U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 01 018 53184 Office: VERMONT SERVICE CENTER Date: JUN 15 2005

IN RE: Petitioner: [redacted]
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:

[redacted]

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 of the service center revoked the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be revoked.

The petitioner, a non-profit that provides consulting services to the Asian-American community, sought to employ the beneficiary as a community liaison. On January 11, 2001, CIS approved the petition in which the petitioner sought 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 director revoked the petition because the beneficiary had not been employed in the occupation for which she was petitioned. On appeal, counsel submits previously submitted evidence.

The regulation at 8 C.F.R. § 214.2(h)(11)(B)(iii)(A) sets forth the grounds for the revocation of an approved petition. The regulation states that the director shall send to the petitioner a notice of intent to revoke the petition if:

> (*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 regulation at 8 C.F.R. § 214.2(h)(12)(B) states that "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 record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's notice of intent to revoke the approved petition; (3) the petitioner's response to the notice; (4) the director's revocation letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The record reflects that the petitioner incorporated on May 16, 2000. On October 20, 2000, CIS received the H-1B petition seeking the beneficiary's services as a community liaison from October 22, 2000 to October 21, 2003. The petition was approved on January 11, 2001. On June 9, 2003, CIS sent a notice of intent to revoke, stating that based on an investigative report, the beneficiary's H-1B employment with the petitioner could not be confirmed, and that the beneficiary's salary was paid by another company. The notice indicated that the petitioner had 30 days in which to respond. In response to the notice, counsel submitted, in part: (1)

an employment agreement entered into by the petitioner and the beneficiary, which states that the petitioner is a subsidized organization of Chinese Express, Inc.; (2) the beneficiary's Form 1040EZ for 2001 and the Form W-2 issued by Chinese Express, Inc. for 2001; (3) a July 7, 2003 letter from the petitioner's owner and president stating that the petitioner began its operation in 2001, and has continued to serve the community; (4) a letter from the Office of the Governor, Commonwealth of Virginia; (5) a letter regarding closing documents for real property and a deed entered into on June 21, 2000; (6) documents relating to real property; (7) the beneficiary's checking account statements; (8) cancelled checks and payroll records showing that Chinese Express paid the beneficiary's monthly salary from March 2001 to December 2001; and (9) the IRS Form 8869.

The director revoked the petition under 8 C.F.R. § 214.2(h)(11)(B)(iii)(A). The director stated that if the petitioning entity was not in operation when the petition was filed on October 20, 2000, then its approval was made in error. Citing *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971), the director stated that a petitioner must establish eligibility at the time of filing, and that a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. The director stated that the Form W-2 reveals that in 2001 Chinese Express, Inc. paid the beneficiary's wages, and that the July 7, 2003 letter indicates that the petitioner started its operation in 2001, which is inconsistent with the H-1B petition as it shows that the petitioner began operation in 2000. Citing *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971), the director stated that a petitioner must establish eligibility at the time of filing, and that a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. According to the director, no evidence demonstrated that the beneficiary was employed by the petitioner in 2002, and that after the establishment of the subsidiary between Chinese Express, Inc. and the petitioner, the beneficiary's duties had not materially changed. Citing *Matter of Treasure Craft,* 14 I&N Dec. 190 (Reg. Comm. 1972), the director stated that going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. The director found inconsistencies in the evidence, and cited *Matter of Ho,* 19 I&N Dec. 582 (BIA 1988), which states that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence in support of the visa petition.

On appeal, counsel asserts that the director did not properly consider the evidence. Counsel states that upon the petition's approval on January 11, 2001, the beneficiary began working for the petitioner, and that she continued to work in accordance with her H-1B classification after the petitioner became a subsidiary. Counsel maintains that the director concluded that the petition was not approvable at the time it was filed based on the erroneous inference that the petitioner was not operational in 2000 since its full-fledged operation started at the beginning of 2001. Counsel states that although the petition indicates that the petitioner was established in 2000, this does suggest that it began full-fledged operations in 2000. Counsel asserts that the petition was filed in October 2000 after the company was operational, and the evidence reveals that it was approvable at the time of filing. According to counsel, the statute at 8 U.S.C. § 214(c)(10) states that an amended petition is not required in situations involving a successor in interest, acquisition, or merger. Counsel maintains that because the petitioner merged to become a subsidiary of Chinese Express, Inc., it was not required to file an amended petition. Referencing the petitioner's July 7, 2003 letter, counsel states that it

shows that Chinese Express, Inc. continues to honor the petitioner's obligations with the beneficiary, and that the beneficiary continues to perform the duties of the specialty occupation.

Based on the evidence in the record, the petitioner has failed to overcome the grounds for revocation of the approved petition under 8 C.F.R. § 214.2(h)(11)(B)(iii)(A).

The regulation at 8 C.F.R. § 214.2(h)(11)(B)(iii)(A)(*1*) states that an approved petition is revocable if the beneficiary is no longer employed by the petitioner in the capacity specified in the petition. No evidence shows that the petitioner actually employed the beneficiary as a community liaison upon the approval of the petition on January 11, 2001. The H-1B petition and accompanying company letter indicate that the petitioner began operations in the year 2000, which is the month the petition was filed; in the July 7, 2003 letter the petitioner averred that it "started its operations in 2001." No evidence in the record shows that the petitioner actively engaged in business in the years 2000 and 2001. The petitioner's business plan and letters from Chippenham Insurer[redacted]Pettus & Company, Realtors, and Advertising Concepts, Inc. show preliminary efforts to launch the petitioner's business, but they do not reveal whether or not the petitioner actively operated a business enterprise in the years 2000 and 2001. The cancelled checks and payroll records reveal that Chinese Express Inc., not the petitioner, paid the beneficiary's salary in 2001. The July 3, 2003 letter from Robert F. Pannell, II indicates that the petitioner purchased property with the intention to ultimately develop it as its home service center, but this does not establish that the petitioner actively engaged in business in the years 2000 and 2001. The letter from the Office of the Governor, Commonwealth of Virginia, appointing the petitioner's president to the Virginia Workforce Council is irrelevant in establishing whether the petitioner actively engaged in business in 2000 and 2001. The deed granting real property to the petitioner shows that it secured a business location, and the letters from the Commerce Bank of Virginia and the Bank of Essex show that the petitioner had banking accounts, but these documents do not show that the petitioner actively engaged in business operations. The petitioner submitted no federal or state income tax records for the years 2000 and 2001 to show that it operated in those years.

