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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUN 2 8 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE: [redacted]

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:

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 initially approved the nonimmigrant visa petition. In response to new evidence, the director issued a notice of intent to revoke (NOIR), and ultimately did revoke the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. Approval of the petition will remain revoked.

The Form I-129 visa petition was filed at the California Service Center on February 25, 2011, and states that the petitioner is a software consulting firm with 2 employees. In order to employ the beneficiary in what it designates as a Software Engineer position, the petitioner seeks 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 petition was approved on March 23, 2011. However, on February 13, 2012, the director issued a notice of intent to revoke (NOIR) in this matter. The petitioner's response was received on March 14, 2012. Subsequently, on May 18, 2012, the director revoked approval of the visa petition. The instant appeal followed.

The director's revocation of approval of the petition was based on his finding that the evidence available indicates that the petitioner has violated the terms and conditions of the approved visa petition. Specifically, the director found that the petitioner is no longer employing the beneficiary at the location specified in the visa petition and that the evidence also indicates that it is no longer employing the beneficiary in the position specified in the visa petition. Those are the terms and conditions that the director found that the petitioner had violated, and the decision of revocation was based on 8 C.F.R. § 214.2(h)(11)(iii)(a)(*3*).

The AAO has determined that the director did not err in her decision to revoke approval of the petition. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will remain revoked.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's notice of intent to revoke (NOIR); (3) the response to the NOIR; (4) the director's revocation letter; and (5) the Form I-290B and counsel's submissions on appeal.

USCIS may revoke the approval of an H-1B petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii), which states the following:

> (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:
>
> *(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, inaccurate, fraudulent, or misrepresented a material fact; 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 LCA submitted to support the visa petition states that the beneficiary would work at No other place of employment is listed on the LCA, and it is valid only for employment in and near Irwindale. The LCA states that the proffered position is a software engineer position, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1031.00, Computer Software Engineers, Applications. The LCA further states that the proffered position is a Level I position.

The visa petition also states that the beneficiary would work at the Irwindale, California address, and that his job title is Software Engineer. As to the duties of the position, the visa petition states:

> Installation of Business Objects Data Services on UNIX machine. Creation of Oracle database on UNIX and creating a repository based on it. Create Transfer structures in BW as destination to load data using Data Services in BW. (see support letter)

Evidence provided with the visa petition indicates that the petitioner has contracts pursuant to which it provides workers to A task order appended to that contract indicates that the beneficiary is to be provided to pursuant to that contract, and that he is to be provided to The start date listed on that agreement is "10/5/2010 or 10/6/2010." It states that the beneficiary's role would be "Sr. BOBJ Func. Analyst," and the scope of his services is "TBD," (to be determined). No end date is listed on that task order.

An undated letter from the president of states that the beneficiary is assigned to that his job title is software engineer, and that his supervisor on the project is It does not state whether is an employee of the petitioner, of or of some other entity. That letter does not indicate when the beneficiary's assignment to through that chain of companies would end.

A letter, dated February 6, 2011 is signed by both a manager at and an engagement manager at was then providing IT services to at its , or elsewhere, as directed by management, and that expected that would continue to provide those services. It states that, "[the beneficiary] is involved in providing those services to ," and that "The work location address is

An employment contract executed by the petitioner and the beneficiary states:

> [The beneficiary] will be assigned to work at (*address*) of the duration of the project or until another project/task is assigned.

Subsequent to the petition's approval, the director issued a NOIR to the petitioner, stating that USCIS had obtained new information regarding the beneficiary's employment with the petitioner. Specifically, the NOIR stated:

> On May 6, 2011, an administrative site visit was performed at the address listed on the petition as the location where the beneficiary would work. Upon review of the work location address at the site inspector discovered that:
>
> - No one interviewed at that location had heard of the petitioner or the beneficiary; and
> - The beneficiary was not working at that address.
>
> In addition, the site inspector called the phone number listed on the I-129 petition and spoke with the signatory of the present petition. During the phone conversation, indicated that the beneficiary now works in Arizona. As such, the petitioner provided a new LCA, certified after the time of filing that included the location of Mason, Ohio. This location was not mentioned in the phone conversation with the signatory of the petition and was not a location that was mentioned in the petition. As such, it is unclear where, when, and for whom the beneficiary has and will be working.

