U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Room 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 99 227 53340 Office: NEBRASKA SERVICE CENTER Date:

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]

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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 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 appeal will be dismissed. The petition's approval will be revoked.

The petitioner is an automotive glass lamination and fabrication company that seeks to employ the beneficiary as an industrial organization manager. 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 August 19, 1999; (2) the director's November 24, 1999 request for additional evidence; (3) previous counsel's November 30, 1999 response to the director's request; (4) the director's approval of the petition, dated January 10, 2000; (5) the American Consulate in Dubai's November 5, 2000 consular return of the petition; (6) the director's November 5, 2001 NOIR; (7) the director's April 10, 2002 revocation; (8) newly-retained counsel's September 18, 2003 motion to reopen or reconsider; (9) the director's May 20, 2005 rejection of counsel's motion; and (10) the Form I-290B and supporting documentation, including counsel's July 15, 2005 submission of supplemental documentation. The AAO reviewed the record in its entirety before issuing its decision.

After obtaining the H-1B approval notice, the beneficiary appeared at the United States consulate in Dubai to obtain the visa. The reviewing officer denied the visa and returned the petition to the service center, stating the following:

> Although [the beneficiary] did not bring the complete Form I-129, the interviewing officer was able to determine [that] he is unable to fulfill the duties of an Industrial Manager. The applicant's bachelor's degree from the Islamic Azad University is in the field of Industrial Management. The State of Colorado Prevailing Wage Request Form, submitted by the company's owner[,] stated that the new employee would require 'knowledge of auto glass lamination and fabrication processes.['] [The beneficiary] presented a letter of employment from his previous employer, Automobile Radiators Manufacturing Company, stating [that] he had been employed as Manufacturing Director. When questioned, [the beneficiary] stated [that] the only thing he knew about glass was from his father's job long ago. [The beneficiary] provided no documentation showing an educational background or work experience in the auto glass field.
>
> In light of the applicant's inexperience and lack of knowledge regarding the proposed field of endeavor, post refused the application under Section 221(g) of the INA, pending revocation of the petition by the INS.
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> Based on the foregoing, the approved petition and all relevant documents are being returned for appropriate action. Post contends that if the INS adjudicator had known of these facts when the petition was filed, the petition would not have been approved.

The reviewing officer relayed these concerns to the service center, and the director, finding that these issues constituted good and sufficient cause, issued the NOIR on November 5, 2001.

The director's NOIR included a memorandum from the consulate relaying the reviewing officer's concerns and provided the petitioner 30 days during which to address these concerns. However, the petitioner did not respond, and the director revoked the approval of the petition on April 10, 2002.

Newly-retained counsel filed a motion to reopen or reconsider on September 18, 2003. Counsel contends that the petitioner never received the NOIR or revocation because the director sent those documents to previous counsel's office. Counsel submits an affidavit from previous counsel, dated September 17, 2003, in which previous counsel asserts that she relocated her office to a new address in January 2000 (eleven months prior to the director's issuance of the NOIR) and did not receive a copy of the NOIR.[1]

The director rejected counsel's motion on the basis of its untimely filing. The director noted that the revocation had not been returned to the service center as undeliverable. The director also noted the lack of any corroborating evidence of the relocation of previous counsel's office and the failure of previous counsel to provide the exact date her office move occurred.[2] The director therefore found that the petitioner had not provided or documented any excusable reason for the 17-month delay in filing the motion.

Counsel filed the Form I-290B, Notice of Appeal to the Administrative Appeals Office, on June 20, 2005.

The AAO will adjudicate this case on its merits. However, before undertaking its own analysis of this case, the AAO reminds counsel and the petitioner that the scope of its jurisdiction in this case is narrow. Issues relating to the beneficiary's maintenance of nonimmigrant status are beyond the scope of its jurisdiction. The sole question before the AAO is whether the petitioner has met its burden of proof in overcoming the concerns of the director and the reviewing officer at the American consulate in Dubai,[3] as articulated in the director's NOIR.

Accordingly, the AAO must determine whether, at the time the petition was filed, the beneficiary qualified to perform the duties of the proposed position. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

> (*1*) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

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[1] Previous counsel states the following: "I notified the INS of my new address by filing new G-28's [sic] for all pending cases. I did not provide new G-28's [sic] for old cases that had been approved such as [the beneficiary's]. I also initiated the forwarding/change of address procedures with the U.S. Postal Service which I understand remains in effect for one year. I also notified the postal worker and new tenants at my former address of my new address in the event anything needed forwarding to me . . . I can attest that neither I, nor anyone in my office, ever received a notice of the Service's intent to revoke [the beneficiary's] H-1b visa."

