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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

D2

FILE: [REDACTED] Office: VERMONT SERVICE CENTER

Date: DEC 29 2010

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: According to USCIS records, the director of the Vermont Service Center initially approved the H-1B petition on April 25, 2008. Subsequently, on June 13, 2008, the director issued a Notice of Intent to Deny (NOID) the petition. Counsel responded to the director's NOID on July 17, 2008. The director then denied the petition on September 25, 2008. The matter is now before the Administrative Appeals Office (AAO) on appeal. In light of the approval of this petition, which was operative on the date of the Notice of Decision to deny the petition, the AAO will both withdraw the director's decision to deny the H-1B petition, and also revoke the petition, commensurate with the discussion below.

The petitioner is a financial services company that seeks to employ the beneficiary as a Market Development 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, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

By an interim rule effective on March 24, 2008, U.S. Citizenship and Immigration Services (USCIS) issued a new regulatory provision, at 8 C.F.R. § 214.2(h)(2)(i)(G), that precludes a petitioner from filing, during the course of any fiscal year, more than one H-1B petition on behalf of the same alien beneficiary if he or she is subject to the 65,000 cap or qualifies for the master's degree cap-exemption. *See* 73 Fed. Reg. 15389, 15394 (Mar. 24, 2008).

The Notice of Decision issued by the director on September 25, 2008, indicates that the director determined that the petition should be denied under 8 C.F.R. § 214.2(h)(2)(i)(G), which states the following regarding the filing of multiple petitions by an employer for the same beneficiary:

An employer may not file, in the same fiscal year, more than one H-1B petition on behalf of the same alien if the alien is subject to the numerical limitations of section 214(g)(1)(A) of the Act or is exempt from those limitations under section 214(g)(5)(C) of the Act. If an H-1B petition is denied, on a basis other than fraud or misrepresentation, the employer may file a subsequent H-1B petition on behalf of the same alien in the same fiscal year, provided that the numerical limitation has not been reached or if the filing qualifies as exempt from the numerical limitation. Otherwise, filing more than one H-1B petition by an employer on behalf of the same alien in the same fiscal year will result in the denial or revocation of all such petitions. If USCIS believes that related entities (such as a parent company, subsidiary, or affiliate) may not have a legitimate business need to file more than one H-1B petition on behalf of the same alien subject to the numerical limitations of section 214(g)(1)(A) of the Act or otherwise eligible for an exemption under section 214(g)(5)(C) of the Act, USCIS may issue a request for additional evidence or notice of intent to deny, or notice of intent to revoke each petition. If any of the related entities fail to demonstrate a legitimate business need to file an H-1B petition on behalf of the same alien, all petitions filed on that alien's behalf by the related entities will be denied or revoked.

The petitioner has appealed the director's decision on the following grounds: (1) USCIS erroneously concluded that the petitioner has filed four separate H-1B petitions for the same

beneficiary; and (2) as the petition was previously approved, USCIS should have issued a Notice of Intent to Revoke (NOIR) rather than a NOID.

The AAO will first consider whether multiple petitions were filed on behalf of the beneficiary such that the petitioner violated 8 C.F.R. § 214.2(h)(2)(i)(G).

Although the petitioner filed only one H-1B petition on behalf of the beneficiary, three of the petitioner's affiliates also each filed an H-1B petition that were accepted for processing under the H-1B cap for Fiscal Year 2009 (FY 09), while a fourth affiliate filed an H-1B petition that was not accepted for processing under the H-1B cap for FY 09. USCIS issued an H-1B approval for the present petition. On June 13, 2008, the director issued a NOID for the present petition.

The NOID for the present petition was issued because it came to USCIS's attention that a subsequent Form I-129 was filed by a related entity to the petitioner on behalf of the beneficiary for the same position in the same location as proffered in the present petition. The NOID noted that an employer may not file, in the same fiscal year, more than one H-1B petition under 8 C.F.R. § 214.2(h)(2)(i)(G) and provided the petitioner an opportunity to "[s]ubmit documentary evidence that clearly shows your business has a legitimate need to file more than one H-1B petition for the same position on behalf of the beneficiary." The NOID also stated, "A final decision will not be made for thirty-three (33) days. During that time you may submit evidence to overcome the noted reasons for denial. . . ."