As was also observed in the NOIR, and as recognized by the court in *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. That court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 387-388. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. The NOIR observed that, as the beneficiary was no longer working in the position with whether the beneficiary was working in the same position with the same job duties was unknown.

The NOIR also observed that, as the beneficiary was no longer employing the beneficiary at the location specified in the visa petition, the petitioner had violated the terms and conditions of the approved petition.

In response to the NOIR, counsel submitted (1) a list of the locations where the beneficiary has worked since the instant visa petition was approved; (2) some additional documents pertinent to the beneficiary's recent employment; (3) a new LCA; and (4) counsel's own letter, dated March 12, 2012.

The list of locations states that the beneficiary worked at the from October 13, 2010 to April 8, 2011; at the from April 11, 2011 to November 3, 2011; and at the from December 2, 2011 to "Present." Other documents confirm the beneficiary's employment in Ohio and New Jersey.

The new LCA was certified on January 13, 2012, for employment in New Jersey.

In his March 12, 2012 letter, counsel stated that the beneficiary was no longer employed in Irwindale, California, but was working at a client site in Ohio. Counsel stated that, when the petitioner's president received the call from the USCIS officer he mistakenly stated that the beneficiary is working in Arizona.[1] The AAO observes that the important fact is not whether the location of the beneficiary's new assignment or assignments are in Arizona, Ohio, or New Jersey. The salient fact is that the beneficiary is no longer working in or near Irwindale, California, which is the location for which the LCA is valid and for which the instant visa petition is approved.

Subsequently, counsel submitted a letter dated March 13, 2012. In that letter, counsel corrected misstatements made in his March 12, 2012 letter. Specifically, counsel had previously stated that the

[1] The AAO finds suspect the assertion that the president of a company with a total of two employees, which number may include both the president and the instant beneficiary, could be mistaken about whether his employee is working in Arizona or in Ohio. Because pursuit of that assertion is unnecessary to reach a decision in this matter, the AAO will not further discuss the matter.

beneficiary was provided to [redacted] Counsel amended that statement to indicate that the beneficiary is provided to [redacted] through [redacted] The AAO observes that the contractor through whom the beneficiary was provided to work in New Jersey is not central to any disputed issue in this case. The pivotal issues are whether the beneficiary is still working in the position described in the visa petition and accompanying materials, and whether he is still working in [redacted] California, the location for which the visa petition is approved.

The director revoked approval of the instant visa petition on May 18, 2012, for the reasons stated above. Counsel submitted a timely Form I-290B appeal.

Counsel asserted that the director erred in revoking the petition. Counsel argued that the visa petition should not have been revoked based on the beneficiary working in a location not included on the visa petition, stating the following:

> The USCIS regulations are unclear on this issue. They provide that the petitioner must file an amended petition when there is a "substantial change of circumstances." Is the fact that the beneficiary moves to a new project for the same employer, on a same position [sic], using the same skill sets, but at a different location a "substantial change of circumstances["?] The Adjudicator's Field Manual [AFM] at 31.2(e) clearly states, "The mere transfer of the beneficiary to another work site, in the same occupation, does not require the filing of an amended petition provided the initial petitioner remains the alien's employer and, provided further, the supporting [LCA] remains valid.
>
> Therefore, USCIS erred in revoking the petition based on the mere fact that the beneficiary moved to a new location.

The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner's response to the NOIR failed to overcome the grounds specified in the NOIR for revoking the petition.

A change in the beneficiary's work location to a geographical area not covered by the LCA filed with the Form I-129 is a material change in the terms and conditions of employment. Because work locations are critical to the petitioner's wage rate obligations, the change deprives the petition of an LCA valid for the additional location or locations where the beneficiary works.