[2] In his denial, the director noted that, while previous counsel stated that her office relocation had occurred in January 2000, she *had* received the approval notice, which was also issued in January 2000.

[3] Subsequent to the U.S. consulate in Dubai's refusal to grant the visa, the beneficiary applied for a visa at the U.S. consulate in Ankara, Turkey. The consulate issued the visa. As the consulate in Dubai had returned the underlying petition to the service center when it rejected the visa application, the basis of the visa's issuance in Turkey is unclear to the AAO.

> (*2*) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
>
> (*3*) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
>
> (*4*) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Here, the beneficiary appears to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), which requires a demonstration that the beneficiary holds a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university, as an evaluation contained in the record states that the beneficiary "has the equivalent of a bachelor's degree in business administration with a concentration in manufacturing management from an accredited college or university in the United States."

However, when a proposed position requires specific education or experience in excess of the requirements set forth at 8 C.F.R. § 214.2(h)(4)(iii)(C), the beneficiary must meet those requirements. When the petitioner submitted its prevailing wage determination to the Colorado Department of Labor and Employment it specifically noted the following requirement in the "Other Special Requirements" field:

> Need knowledge of auto glass lamination and fabrication process.

In its initial letter in support of the application, the petitioner's director of human resources stated the following:

> We will make particular use of [the beneficiary's] specialized knowledge and skills involving [g]lass fabrication and production.

Accordingly, the petitioner made knowledge of glass lamination, fabrication, and production a requirement for the position. When the beneficiary told the reviewing officer at the consulate that "the only thing he knew about glass was from his father's job long ago," the consulate properly raised questions regarding the beneficiary's qualifications for this position.

On appeal, counsel states the following:

> While the petition indicates that the business is involved in auto glass lamination and fabrication, this does not transform the position [in which the beneficiary] was to be employed in into [sic] an industrial or manufacturing engineer that would required [sic] detailed knowledge of lamination or fabrication of auto glass.

The AAO does not agree. Upon review, the petitioner has failed to overcome the director's revocation.

Counsel's assertion fails, as it directly conflicts with the petitioner's statement on the prevailing wage request, which specifically states that knowledge of the auto glass lamination and fabrication process is required. In attempting to remove this qualification, counsel attempts to amend the petition by changing the proposed position's requirements. **However, such amendments on appeal are not permitted.** A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Moreover, counsel's attempted amendment to the qualifications for the proposed position, if accepted, would call into question the validity of the prevailing wage determination, as knowledge of the auto glass lamination and fabrication process was a component of that determination. If the validity of the prevailing wage determination, upon which the labor condition application was certified, were called into question, then the validity of the certified labor condition application is called into question as well.

If the petitioner had not intended for the qualifications of the proposed position to include knowledge of the auto glass lamination, production, and fabrication processes, then it should not have made such requirements a part of the petition. Counsel has not explained why such qualifications were required at the time the petition was filed, but are not required now. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO finds that counsel and the petitioner have failed to overcome the concerns of the interviewing officer regarding the qualifications of the beneficiary to perform the duties of the proposed position, as those qualifications were set forth in the initial petition.

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 because the beneficiary is not qualified to perform the services of the specialty occupation.

Finally, the AAO turns to counsel's contention that the director revoked the petition's approval on grounds other than those stated in his NOIR. The contents of the NOIR were set forth previously; the director noted the concerns of the reviewing officer regarding the beneficiary's qualifications to perform the duties of the proposed position. The regulation at 8 C.F.R. § 214.2(h)(11)(iii)(A)(*1*) states that the director shall send the petitioner a NOIR if he finds that the beneficiary is no longer employed by the petitioner in the capacity specified in the petition. The issue before the director was whether the beneficiary is qualified for the position proposed by the petitioner in the petition. If the beneficiary were found unqualified for that position, he could not have been working in the capacity specified by the petitioner in its petition. As such, the AAO does not find counsel's contention persuasive.

Accordingly, no evidence has been offered to overcome the grounds for 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 appeal is dismissed. The approval of the petition is revoked.