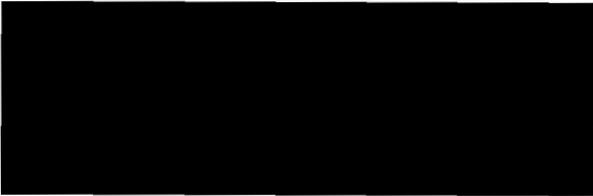


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Services

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FILE: WAC 04 215 53613 Office: CALIFORNIA SERVICE CENTER Date: **SEP 18 2006**

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center approved the nonimmigrant visa petition on August 12, 2004. On January 5, 2005, the director issued a Notice of Intent to Revoke (NOIR) setting forth the grounds for revocation of the approval of the petitioner's Form I-129 petition. The director informed the petitioner that it had 30 days in which to respond to the NOIR. Counsel for the petitioner responded to the NOIR in a letter dated January 25, 2005. On February 28, 2005 the director revoked approval of the Form I-129 petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The approval of the petition will be revoked.

The petitioner is a company organized in 2001 in the State of California. It claims to provide engineering services in the construction industry and seeks to employ the beneficiary as a mechanical consultant. Accordingly, the petitioner 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 (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The record includes:

- (1) The Form I-129 and supporting documents;
- (2) The director's January 5, 2005 NOIR, noting: (a) that pursuant to information received from an overseas consulate, the beneficiary's student status was based on fraudulently acquired I-20s and as such Citizenship and Immigration Services (CIS) strongly encourages the petitioner to submit evidence unequivocally supporting and documenting the beneficiary's student status beginning in 1992; (b) that additional investigation revealed that the petitioner's business had been suspended, thus the petitioner did not appear to be a valid employer able to petition for a nonimmigrant worker; (c) that the beneficiary appeared to be the business principal and sole owner of a general building contractor identified as [REDACTED] and (d) that the beneficiary is listed as the registered agent and an executive of [REDACTED] of Alhambra, California;
- (3) Counsel's January 25, 2005 response to the NOIR wherein counsel asserted: (a) for the director to revoke an approved petition, the director must find the statement of facts contained in the petition was not true and correct (8 C.F.R. 214.2(h)(i)(11)(B)(iii)) [sic]; and (b) the petitioner is a California corporation and the beneficiary is currently employed by the petitioner;
- (4) The director's February 28, 2005 revocation decision determining: (a) that the petitioner had not submitted documentary evidence of the beneficiary's student status beginning in March 1992 or any evidence pertaining to the petitioner or its employment of the beneficiary despite CIS's clear expression of the facts it wished clarified; and (b) that the petitioner's failure to submit evidence in rebuttal required the revocation of approval of the petition; and
- (5) Counsel's Form I-290B stating: "The basis for the director's revocation is unclear and ambiguous. In his Notice of Intent to Revoke, the director summarily states that beneficiary's

student status was based upon fraudulently acquired I-20s without specifics. We do not know which I-20 and the basis of the claimed fraud. It is impossible for beneficiary to rebut this accusation. Thus the revocation of the approved visa petition by the Center Director is arbitrary and contrary to the law."

Counsel noted that neither a brief nor evidence would be submitted. The AAO also reviewed the memorandum from the U.S. Embassy, Beijing – Consular Section, Fraud Prevention Unit, Nonimmigrant Visa Unit dated June 26, 2003, referenced in the director's NOIR. Said memorandum indicated that the beneficiary had arrived in the United States in 1991 and had never left the country; that from March 1992 up to January 1999 he attended several ESL language schools in Alhambra and Arcadia; and that his last Form I-20 showed he attended Ivy University to study for a bachelor's degree in business administration. The record also includes a copy of the beneficiary's Form I-94 arrival and departure record showing that the beneficiary arrived in the United States on September 26, 1991 and had been admitted in a B-2 classification until March 26, 1992.

The AAO reviewed the record in its entirety before issuing its decision.

Pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A), a director shall issue a notice of intent to revoke an approved 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.

