U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: FEB 04 2013 OFFICE: VERMONT SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner states that it is a business engaged in projects for engineering and hydraulics with two employees with a gross annual income of $232,931. It seeks to continue to employ the beneficiary as a civil engineer advisor and to classify him 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 approval of this extension petition on each of two separate grounds, namely: (1) that an employer-employee relationship did not exist between the petitioning employer and the beneficiary, based upon information obtained from a U.S. Citizenship and Immigration Services administrative site visit and from the State of Florida's Department of State Division of Corporations Internet site; and (2) that approval of the petition was erroneous, in that the petitioner had failed to establish that the proffered position was a specialty occupation.

The record of proceeding before the AAO contains: (1) Form 1-129 and supporting documentation; (2) the director's notice of intent to revoke (NOIR); (3) the notice of decision to revoke; and (4) the Form I -290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

On July 1, 2009, the petitioner filed an H-1B petition with USCIS, and it was approved on November 6, 2009 for a validity period from August 1, 2009 up to and including August 1, 2011.

This petition was randomly selected for a post adjudicative administrative site visit. On December 29, 2009, the site inspector discovered that the petitioner's business was closed for the holidays, as indicated by a sign placed on the petitioner's business door. The site inspector interviewed an individual at a neighboring business located next to the petitioner's place of business. The named interviewee identified himself as the father of the neighboring business owner, who stated that he believed that the beneficiary was the owner of the petitioning business, and that the owner was an employee of the business.

The director issued a Notice of Intent to Revoke (NOIR) on December 17, 2010 requesting the petitioner to submit, in relevant part:(1) indicia of a valid employer-employee relationship; (2) evidence of the petitioner's ongoing business operation; and (3) evidence supporting the claim that the proffered position is a specialty occupation within the applicable statutory and regulatory scheme. The director also questioned an individual at a neighboring business. Within the NOIR, the director indicated that a final decision would not be made for 33 days.

The director revoked the approval of the petition on August 2, 2011, stating that because the petitioner had failed respond to the NOIR," the grounds of revocation have not been overcome.".

Through counsel, the petitioner filed a timely appeal of the revocation, on September 2, 2011.

The appeal does not dispute the director's statement that the petitioner had not responded to the NOIR. On appeal, counsel submits a brief dated September 1, 2011, wherein he states that the director

erred in determining that the petitioner may not be in operation and that the beneficiary may have an ownership interest in the petitioning entity. Counsel further maintains that a valid employer-employee relationship exists between the petitioner and the beneficiary, and also declares that the beneficiary works in a specialty occupation position. In support of these contentions, counsel submits a brief and evidence.

As a preliminary matter, the AAO finds that information gained in the administrative site-visit is not in itself a sufficient basis to revoke the approval of this petition. The site inspector placed relied upon information provided by an individual at a neighboring business. The summary of findings report produced by the site inspector does not specifically identify the individual who was interviewed. Moreover, the summary of findings does not identify the neighboring business, or explain the interviewee's source of knowledge or opinion regarding the petitioner's ownership, its operations, and the beneficiary's place in the petitioner's business structure. Further, on appeal, counsel for the petitioner provides an affidavit of the interviewee, who explains that his observations regarding the petitioner and the beneficiary were made in passing, without a full knowledge of which man is the business owner of the petitioner and which man is the employee of the petitioner.

The AAO further finds, however, that while the information from the site visit is not in itself sufficient grounds for revoking approval of the petition, the issues that the site visit raised and that were specified in the NOIR did provide proper bases for revocation.

At the outset, the AAO finds that the totality of the evidence in the record of proceeding, including the documentation submitted on appeal, sufficiently addresses the employer-employee issue as to effectively rebut and overcome it as a basis for revoking approval of this petition. Accordingly, the AAO hereby withdraws as a basis for revocation in this matter the director's implicit finding that the petitioner failed to establish itself as a U.S. employer as defined at 8 C.F.R. § 214.2(h)(4)(ii).

The AAO will now address the remaining basis of the revocation action in this case, namely, the director's finding that the petition had been erroneously approved because the evidence in the record of proceeding failed to establish the proffered position as a specialty occupation.

The regulation at 8 C.F.R. § 214.2(h)(10)(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 AAO finds that the content of the NOIR was sufficient to place the petitioner upon notice of the director's intention to revoke approval of the petition on each of two bases related to the earlier USCIS determination that the proffered position was a specialty occupation, namely: (1) that the petition's assertion that the beneficiary would serve in a Civil Engineer Advisor position whose performance would require at least a bachelor's degree, or the equivalent, in a specific specialty, was not true and correct (so as to constitute a ground for revocation under 8 C.F.R. § 214.2(h)(10)(iii)(A)(*2*)),and (2) that, because the petitioner had not actually established that the proffered position was a specialty occupation, the approval of the petition violated the H-1B specialty occupation requirements as specified at 8 C.F.R. § 214.2(h) and also constituted gross error (which states grounds for revocation pursuant to 8 C.F.R. § 214.2(h)(10)(iii)(A)(*2*)).

The AAO specifically finds that the requests for documentary evidence of the substantive nature of the beneficiary's work alerted the petitioner of what the AAO also finds to be a material lack of substantive evidence, in the record of proceeding before the director when the NOIR and revocation decisions were issued, substantiating the petition's claim that the beneficiary would be employed in a position that requires the theoretical and practical application of at least a bachelor's degree level of knowledge in a specific specialty, as required to satisfy the statutory and regulatory requirements for an H-1B specialty occupation as defined at section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii).

The AAO acknowledges the duties and associated time requirements that counsel states in his brief on appeal. The AAO also taken into account all of the allied documents that counsel submits with the brief. However, the AAO finds that neither alone nor in the aggregate do those documents establish what the particular person who is the beneficiary here has been doing in the course of his employment under the approved petition that would substantiate the proffered position as being one that requires at least a bachelor's degree, or the equivalent, in civil engineering, or, for that matter, in any other specific specialty.

The record of proceeding does not reveal the substantive nature of the actual work that would be involved, substantial information about any applications of a body of highly specialized knowledge in any specialty that would be required to perform such work, or a necessary correlation between such

work and the necessity for the beneficiary to hold at least a bachelor's degree, or the equivalent, in a specific specialty closely related to the nature of the proffered position as it would actually be performed. In this regard, the AAO specifically finds that none of the documents – including the Contractor Agreements submitted into the record – substantiate whatever "civil engineering issues" have been involved in the performance of those contracts or any other work. The record of proceeding lacks substantive evidence of any projects and work assignments of the beneficiary during the period of employment covered by the approved petition. Further, the AAO specifically notes that it is not apparent in the record of proceeding that the drawings and diagrams that are presented on appeal in any way involved the beneficiary in specialty-occupation level work.

Additionally, because the evidence in the record of proceeding does not have documentary evidence supporting the accuracy of the assertions in counsel's brief regarding the beneficiary's duties and the related worktime expenditures, those claims merit no weight. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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 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).

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. The burden of proof in these proceedings rests solely with the petitioner. Accordingly, the appeal will be dismissed, and the petition will be revoked.

**ORDER:** The appeal is dismissed. The petition is revoked.