

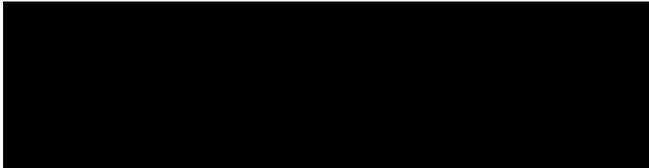
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U.S. Citizenship
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Services



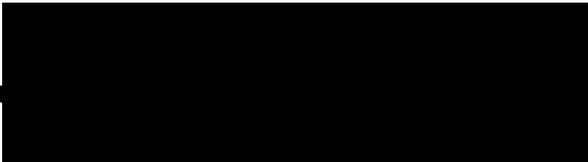
FILE: WAC 01 287 55030 Office: CALIFORNIA SERVICE CENTER

Date: **JAN 18 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:



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, Director
Administrative Appeals Office

DISCUSSION: The director initially approved the nonimmigrant visa petition. Upon subsequent review of the record, the director issued a notice of intent to revoke (NOIR), and ultimately did revoke, approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be affirmed. The petition's approval will be revoked.

The petitioner is a wholesale distributor of wireless communications equipment and accessories seeking to employ the beneficiary as an accountant. 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 (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation, filed on September 14, 2001; (2) the director's approval of the petition, dated November 13, 2001; (3) the director's March 23, 2004 notice of intent to revoke the petition (NOIR); (4) the petitioner's April 15, 2004 response to the NOIR; (5) the director's July 29, 2004 notice of revocation; and (6) the Form I-290B and supporting documentation, filed on August 16, 2004. The AAO reviewed the record in its entirety before issuing its decision.

Pursuant to 8 C.F.R. § 214.2(h)(11)(B)(iii)(5), the director may revoke an H-1B petition if approval of the petition violated paragraph (h) of 8 C.F.R. § 214.2, or involved gross error.

At the time the instant petition was filed in 2001, the petitioner proposed to employ the beneficiary as a part-time accountant. In its August 8, 2001 letter of support, the petitioner set forth the duties of the positions as follows:

[The beneficiary] will be responsible for compiling and analyzing financial information to prepare entries to accounts, such as general ledger account to document business transactions in accordance with generally accepted accounting principles (GAAP). The job will also involve preparation of financial statement, balance sheet, profit and loss statement[,] and other accounting reports. This aspect of the job does not call for [a] simple bookkeeping job which can be handle[d] by an ordinary bookkeeper or accounting clerk. . . .

[The beneficiary] will be expected to prepare cash flow and budgetary projection[s]. She will prepare [a] schedule of payments and will prepare reports to show the company's current and projected cash position. She will be expected to provide the management with the a [sic] sound advice on cash management. Consequently, she will have to prepare budgetary projections, which will involve analysis and costing.

The job will further inventory control, which will call for analysis of how much inventory of cell phones and accessories should be maintained at the warehouse to avoid unnecessary inventory cost.

On transactions involving importation of cell phones and accessories, [the beneficiary] will oversee the preparation of required banking documents such as Letter of Credit. She will prepare comparative analysis comparison between locally manufactured products versus imported items, the factors affecting prices as well as the revenues generated from each type of transaction.

Moreover, [the beneficiary] will be engaged in internal control measures. She will institute check and balance, and will examine expenses, assets, and liabilities. She will also audit sales vouchers, check shipping documents, review sales contract[s], and prepare reports to substantiate individual transactions prior to settlement.

Likewise, she will develop an accounting software to simplify operation, as well as to easily monitor daily financial transaction[s], sales, and collection. She will implement a sound accounting systems [sic] and procedures to ensure compliance with the GAAP and in adherence to company policies.

The legacy Immigration and Naturalization Service approved the petition on November 13, 2001.