Counsel for the petitioner responded to the NOID on July 17, 2008. In the response to the NOID, counsel cites to the preamble of the interim rule, arguing that related employers are not precluded from filing petitions on behalf of the same beneficiary for distinct positions, provided that there is a legitimate business reason to do so. Counsel argues that because the petitioner and its four related entities all require the services of a Market Development Manager, each entity should be able to file a petition on behalf of the beneficiary without having the petitions denied or revoked under 8 C.F.R. § 214.2(h)(2)(i)(G).

The relevant language cited by counsel in the interim rule reads as follows:

[T]his rule does not, however, preclude related employers from filing petitions on behalf of the same alien. USCIS recognizes that an employer and one or more related entities (such as a parent, subsidiary or affiliate) may extend the same alien two or more job offers for *distinct positions* and therefore have a legitimate business need to file two or more separate H-1B petitions on behalf of the same alien.

For example, a Fortune 500 company may be the parent company of numerous U.S.-based subsidiaries whose business is to engage in either the food, beverage or snack industries. Each line of business may, in turn, be divided into several business units and operate distinct companies (restaurant, bottled beverage plant, cereal manufacturer, etc) with different EIN numbers, addresses, etc. Although all the subsidiaries are ultimately related to the parent company through corporate ownership, this rule does not prohibit different subsidiaries from filing one H-1B

petition each on behalf of the same alien so long as each employer/subsidiary has a legitimate business need to hire such alien for a position within that subsidiaries' corporate structure. Thus, in this example, if the bottled beverage plant owned by the Fortune 500 company and the cereal manufacturing company owned by the same Fortune 500 company are each in need of the services of a Chief Financial Officer, both may file one petition each on behalf of the same alien. *A subsidiary should not file an H-1B petition for an alien just to increase the alien's chances of being selected for an H-1B number where that subsidiary has no legitimate need to employ the alien and is, instead, only filing a petition to facilitate the alien's hiring by a different, although related, subsidiary.*

USCIS may issue a request for additional evidence or notice of intent to deny, or notice of intent to revoke for any or each petition if it determines that the employer and related entity(ies) filed a duplicate petition as defined in this regulation. See 8 CFR parts 103 and 214.2(h)(11). *The burden rests with the employer to establish that it has a legitimate business need to file more than one H-1B petition on behalf of the same alien. If the employer does not meet its burden, USCIS may deny or revoke each petition, as appropriate.* Without such authority, a loophole would exist for related employers to file multiple petitions on behalf of the same alien under the guise that the petitions are based on different job offers, when the true purpose of filing the petitions is to secure employment for the alien with a single employer seeking his or her services. As an example, one target of this provision is the unscrupulous employer that establishes or uses shell subsidiaries or affiliates to file additional petitions on behalf of the same alien in order to increase the alien's chances of being allotted an H-1B number. USCIS believes that these consequences are warranted in order to deter unfair filing practices and further ensure the integrity of the H-1B cap counting process.

(Emphasis added.) See 73 Fed. Reg. at 15392-15393.

The director noted in his denial “[t]hat the beneficiary’s intended place of employment is listed as the same location in all filings, namely [REDACTED] Pennsylvania. In addition, the offered salary of \$100,000/year is also the same amount offered in all the filings. . . .”

On appeal, counsel provides copies of each of the five letters submitted by the petitioner and its four affiliates in support of the H-1B petitions filed on behalf of the beneficiary. The position title listed in each letter is Market Development Manager and the position descriptions of the Market Development Manager are identical in each letter. Moreover, the position location is listed as being at “[t]he company’s [REDACTED] Pennsylvania facility,” even though one of the entities is located in Wilmington, Delaware.