Counsel's citation from the AFM is therefore not germane to the instant case. The language he quoted pertains only to a situation in which the beneficiary moves to a new location for which the LCA remains valid, that is, within the area specified in the certified LCA.[2] In the instant case, in

[2] In addition, as is discussed below, the LCA would remain valid only if the employment in the new location is consistent with the employment type for which the LCA is valid, as will be discussed further below.

which the LCA is approved for areas in and near Irwindale, California, and the beneficiary has been sent to work in Ohio and New Jersey, the language relied upon by counsel is irrelevant.

The regulations pertinent to H-1B visa petitions make clear that such visa petitions are valid only for the location or locations for which they are approved.

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) in pertinent part as follows:

> Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

> *Demonstrating eligibility.* An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions. Any evidence submitted in connection with a benefit request is incorporated into and considered part of the request.

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from DOL in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must submit evidence that an LCA has been certified by DOL when submitting the Form I-129.

Additionally, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) provides as follows:

> *Service or training in more than one location.* A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the I-129 shall be where the petitioner is located for purposes of this paragraph.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

> For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL-certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[Emphasis added]. As 20 C.F.R. § 655.705(b) requires that USCIS ensure that an H-1B petition is filed with a "DOL-certified LCA attached" that actually supports and corresponds with the petition on the petition's filing, this regulation inherently necessitates the filing of an amended H-1B petition to permit USCIS to perform its regulatory duty to ensure that a certified LCA actually supports and corresponds with an H-1B petition as of the date of that petition's filing. In addition, as 8 C.F.R. § 103.2(b)(1) requires eligibility to be established at the time of filing, it is factually impossible for an LCA certified by DOL after the filing of an initial H-1B petition to establish eligibility at the time the initial petition was filed. Therefore, in order for a petitioner to comply with 8 C.F.R. § 103.2(b)(1) and USCIS to perform its regulatory duties under 20 C.F.R. § 655.705(b), a petitioner must file an amended or new petition, with fee, whenever a beneficiary's job location changes such that a new LCA is required to be filed with DOL.

In light of the above, the AAO finds that a necessary condition for approval of an H-1B visa petition is an LCA, certified *on or before* the filing date of the petition, with information, accurate as of the date of the petition's filing, as to where the beneficiary would actually be employed. Furthermore, the petition must list the locations where the beneficiary would be employed and be accompanied by an itinerary with the dates the beneficiary will provide services at each location. Both conditions were not satisfied in this proceeding. The petitioner's attempt to amend the petition by submitting an itinerary in response to the RFE and to remedy the LCA deficiency by submitting an LCA certified after the filing of the petition is ineffective. Again, a petitioner must establish eligibility at the time of filing a nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). 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'r 1978).

It is further noted that to ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. If a petitioner's intent changes with regard to a material term and condition of employment or the beneficiary's eligibility, an amended or new petition must be filed. To allow a petition to be amended in any other way would be contrary to the regulations. Taken to the extreme, a petitioner could then simply claim to offer what is essentially speculative employment when filing the petition only to "change its intent" after the fact, either before or after the H-1B petition has been adjudicated. The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

> Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not

> intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

As was noted above, the petitioner indicated on the Form I-129 that the beneficiary would be working only at the Irwindale, California location for the duration of the H-1B employment period, i.e., March 2, 2011, to October 1, 2013. The certified LCA submitted *with* the Form I-129 also indicates that the beneficiary will work only at the Irwindale, California location.[3] However, in response to the director's RFE, the petitioner submitted an itinerary showing that the beneficiary had worked Ohio, as well as Irwindale, California, and was then working in New Jersey. On appeal, counsel did not contest that the beneficiary has worked and is working in locations for which the visa petition was not approved and for which the originally submitted LCA is not valid, but implied that such a change of location is not a violation of the terms and conditions of the approved visa petition.