The petitioner later filed a nonimmigrant petition (WAC 04 056 50181) for another proposed position within its company. The petitioner submitted an organizational chart, dated February 17, 2004, which showed that the beneficiary was working in its administrative department, not its accounting department. The petitioner also submitted a listing of all employees at the company, along with job descriptions. The beneficiary was not listed as an accountant. Rather, she was listed as the administrative manager. Her duties had also changed; she was no longer performing accounting functions for the company. Rather, her duties were set forth as follows:

- Makes recommendations related to establishing policies and procedures for the [administrative] department.
- Selects, trains, and evaluates professional and company personnel.
- Provides planning and management analysis services.
- Budget preparation and presentation.
- Contract monitoring.
- Economic or business needs forecasting.
- Develops and implements management techniques.
- Monitors external regulatory and legal precedents affecting the operation of the department.
- May act as a liaison with human resource, fiscal, risk management, or materials management personnel.

Accordingly, the director issued the NOIR on March 23, 2004. The NOIR articulated the concerns of the director and provided the petitioner 30 days during which to address these concerns. Specifically, the director noted that “[t]he petitioner no longer employs the beneficiary in the capacity specified in the petition.” Therefore, the director further noted, “the beneficiary is no longer eligible for classification under this section of the law.”

Counsel submitted a timely response to the director’s NOIR. Counsel stated the following:

Please be advised that the [organizational] chart described how the organization might appear with *the addition of another employee* (emphasis in original). Due to the continuing expansion of [the petitioner] with complex transactions and over nine million dollars in sales, the changed organizational model would have taken effect upon entry of the new employee.

[The beneficiary] at all times functioned as [an] Accountant with additional job duties. At present, [the beneficiary] is the Accountant of the company and she controls the Accounting Department. She has been and is still performing the functions as indicated in her petition.

In view of the company's voluminous transaction[s], the company has had 2 other part time accountants, namely [name redacted] and [name redacted]. [Name redacted] had voluntarily left the company while [name redacted] provided internal auditing, leaving the entire accounting function to [the beneficiary].

The Petitioner, [company name redacted] has always complied with the conditions of the Labor Condition Application that was filed and approved on behalf of [the beneficiary]. Enclosed please find the present organization chart.

Counsel submitted an organizational chart that differed from the one dated February 17, 2004. In the organization chart submitted with the NOIR response, the beneficiary was listed as the accountant. No administrative manager was named.

The director found counsel's response unpersuasive and revoked the approval of the petition. The director found counsel's contention that the February 17, 2004 organizational chart reflected only how the petitioner's company "might appear" unpersuasive:

At the time the USCIS received the petitioner's evidence pertaining to, WAC 04 056 50181, there was no mention [of] the organizational chart and the accompanying list of duties being prospective in nature. It serves no logical purpose and holds no evidentiary value for a petitioner to submit documents that are based on speculation or conjecture. The USCIS does not make determinations of eligibility based upon speculations of what may occur in the future. The record, as it currently stands, contains conflicting and contradictory evidence as to the actual duties that the beneficiary is currently, and has been previously[,] performing.

The director was not convinced that the beneficiary had been solely performing the duties of an accountant. The director noted that "[w]hen a petitioner signs the petition, he or she is certifying that the petition and all evidence submitted with it, either at the time of filing or thereafter, is true and correct."

The director also noted that it appeared as though the beneficiary appeared to have been working in a full-time capacity for the petitioner:

In his letter, counsel states that the beneficiary has been performing additional duties – the evidence of record supports this claim and thus further supports the USCIS position to revoke the instant petition. According to the petitioner's State of California Employment Development Department, Quarterly Wage Reports, Forms DE-6, it appears that the beneficiary has been employed on a full-time basis during 2002 and 2003, not on a part-time basis as was originally petitioned. . . . The performance of additional duties along with the change in the hours of employment constitutes a significant change in the terms and conditions of employment.

Finally, the director stated the following:

The numerous discrepancies encountered in the evidence call into question the petitioner's ability to document the requirements under the statute and regulations. The discrepancies in the petitioner's submissions have not been explained satisfactorily. . . .

