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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, NW
BCIS, AAO, 20 Mass, 3/F
Washington, D. C. 20536



SEP 04 2003

FILE: SRC 02 064 50237 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:
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:



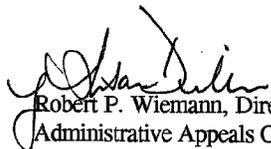
INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, who then certified the matter to the Administrative Appeals Office (AAO) for review. The decision of the director will be withdrawn and the matter will be remanded for further consideration.

The petitioner is a restaurant. It seeks to employ the beneficiary as a management trainee. The director found that, because the Bureau denied the beneficiary a change of status while the H-3 petition was pending, the beneficiary was out of status at the time the H-3 petition was decided and, therefore, the petition could not be approved.

Neither counsel nor the petitioner submits evidence in response to the notice of certification.

According to the director, the beneficiary entered the United States on November 7, 2000 in J-1 status. On August 22, 2001 the beneficiary applied to change his status to B-1. The petitioner filed the I-129 for H-3 status on December 19, 2001. The Bureau denied the beneficiary's request to change status to B-1 on April 24, 2002. The H-3 petition was adjudicated on July 11, 2002.

The director erred in her decision. According to 8 C.F.R. § 248.1(b), "a change of status may not be approved for an alien who failed to maintain the previously accorded status or whose status expired *before the application or petition was filed.*" (Emphasis added). No documentary evidence in the record indicates that the beneficiary's J-1 status (which was issued for the duration of his stay) had expired at the time the H-3 petition was filed. More importantly, however, the AAO does not have the authority to review an application for a change of status that has been filed on an I-129 petition. See 8 C.F.R. § 248.3(g).

The director must adjudicate the beneficiary's request for a change of status and the merits of the petitioner's H-3 petition separately. As the director's decision did not address the underlying issues of the H-3 petition, the director must render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision of July 11, 2002 is withdrawn. The matter is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.