U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: SRC 05 108 51123 Office: TEXAS SERVICE CENTER Date: AUG 14 2007

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.

for Michael T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, approved the nonimmigrant visa petition on March 28, 2005. On March 8, 2006, 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. On April 24, 2006 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 sustained. The director's revocation of the approved petition will be withdrawn. The petition will remain approved.

Established in 1983, the petitioner is in the business of importing, wholesaling and retailing used Japanese car engines, transmissions and related parts as well as repairing and rebuilding those parts. The petitioner has six (6) employees and a gross annual income of $980,000. Pursuant to a previously approved H-1B petition filed on behalf of the beneficiary, the petitioner has been employing the beneficiary in an automotive engineer position. 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 request for further evidence (RFE); (3) counsel's response to the director's RFE and supporting documents; (4) the director's notice of intent to revoke approval; (5) counsel's response to the NOIR; (6) the director's decision revoking approval of the petition; and (7) counsel's appeal. The AAO reviewed the record in its entirety before issuing its decision.

The NOIR stated that the beneficiary appeared for interview at the American Institute in Taiwan and that "upon interview, the Officer returned the petition to this Office requesting review and possible revocation." The NOIR requested the petitioner to address the following and to submit convincing evidence in support of its petition:

> The beneficiary was petitioned to assume the position of automotive engineer. During interview, the beneficiary claimed to have 5 years of automotive experience with Ding Li Metal Industrial Co., LTD, a Taiwanese company between 1990 and 1995. The beneficiary was also attending Nan Kai College full-time during this claimed period. Also, the beneficiary was in the U.S. since 1997 initially as a [sic] F-1student and then changed status to E-2 to operate a breakfast shop with stated income of less than $5,000.00. The fraud prevention unit contacted the beneficiary's claimed former employer in order to verify his employment claims. The entity did not have any record of the beneficiary ever working there. Therefore, it appears the beneficiary submitted fraudulent evidence in order to gain a benefit.

On April 24, 2006 the director revoked the petition based on her determination that the petitioner failed to overcome the grounds specified in the NOIR. The director stated that the petitioner did not submit a response to the NOIR and, therefore, determined that the beneficiary submitted fraudulent evidence in order to gain a benefit. Furthermore, the director determined that the beneficiary was not eligible for the classification sought and that the H-1B classification would be revoked.

Generally, a director's decision to revoke the approval of a petition will be affirmed, notwithstanding the submission of evidence on appeal, where a petitioner fails to offer a timely explanation or rebuttal to a properly issued notice of intention to revoke. *See Matter of Arias*, 19 I&N Dec. 568, 569 (BIA 1988). On appeal counsel disputes the director's findings and states on the Form I-290B that the basis for the revocation is wrong because, contrary to the director's finding, a response to the NOIR had been submitted. As evidence that the response to the NOIR was timely filed, counsel includes a USPS certified mail receipt with a USINS stamp dated April 10, 2006. A review of CIS records indicates that the petitioner's statement is credible. CIS electronic records include an entry for receipt of a change-of-address document at the time the petitioner claims to have filed the NOIR response, but no such document or change of address actually appears in the record of proceedings. Therefore, the only issue before the AAO is whether the petitioner has overcome the grounds for revocation specified in the NOIR.

The regulation at 8 C.F.R. § 214.2(h)(11)(iii), which governs revocations that must be preceded by notice, states:

> (A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
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> *(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
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> *(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.
>
> (B) *Notice and decision.* 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 petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

The director's revocation attempts have not complied with the notice, opportunity-to-respond, and decision requirements of the Citizenship and Immigration Services (CIS) regulations on revocation.

To comply with the notice requirements of 8 C.F.R. § 214.2(h)(11)(iii), a director's decision to revoke a previously approved petition must be preceded by a NOIR. This document should: (1) specify the section or sections of 8 C.F.R. § 214.2(h)(11)(iii)(A) under which the director proposes to revoke the approved petition; (2) for each section of 8 C.F.R. § 214.2(h)(11)(iii)(A) specified as a basis for revocation, present a detailed statement of the factual grounds that justify the proposed revocation; and (3) specify the time period (of at least 30 days) allowed for the petitioner to submit a response to the NOIR.

Although the March 8, 2006 NOIR conveyed that the director intended to revoke the petition, this letter did not constitute an adequate NOIR. While the NOIR gave the petitioner 30 days in which to address the consulate's objections, the notice did not specify the particular provisions of 8 C.F.R. § 214.2(h)(11)(iii)(A) upon which the director proposed to act. The NOIR also failed to present a detailed statement of the factual grounds upon which the director proposed to act. Furthermore, by not considering the petitioner's response to the director's March 6, 2006 NOIR, the director denied the petitioner its right under 8 C.F.R. § 214.2(h)(11)(iii)(B) to have those matters considered before the director issued a revocation decision.

The crux of the objections presented in the director's NOIR rests upon the fact that the fraud prevention unit contacted the beneficiary's previous employer in order to verify employment and the employer did not have a record of the beneficiary ever working there. The director does not provide any additional information. There is no indication of whom the fraud prevention unit spoke with, the position of the individual(s) within the company, the individual(s) familiarity with the beneficiary or with the company's employment records, or about the substance of the conversation.

In response to the NOIR, counsel presents a letter dated March 14, 2005 from [redacted] president of Dinli, confirming the beneficiary's employment from January 1990 to June 1995. Although CIS is authorized to revoke H-1B petitions approved in error or on the basis of incorrect information, the statements in the NOIR are too vague to overcome a letter by the president of the company confirming the beneficiary's employment.

Therefore, for the reasons just discussed, the AAO concludes that the director erred in basing her revocation of the instant petition on the lack of a response to the NOIR by the petitioner. As the petitioner has effectively refuted the grounds specified in the NOIR, the AAO will sustain the petitioner's appeal and withdraw 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 met that burden.

ORDER: The appeal is sustained. The director's April 24, 2006 decision to revoke approval of the petition is withdrawn. The petition remains approved.