While the AAO agrees with counsel that there are circumstances under which a petitioner and related entities could file petitions simultaneously on behalf of the same beneficiary without violating 8 C.F.R. § 214.2(h)(2)(i)(G), the petitioner has failed to meet its burden of proof in demonstrating that the petitioner and its affiliates have legitimate business needs to file H-1B

petitions for the same beneficiary to perform the same duties at the same worksite for the same salary on a full-time basis, even though one of the petitioning entities is not located at the proffered worksite.

Although, according to counsel's letter written in response to the NOID, each entity's project needs for the Market Development Manager is different, counsel's response was not supported by independent evidence that the proffered position is distinct from those positions proffered by the petitioner's affiliates nor that each entity has a legitimate business need for hiring a Market Development Manager at the same time as its affiliates. For example, counsel did not provide any information regarding whether the position of Market Development Manager is a newly created position at each entity and, if so, why there is suddenly a need to fill this position or, if not, who has filled this role previously and why there is a need to again fill this position. Also, the petitioner did not explain why it, together with its affiliates, requires five Market Development Manager positions to be filled at the same time at the same location on a full-time basis by the same person. In addition, the petitioner did not demonstrate that if the beneficiary were not to be hired, the petitioner and its four affiliates would still each hire a Market Development Manager to work in the same location at the same salary. Moreover, the petitioner has failed to explain how a single individual could possibly perform five full-time positions requiring between 180 and 200 hours of work each week when a week only contains 168 hours total. 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). Therefore, counsel's descriptions of the independent business needs of the petitioner and each affiliate provided in response to the NOID do not demonstrate that the petitioner and its affiliates had a legitimate business need for filing H-1B petitions simultaneously on behalf of the beneficiary.

As the petitioner has not met its burden of proof in demonstrating that it and its affiliates have legitimate business needs to file more than one H-1B petition on behalf of the same beneficiary in the same fiscal year, the AAO therefore affirms the director's decision that the petition was approved in error as the petitioner and its affiliates violated 8 C.F.R. § 214.2(h)(2)(i)(G).

Next, the AAO will consider counsel's argument that the director should have issued a NOIR instead of a NOID.

Counsel argues, correctly, that, if this H-1B petition was approved in error, USCIS must follow the Revocation on Notice procedures outlined at 8 C.F.R. § 214.2(h)(11)(iii).

Notice of Intent to Revoke Required

USCIS regulations provide only one avenue for undoing an erroneously issued approval of an H-1B petition in the circumstances of this particular case, and that is the Revocation on Notice procedures at 8 C.F.R. § 214.2(h)(11)(iii), which states:¹

¹ As the petitioner has neither gone out of business nor filed a written withdrawal of the petition, the automatic revocation provisions at 8 C.F.R. § 214.2(h)(11)(ii) do not apply.

(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; 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.

Accordingly, the director's attempt to deny the petition after its approval is ineffective and will be withdrawn. However, as discussed previously, the petition was erroneously approved as the petitioner violated 8 C.F.R. § 214.2(h)(2)(i)(G).

Although counsel is correct that the director erred procedurally and should have issued a NOIR instead of a NOID as well as a revocation of the petition instead of a denial, it is not clear what remedy would be appropriate beyond the appeal process itself. As discussed previously, in the NOID, the director provided the petitioner with a de facto basis for revocation (namely, the violation of 8 C.F.R. § 214.2(h)(2)(i)(G)), as well as an opportunity to respond within 33 days. As the petitioner did, in fact, respond to the notice and, moreover, has supplemented the record on appeal, it would serve no useful purpose to remand the case simply to afford the petitioner an additional opportunity to supplement the record with new evidence. Therefore, as the petitioner was in fact given the requisite notice of its violation of 8 C.F.R. § 214.2(h) and the required rebuttal period in accordance with 8 C.F.R. § 214.2(h)(11)(iii), the AAO will order that the petition be revoked.

ORDER: The director's September 25, 2008 decision is withdrawn. The petition is hereby revoked.