The regulation at 8 C.F.R. § 214.2(h)(2)(E) states:

> *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 or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

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[3] The subsequently submitted LCA was certified on January 13, 2012, after the instant visa petition was filed on February 25, 2011, and, for reasons explained above, will not be considered.

The petitioner has violated the terms of the approved visa petition by employing the beneficiary in a location for which the visa petition is not approved and in which the LCA submitted to support it is not valid. The appeal will be dismissed and approval of the visa petition will remain revoked for that reason.

The remaining basis for revocation of the approval of the instant visa petition is the director's finding that the petitioner has not demonstrated that it is employing the beneficiary in the position for which the visa petition is approved. The instant visa category is for employment of aliens in specialty occupation position, that is, those that require a minimum of a bachelor's degree in a specific specialty or its equivalent. In order to demonstrate that, for the purposes of this visa category, the beneficiary is doing the same job for which the visa petition was approved, notwithstanding for a different company and in a different location, the petitioner would be obliged to demonstrate, not only that the beneficiary is continuing to work as a software engineer, but that the beneficiary is continuing to work in a position that is a specialty occupation position.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO notes that, as recognized by the court in *Defensor*, *supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 387-388. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

In the instant case, since ceasing to work at the Irwindale, California location of [redacted], the beneficiary has reportedly worked for [redacted] New Jersey. The only evidence provided by [redacted] pertinent to the beneficiary's duties at its location is an undated letter entitled, "To Whom It May Concern." It states that the position requires a bachelor's degree, but not that the degree must be in any specific specialty closely related to the position's duties. As such, it does not effectively allege that the position in which the beneficiary is currently working is in a specialty occupation. That letter further states that the beneficiary is "working . . . on a project involving design and development using SAP Data Services."

That the petitioner is working on a project involving design and development using SAP Data Services is insufficient. The duties involved in the overall project are not at issue. The issue is the nature of the duties the petitioner, himself, performs in his work for The record has insufficient evidence of the duties he is performing for

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

As the petitioner has not demonstrated that the beneficiary is still working in a specialty occupation position, it has failed to demonstrate that the beneficiary is employed in the position for which the visa petition was approved. The AAO finds that the lack of evidence on that point suggests, strongly enough to constitute a preponderance of the evidence, that the petitioner is no longer employing the beneficiary in the position for which the visa petition was approved. This is an additional specification of the petitioner's violation of the terms and conditions of the approved visa petition. The appeal will be dismissed and approval of the visa petition will remain revoked for this additional reason.

Further, the undated letter from contains no indication of the period during which the beneficiary's assignment to will continue. The petitioner is in the business of locating IT personnel and providing them to work at its clients' locations to work on its clients' projects. The petitioner has provided no evidence of how long the beneficiary's assignment to would continue, and no evidence that, at the conclusion of that assignment, the beneficiary would be working as a specialty occupation software engineer.[4]

Because the petitioner has not demonstrated that the beneficiary's present employment is consistent with the approved visa petition, and has not demonstrated that the beneficiary's future employment would be consistent with the approved visa petition, the AAO need not, and will not, address

[4] Nor could the petitioner reasonably provide such evidence, as whether the beneficiary's future work would be work as a software engineer, and whether it would constitute specialty occupation employment, would hinge on the duties assigned to him by the end-user of his services, and the educational requirements placed on the position by that end-user. As that future end-user has not been identified, providing evidence from it is essentially impossible.

whether the beneficiary's interim employment at the [redacted] was consistent with the approved visa petition.

The location issue shows that the petitioner violated the terms and conditions of the approved visa petition. The issue pertinent to whether the position the beneficiary is now working in is the same position as that proffered in the approved visa petitioner and is in a specialty occupation position also shows that the petitioner has violated terms and conditions of the visa petition.

Therefore, the appeal will be dismissed and approval of the visa petition will remain revoked for both reasons, with each considered as an independent and alternative basis for the decision. 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.

ORDER: The appeal is dismissed. The petition will remain revoked.