In the present case, it appears that the petitioner has provided clear misrepresentation, possibly fraudulent, through the inconsistent and completely conflicting information. As such[,] the reliability of all of the evidence provided with the present petition is in question and will be accorded no evidentiary value. The USCIS is not convinced that the petitioner has employed the beneficiary solely in the capacity of an accountant during the validity period of the approved petition.

Counsel submitted a timely appellate brief and supporting documentation.

On appeal, counsel contends that the revocation is "arbitrarily punitive in nature and simply devastating to the company's future existence." Counsel asserts the following:

We maintain our position that the Beneficiary is being employed by the Petitioner in the capacity specified in the petition, i.e. an Accountant. The primary duties as stated in the original petition are being performed by the Beneficiary and such additional duties as may be incidental and necessary in order to complete the job effectively. Therefore, the mere inclusion of incidental duties such as management or supervision of subordinates that may be involved in the accounting process should not change or alter the requirements of the position as a specialty occupation since it increases, rather than decreases[,] the need for appropriate educational background (emphasis in original).

However, the issue on appeal is not whether the position qualifies as a specialty occupation. Accountant positions normally qualify for classification as specialty occupations, and supervisory accountants would therefore normally qualify as well. The issue here is whether the beneficiary was working pursuant to the terms and conditions of the approved petition, or whether the change in the beneficiary's duties constituted a "material change" to those terms and conditions.

Minor changes in job duties or salary increases do not necessitate the filing of a new petition, nor do promotions within the same occupation. Only material changes require the filing of a new petition. Letter, LaFleur, Chief, NIV Branch, Adjudications, HQ 214h-C (Oct. 12, 1995), *reprinted in* 72 No. 45 *Interpreter Releases* 1578, 1599-1601 (Nov. 20, 1995).

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(E) states, in part, the following:

Amended or new petition. The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training. . .

The regulation at 8 C.F.R. § 214.2(h)(11) states, in part, the following:

Revocation of approval of petition –

(i) *General*

- (A) The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(H) of this Act and paragraph (h) of this section. An amended petition on Form I-129 should be filed when the petitioner continues to employ the beneficiary.

The AAO agrees with the director and finds counsel's statement that the February 17, 2004 organizational chart and accompanying list of duties reflected how the petitioner's organizational structure "might appear" to be unsupported by the record. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 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 AAO agrees that there is no evidentiary value for a petitioner to submit documents that are based on speculation or conjecture. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Had counsel wished for CIS to consider these documents as speculative, he should have labeled them as such.

Accordingly, the AAO will review the information contained in the February 17, 2004 organizational chart and accompanying list of duties. The beneficiary's title was labeled as "administrative manager," and she was listed as working in the administrative department (as opposed to operating solely out of the accounting department).

The petitioner stated that the beneficiary coordinated the activities of all departments in the company: accounting, purchasing, sales, RMA, and IT. Such supervision of non-accounting functions was not reflected in the original petition.

The petitioner also stated that the beneficiary "selects, trains, and evaluates professional and company personnel." Such human resource-type duties were not reflected in the original petition, either. Nor was management analysis, or acting as a liaison with human resource, fiscal, risk management, or materials management personnel.

The responsibility to develop and implement management techniques was not in the original petition, either.

These are not accounting functions, and they are materially different from the duties listed in the original petition. After a thorough review of the record in its entirety, the AAO concludes that the duties of the position have materially changed since the petition was approved. The petitioner no longer employs the beneficiary in the capacity specified in the petition, and an amended petition should have been filed. The approval of the petition was properly revoked.

The director also questioned whether the petitioner still in fact employed the beneficiary on a part-time basis. This question arose after the director's review of the petitioner's Quarterly Wage and Withholding Report (DE-6). According to the Forms DE-6, the beneficiary earned \$7806 in the first quarter of 2003, \$6000 in the second quarter of 2003, \$10,012 in the third quarter of 2003, and \$11,226.75 in the fourth quarter of 2003, for a total annual income of \$35,044.75 in 2003.

