



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **JUL 25 2014**

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
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 revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, and the approval of the petition will remain revoked.

I. FACTUAL AND PROCEDURAL HISTORY

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center. In the Form I-129 visa petition and supporting documentation, the petitioner described itself as a cellular phone service business established in 2002. In order to employ the beneficiary in what it designated as a logistics and parts procurement manager position, the petitioner sought 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).¹ The director reviewed the record of proceeding and approved the petition.

Subsequently, an administrative site visit was conducted; however, the site inspector determined that the petitioner's representative (as designated on the Form I-129 and Labor Condition Application) and the beneficiary were not located at the address specified in the H-1B petition.² The site inspector attempted to contact the petitioner's representative via email and by telephone; however, he did not receive a response. The director reviewed the site visit report and the record of proceeding and issued a NOIR. The petitioner did not respond to the NOIR. The director revoked the approval of the petition. Thereafter, counsel submitted an appeal.

II. GROUNDS FOR REVOCATION

U.S. Citizenship and Immigration Services (USCIS) is required to revoke on notice the approval of an H-1B petition when one of five grounds is found. Specifically, 8 C.F.R. § 214.2(h)(11)(iii) states the following:

¹ In the October 27, 2010 letter of support, the petitioner provides the proposed duties of the beneficiary as follows:

1. Establish and maintain operational procedures and standards for inventory quality control;
2. Manage and control the in-flow of parts to guarantee no shortage for the clients' needs;
3. Procure parts from China and Korea that are necessary for refurbishing cellular phones; and
4. Conference with the factories in China and Korea for manufacturing and purchasing.

² USCIS must be able to verify the information provided in the petition to further determine eligibility for an immigration benefit and/or compliance with applicable laws and authorities. To that end, agency verification methods may include but are not limited to review of public records and information; contact via written correspondence, the Internet, facsimile or other electronic transmission, or telephone; unannounced physical site inspections; and interviews. See 8 C.F.R. §§ 103, 204, 205, and 214, 8 U.S.C. §§ 1103, 1155, 1184 (2013).

(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.

Here, the director revoked the approval of the petition finding that USCIS was not able to verify that the petitioner was lawfully employing the beneficiary in the capacity specified in the petition and that the petitioner was complying with the terms and conditions of the approved petition. 8 C.F.R. § 214.2(h)(11)(iii)(A)(1) and (3).

III. REVIEW OF THE DIRECTOR'S DECISION

We reviewed the record of proceeding in its entirety, including the documentation submitted with the petition, the information obtained from the site visit report, as well as the evidence provided in support of the appeal.³

Counsel states that the petitioner did not have any knowledge of the NOIR. We note that the record of proceeding indicates that the NOIR was sent to counsel and, in fact, a copy of the NOIR was included with counsel's appeal submission. When a petitioner fails to resolve discrepancies after

³ On appeal, the petitioner and counsel submitted several documents, including the following: (1) counsel's brief; (2) a letter from the petitioner, dated July 18, 2013; (3) the beneficiary's performance evaluations for 2011 and 2012; (4) printouts from the petitioner's website; (5) a description of the beneficiary's job duties; (6) Form W-2, Wage and Tax Statements, issued to the beneficiary for 2011 and 2012; (7) the petitioner's Quarterly Federal Tax Return for 2012 (quarter 3); (8) the petitioner's State of Texas Quarterly Wage Reports for 2012 (quarters 2 and 3); (9) a business plan purportedly prepared by the beneficiary; and (10) a copy of the NOIR.

USCIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions.

On appeal, counsel asserts that the "[b]eneficiary was not at work the day of the visit because he was on vacation for three days during that week which is documented in his Human Resources file." Counsel also claims that the petitioner's representative was missing on various occasions and was eventually dismissed. According to counsel, the petitioner's representative did not inform the petitioner of the inspector's site visit or of the other attempts at contact, and further asserts that the petitioner's representative attempted to sabotage the company's business dealings. Counsel states that the petitioner is currently engaged in legal proceedings with the petitioner's representative for missing funds.

We reviewed counsel's statements, but it must be noted that the petitioner did not submit evidence to support the assertions.⁴ For instance, counsel claims that the beneficiary's human resource file contains documentation establishing the basis for the beneficiary's absence during the site visit; however, the documentation was not provided to USCIS. Moreover, the petitioner did not submit any evidence regarding the dismissal and/or legal proceedings involving its representative. 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 Obaighena*, 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).

The petitioner provided a letter dated July 18, 2013 from [REDACTED] CFO, as well as a chart with the beneficiary's job duties. The documentation repeats verbatim the four tasks that were provided with the initial H-1B submission. The documents provide general job duties rather than information regarding such aspects of the beneficiary's work as his day-to-day responsibilities, the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Upon review, we find that they do not adequately describe the substantive nature of the work that the beneficiary performs within the petitioner's business operations.

On appeal, the petitioner provided several documents to establish that it employs the beneficiary, including documentation regarding the payment of wages and performance evaluations. The petitioner also provided an eight-page document entitled "2012 Business Plan" that purportedly was prepared by the beneficiary. While the documents may provide some insight into the petitioner's business operations, the petitioner should note that the beneficiary had been employed by the petitioner for approximately five years when the petition was revoked. The documentation fails to provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position, so as to persuasively support the claim that the beneficiary is employed in the capacity specified in the petition. There is a lack of documentation corroborating the petitioner's statements regarding the position and establishing that the beneficiary is performing H-1B caliber work.

⁴ The petitioner's letter submitted on appeal does not provide any information regarding the site visit, its representative, and the reasons that it did not respond to the site inspector and the NOIR.

IV. CONCLUSION AND ORDER

In conclusion, based upon a complete review of the record of proceeding, the petitioner has not overcome the grounds for revoking the approval of the petition. The record of proceeding lacks sufficient documentary evidence regarding the work performed by beneficiary. 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)). 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).

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.⁵

ORDER: The appeal is dismissed. The approval of the petition remains revoked.

⁵ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). However, as the appeal is dismissed, and the petition is revoked for the reasons discussed above, we will not further discuss the additional issues and deficiencies that we observe in the record of proceeding.