the petition's approval, the United States Consulate General in Sydney, Australia returned the petition to the director for review. The Consulate notified U.S. Citizenship and Immigration Services (USCIS) that during the course of a visa interview with the beneficiary, which was held on January 15, 2010, information was presented that was not available to USCIS at the time the petition was approved. USCIS issued a Notice of Intent to Revoke (NOIR), which contained a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner was given thirty-three days to respond to the NOIR. On August 16, 2010, USCIS revoked the petition finding that the petitioner failed to submit a response on or before the due date. On appeal, counsel asserts that the director's basis for revocation of the petition was erroneous and contends that the response was timely filed. In support of this assertion, counsel submitted a brief and additional evidence.

*The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the approval notice for the Form I-129; (3) the NOIR; (4) the decision to revoke the approved petition; (5) the Form I-290B and supporting documentation; (6) the AAO's request for evidence (RFE); and (7) the petitioner's response to the AAO's RFE.*

Upon review of the record, it appeared that the petitioner filed a timely response to the NOIR. That is, the petitioner submitted a delivery tracking receipt from Federal Express showing that a delivery was received by the director on July 12, 2010 with regard to this petition.<sup>1</sup>

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<sup>1</sup> USCIS issued a NOIR on June 8, 2010 stating that a final decision would not be made for thirty-three days. However, July 11, 2010 was a Sunday; therefore, the AAO finds that the actual due date was July 12, 2010 (Monday) in accordance with 8 C.F.R. § 1.2 (definitions) which states the following:

Day, when computing the period of time for taking any action provided in this chapter I including the taking of an appeal, shall include Saturdays, Sundays, and legal holidays, except that when the last day of the period computed falls on a Saturday, Sunday, or a legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

The record of proceeding, however, does not contain the petitioner's response to the RFE. Therefore, the AAO issued an RFE on August 9, 2012 requesting additional evidence that a response was indeed submitted, including a copy of the response that counsel claims was received by USCIS on July 12, 2010. The AAO received a copy of the response on August 22, 2012. Accordingly, the petition is remanded to the director for consideration of this evidence and issuance of a new decision.

In addition, the AAO finds that the record of proceeding contains additional issues, not identified by the director in the NOIR that may also be reviewed by the director for consideration of issuance of an RFE or new NOIR.<sup>2</sup> For example, the AAO observes that the petitioner has not established that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. Further, the AAO notes that the petitioner has made contradicting statements as to whether or not it is an H-1B dependent employer. On the Form I-129 H-1B Data Collection Supplement, Part A, 1a, (page 13) the petitioner indicated that it is not a dependent employer. However, in subsection 1 of F-1 of the Labor Condition Application (LCA) (page 3), the petitioner marked box C, indicating that it is "an H-1B dependent and/or willful violator BUT will use this application only to support H-1B petitions for exempt nonimmigrants." The director may request any additional evidence considered pertinent in determining whether or not the petitioner has met the applicable statutory and regulatory requirements.

**ORDER:** The director's decision to revoke the petition is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.

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<sup>2</sup> The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). However, as the director's decision to revoke the petition is withdrawn, the AAO will not further discuss the additional issues and deficiencies that it observes in the record of proceedings.