According to the Form I-129, the beneficiary was to work 20 hours per week, at a compensation of \$18.50 per hour. This equates to \$370 per week, or \$19,240 for a 52-week period. Therefore, the beneficiary earned nearly twice the annual salary that would have been expected.

In his revocation, the director interpreted this as evidence that the beneficiary was no longer working on a part-time basis, thus lending further support to his decision to revoke the approval of the petition. On appeal, counsel responds to this issue as follows:

With regards to the change in the number of hours, it appears that the Service made a speculation based on the wages received by the Beneficiary as reflected in the DE 6, Quarterly Wage Report Forms that was [sic] previously submitted by the Petitioner. It was concluded by the Service that the Beneficiary has been employed on a full time basis during 2002 and 2003 [and] not on a part time basis as was originally petitioned. Please be advised that the wages received by the Beneficiary vary from 2002 and 2003.

It is not proper for the Service to make the above conclusion since the DE 6 does not indicate the number of hours worked by the Beneficiary. Enclosed please find the DE 6, previously submitted as Exhibit "E." Note that it was only during the last quarter of 2003 that the Beneficiary received \$10,013 [sic]¹, which reflect wages and the addition of performance related bonuses (emphasis in original).

Further, we believe that any minor change in the number of hours of employment would only necessitate an amendment of the conditions of employment and not be grounds for revocation.

Counsel's explanation would be reasonably accepted if the annual salary varied only slightly. However, as noted *supra*, the beneficiary earned nearly twice the annual salary that would have been expected. Had the salary varied only slightly, then it would have indeed been improper for the director to conclude that the beneficiary was not working on a part-time basis.

However, when coupled with the fact that the beneficiary's duties were changed significantly, an annual income that is nearly twice that normally expected leads the AAO to conclude that the beneficiary was not working on a part-time basis, and/or that the job duties had changed significantly. Counsel explained that the increased wage was the result of a performance bonus. Many employers offer performance-related bonuses. However, such bonuses rarely double a worker's annual salary. Moreover, counsel only addresses the quarter in which the beneficiary earned \$10,012 (the third quarter of 2003). As noted *supra*, the beneficiary earned \$7806 in the first quarter of 2003, \$6000 in the second quarter of 2003, and \$11,226.75 in the fourth quarter of 2003, all well over the \$4440 per quarter established on the LCA and in the petition.

Counsel asserts that "we believe that any minor change in the number of hours would only necessitate an amendment of the conditions of employment and not be grounds for revocation." The director and the AAO both agree with counsel that an amendment should have been filed.

The photocopies from the *H-1B Handbook* that counsel submits on appeal underscore this point. The pages submitted by counsel indicate that an amended petition is not required if there is "a change in

¹ According to the Form DE-6, the figure was actually \$10,012.

salary, unless the change is so dramatic that it indicates a significant change in responsibility or duties.” The beneficiary’s actual salary was nearly twice the amount indicated on the Form I-129, which, in the context of this record, indicates to the AAO that there was “a significant change in responsibility or duties.”

For this additional reason, the AAO concludes that the duties of the position have materially changed since the petition was approved. The petitioner no longer employs the beneficiary in the capacity specified in the petition, and an amended petition should have been filed. The approval of the petition was properly revoked.

Pursuant to 8 C.F.R. § 214.2(h)(11)(B)(iii)(5), the director may revoke an H-1B petition if approval of the petition violated paragraph (h) of 8 C.F.R. § 214.2, or involved gross error. In this instance, approval of the petition was in violation of paragraph (h) of the cited regulation in that the beneficiary is no longer employed by the petitioner in the capacity specified in the petition. *See* 8 C.F.R. § 214.2(h)(11)(B)(iii)(1).

Neither counsel nor the petitioner have offered sufficient evidence to overcome the grounds for the director’s revocation, and the AAO will not withdraw the director’s decision.

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 not sustained that burden.

ORDER: The director’s July 29, 2004 decision is affirmed. The approval of the petition is revoked.