The record also contains Form 8869, Qualified Subchapter S Subsidiary Election. This form is used when a parent S corporation elects to treat one of its eligible subsidiaries as a qualified subchapter S subsidiary (QSub). The QSub election results in a liquidation of the subsidiary into the parent. Following the liquidation the QSub is not treated as a separate corporation, all of the subsidiary's assets, liabilities, and items of income, deduction, and credit are treated as those of the parent. On Form 8869, Chinese Express, Inc. is shown as the parent S corporation; Asian American Consulting Group, Inc. is the subsidiary corporation for which the election was made. Interestingly, although the Qsub election form is dated June 15, 2001, it indicates that the election is to take effect on January 1, 2001, which is the month the H-1B petition is approved. The election to liquidate the petitioner into Chinese Express, Inc. does not, however, establish that the petitioner actively operated from October 2000 to June 15, 2001, or employed the beneficiary as a community liaison upon the approval of the petition.

Although the petitioner asserts in the July 7, 2003 letter that the beneficiary continues to be employed as a community liaison, we have already discussed that no evidence establishes that the petitioner actively

engaged in business in 2000 and 2001 and that it employed the beneficiary's services as a community liaison. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Based on the above discussion, the director properly determined that the petitioner failed to overcome the ground for revocation under 8 C.F.R. § 214.2(h)(11)(B)(iii)(A)(*1*), which states that an approved petition is revocable if the beneficiary is no longer employed by the petitioner in the capacity specified in the petition.

Under 8 C.F.R. § 214.2(h)(11)(B)(iii)(A)(*2*), an approved petition is revocable if the statement of facts contained in the petition is not true and correct. As we have already discussed in this decision, no evidence shows that the company actively engaged in business in the years 2000 and 2001, and employed the beneficiary's services as a community liaison. Thus, the statement of facts contained in the petition, that the petitioner will employ the beneficiary's services as a community liaison upon the approval of the petition, is not true and correct. Consequently, the director correctly concluded that the petitioner fails to overcome the ground for revocation under 8 C.F.R. § 214.2(h)(11)(B)(iii)(A)(*2*).

The regulation at 8 C.F.R. § 214.2(h)(11)(B)(iii)(A)(*3*) states that an approved petition is revocable if the petitioner violated terms and conditions of the approved petition. Based on the submitted evidence, the petitioner fails to establish that it employed the beneficiary's services as a community liaison under the terms and conditions as described in the petition and its accompanying documents. As such, the director properly determined that the petitioner fails to overcome the ground for revocation under 8 C.F.R. § 214.2(h)(11)(B)(iii)(A)(*3*).

Pursuant to 8 C.F.R. § 214.2(h)(11)(B)(iii)(A)(*4*), an approved petition is revocable if the petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section. The Act states that an amended petition is not required in a corporate restructuring, including a successor in interest, acquisition, consolidation, or merger, where a new corporate entity succeeds to the interests and obligations of the original petitioning employer and where the terms and conditions of employment remain the same but for the identify of the petitioner. On appeal, counsel cites 8 U.S.C. § 214(c)(10) and asserts that the petitioner is not required to file an amended petition because of the merger of the petitioner into Chinese Express, Inc. We disagree with counsel's assertion. The statute at 8 U.S.C. § 214(c)(10) states that an amended petition is not required in a corporate restructuring, including a successor in interest, acquisition, consolidation, or merger, where a new corporate entity succeeds to the interests and obligations of the original petitioning employer and where the terms and conditions of employment remain the same but for the identify of the petitioner. No evidence in the record establishes that the terms and conditions of the beneficiary's employment remained the same after the liquidation and that the beneficiary continued to perform the specialty occupation for which the petition was approved. The AAO notes the dissimilar nature of the petitioner, a nonprofit providing consulting services to the Asian-American community, from that of Chinese Express, Inc., a network of locally based Chinese food restaurants. Consequently, the petitioner fails to establish that it was not required to file an amended petition. As such, the petitioner fails to overcome the ground for revocation under 8 C.F.R. § 214.2(h)(11)(B)(iii)(A)(*4*).

Pursuant to 8 C.F.R. § 214.2(h)(11)(B)(iii)(A)(5), the approval of a petition is revocable if it violated paragraph (h) of this section or involved gross error, and under section 101(a)(15)(H)(i)(b) of the Act a nonimmigrant alien is defined as one who is coming to perform services in a specialty occupation. 8 C.F.R. § 214.2(h)(1)(i). Based on the evidence in the record, the petitioner fails to establish that it employed the beneficiary as a community liaison in accordance with the approved petition and its accompanying documents. As such, the director properly determined that the petitioner fails to overcome the ground for revocation under 8 C.F.R. § 214.2(h)(11)(B)(iii)(A)(5).

As related in the discussion above, the petitioner has failed to overcome the grounds of revocation of the approved petition. Accordingly, the AAO shall not disturb the director's revocation of the petition.

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 appeal is dismissed. The petition is revoked.