The director's notice of intent to revoke and ultimate revocation of approval is based on the criterion at 8 C.F.R. §§ 214.2(h)(11)(iii)(A)(1) and (2). The AAO turns first to the criterion at 8 C.F.R. § 214.2(h)(11)(iii)(A)(1) that requires a NOIR if the beneficiary is no longer employed by the petitioner in the capacity specified in the petition. The director specifically noted that information showed that the petitioner had been suspended from conducting business, and thus it did not appear able to employ the beneficiary. The director also noted that the information indicated that the beneficiary was an owner of a different but similarly titled company and an executive and agent for a separate company. The information available to the director was sufficient to properly issue a NOIR in an effort to determine if the beneficiary continued to be employed by the petitioner in the capacity specified in the petition. Counsel's assertion that the petitioner is a California

corporation in the rebuttal to the NOIR is insufficient to overcome the director's information that the petitioner had been suspended from conducting business in California and that the petitioner no longer employed the beneficiary in the capacity specified in the petition. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The director's revocation decision was not arbitrary or contrary to law. Counsel on appeal offered no argument or evidence on this issue. Thus on this basis alone, the director's revocation decision is affirmed.

The AAO now turns to 8 C.F.R. § 214.2(h)(11)(iii)(A)(2) which requires that a NOIR be issued if the statement of facts contained in the petition was not true and correct. The petitioner indicates that the basis for classification is continuation of employment without change. As observed above, the director properly questioned whether the petitioner continued to conduct business as it had been suspended July 21, 2004 and the petition was filed August 2, 2004. Thus, it appears that the petitioner's cessation of business would result in a change of the beneficiary's employment. Again, counsel's assertion that the petitioner is a California corporation does not address the suspension of the business. Counsel's claim that the petitioner currently employs the beneficiary is not substantiated by documentary evidence. Again, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Regarding the issue of the beneficiary's status in the United States from 1992, the AAO observes that the petitioner omits any information regarding the beneficiary's work experience, student status, or whereabouts from 1990 to 2001. Counsel's rebuttal to the director's notification in the NOIR of the investigation into the beneficiary's student status prior to the beneficiary's first H-1B approval was to reference 8 C.F.R. 214.2(h)(i)(11)(B)(iii).¹ The AAO finds that the petitioner's omission of any information relating to the beneficiary's status from 1990 to 2001 does cause concern regarding the petitioner's knowledge of the legitimacy of the beneficiary's status during this time period. The petitioner's failure to question the beneficiary regarding his status during this time period, failure to inform CIS of the beneficiary's status during this time period, and failure to respond to the director's NOIR regarding the beneficiary's status during this time period, constitutes an admission that the beneficiary's status during this time period was not legitimate. Although the petitioner did not affirmatively provide untrue or incorrect information regarding the beneficiary's status, the failure to provide evidence of the beneficiary's status from 1992 to 2001 despite the director's encouragement to do so, casts doubt on the credibility of the petitioner and its relationship with the beneficiary. Contrary to counsel's claim on appeal, a simple verification of the beneficiary's status with appropriate documentary evidence establishing the beneficiary's location and attendance of school as required by all approved Form I-20s would have clarified this matter. The AAO determines that the petitioner's omission of this evidence in the petition is the same as providing a statement of fact in the petition that was not true and correct.

¹ The AAO believes counsel meant to reference 8 C.F.R. § 214.2(h)(11)(iii)(A)(2), the ground for revocation relating to untrue or incorrect statements in the petition.

CIS is authorized to revoke H-1B petitions approved in error or on the basis of incorrect information. Revocation is also justified if the conditions under which CIS approved the H-1B petition have altered, either because of a change in the beneficiary's employment or because the petitioner violated the language of section 101(a)(15)(H) of the Act, 8 U.S.C. § 1101(a)(15)(H), or 8 C.F.R. § 214.2(h), or the terms of the approved H-1B petition. The statements set forth by counsel in support of the appeal do not overcome the evidence in the record that the petitioner was no longer conducting business when it submitted the H-1B petition on behalf of the beneficiary. Additionally, the AAO finds that the petitioner's failure to disclose adverse evidence regarding the beneficiary's status in the United States is an overt omission intended to hide the beneficiary's lack of legitimate status. Upon review of the totality of the record, the petitioner has not overcome the grounds of revocation.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The approval of the petition is revoked.