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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**

[Redacted]

D2

JUN 08 2012

Date: Office: VERMONT SERVICE CENTER

[Redacted]

IN RE: [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:

[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 with the field office or service center that originally decided your case by filing a 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,

for Michael T. Kelly
Perry Rhew
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 did revoke the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The approval of the petition will be revoked.

The petition was filed at the Vermont Service Center on May 8, 2008, seeking to classify the beneficiary as an H-1B temporary 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 July 21, 2008. Subsequent to the petition's approval, the United States Consulate in Mumbai returned the petition to the director for review. The Consulate notified USCIS that, during the course of the visa interview, the beneficiary presented information that was not available to USCIS at the time the petition was approved. Specifically, the Consulate indicated that it requested the beneficiary present supporting documentation for the H-1B petition filed on his behalf, including a description of the project to which he would be assigned and the petitioner's tax documents. The beneficiary submitted a description for a project entitled "Assaying." The information appeared to be wholly plagiarized from a published book. The Consulate did not find it credible that the petitioner was developing a project described entirely in this text. Additionally, the Consulate reviewed the tax documents and noted that the tax returns suggested that the petitioner was a consulting firm, rather than a company that engages in internal product development.

Thereafter, the director issued a NOIR to the petitioner. The NOIR contained a detailed statement regarding the information that USCIS had obtained from the Consulate in Mumbai, and notified the petitioner that it was afforded an opportunity to provide evidence to overcome the stated grounds for revocation. The petitioner responded to the NOIR with a letter from its CEO/President and additional evidence. The director reviewed the petitioner's response but found the information submitted insufficient to refute the findings in the NOIR. The director revoked the approval of the petition on February 25, 2010. Thereafter, the petitioner filed a timely appeal.

In the appeal, the petitioner states that it is providing "various documents that establish the relationship between [the petitioner] and KGK Jewellery [sic]." The petitioner further asserts that "the Assaying project developed by [the petitioner] is custom developed Enterprise-Wide Resource Planning application and we have spent considerable resources and man hours developing this project." The petitioner claims that "with reference to plagiarism [the petitioner] would like to state that the definition and diagrams used are generic and widely available in the public domain" and asserts that the information "can be used without violation of any copy rights [sic]."¹

¹ The petitioner also requests that if the AAO dismisses the appeal and revokes the petition "that the fees paid by [the petitioner] in connection with the petition be refunded." The AAO notes that when a petitioner pays a filing fee for an application or petition, it is seeking a decision from USCIS regarding eligibility for the benefit(s) being sought. In general, USCIS does not refund a fee regardless of the decision on the application or petition. There are only a few exceptions to this rule, such as when an incorrect fee was collected or when

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's NOIR; (3) the response to the NOIR; (4) the director's revocation notice; and (5) the Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

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 director sent a NOIR to the petitioner, who was offered an opportunity to submit additional evidence or arguments for consideration. Upon review of the record, the AAO finds that the NOIR placed the petitioner on notice that revocation of the approval of the petition was contemplated within the scope of the revocation-on-notice provisions, namely, that the approval of the petition

USCIS made an error which resulted in the application or petition being filed inappropriately. Here, the petitioner has not established that it is entitled to a refund.

violated the regulatory requirements regarding the proffered position at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2).

As will be evident in the discussion below, the AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner has failed to credibly establish that it will provide qualifying H-1B employment to the beneficiary in accordance with the applicable statutory and regulatory provisions. The petitioner has not provided persuasive evidence that it would employ the beneficiary in the capacity specified in the petition and it has not established that the statement of facts contained in the petition is accurate. Accordingly, the appeal will be dismissed, and approval of the petition will be revoked.

As previously noted, when the beneficiary applied for a nonimmigrant visa at the Consulate in Mumbai, the beneficiary submitted the petitioner's 2007 tax returns. The Consulate reviewed the tax documents and noted that the tax returns suggested that the petitioner was a consulting firm, rather than a company that engages in internal product development. Additionally, the beneficiary submitted a description to the Consular Officer for a project that he claimed he would be assigned to entitled "Assaying." However, the consular officer determined that the information regarding the project appeared to be wholly plagiarized from a published book.

In the NOIR, the director notified the petitioner that the internal tax documents submitted to the Consulate suggested that the petitioner had no credible claim to internal product development. In response to the NOIR, the President/CEO stated that the "tax records can only provide limited historical information and it indicates past financial performance not the future plans of the company for which we have applied for the services of the beneficiary." With the appeal, the petitioner now submits a document detailing its "Track Record in software development." The internal document indicates that the petitioner had released and implemented products prior to the filing of the petition on behalf of the beneficiary and that it has had additional projects in progress for several years, including the "Assaying" project (to which the beneficiary will reportedly be assigned). The petitioner did not provide any explanation as to the reason that this information was not submitted or described in its response to the NOIR. It must be noted that the petitioner's document "Track Record in software development" represents a claim by the petitioner rather than evidence to support that claim.

The petitioner responded to the NOIR by stating that "the original Assaying project was executed by [the petitioner] in partnership with [the petitioner's] client KGK Enterprises aka KGK Jewelry or KGK Group, (KGK) during the period between 2000 to 2006." The petitioner submitted documentation that it claims "establish[es] the relationship between [the petitioner] and KGK Jewellery [sic]" along with a statement regarding the beneficiary's role in the project and a receipt notice for a wire transfer. It must be noted, however, that these documents do not adequately address the issue here. The petitioner claimed that it "seems quite difficult for us to comprehend" that the beneficiary submitted plagiarized materials to the Consulate and that "[i]f [the petitioner] were to make a guess, the only two possible explanations that could explain the allegation of plagiarism" are (1) that the beneficiary was misled by outside sources and purchased a ready-made report from the market, that the petitioner was not aware of; or (2) that the project manager, who is

no longer employed with the company, was responsible for taking material from other sources, without the petitioner's knowledge.

If testimonial evidence lacks specificity or detail, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998). However, the AAO notes that the petitioner failed to provide any documentation to support either of these claims. Based upon the petitioner's response, it did not question the beneficiary to determine the actual source of the information. While the petitioner's letter provides some general information regarding the claimed project, the petitioner has not sufficiently explained and overcome the implications of the plagiarized information submitted by the beneficiary at the visa interview. When a petitioner fails to resolve discrepancies after USCIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. 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'r 1972)).

In the appeal, the petitioner now claims that it can use the information [submitted by the beneficiary to the Consulate] because it is "available in the public domain." A review of the book indicates that the information has been copyrighted and it further specifically states that "[n]o part of this book may be reproduced in any form, by mimeograph or any other means, without permission in writing from the publisher." Thus, the AAO is not persuaded by the petitioner's claim. Furthermore, as discussed below, the issues in this case go beyond whether or not the beneficiary submitted documentation that was properly cited.

The information provided by the beneficiary to the Consular Officer is approximately 20 pages long and was printed on the petitioner's letterhead. The document contains a notice of confidentiality and states that the document "shall not be disclosed to any third party outside [the petitioner] or its affiliates and shall not be duplicated, used, or disclosed in whole or in part." The document also indicates that the petitioner claims to possess copyright and property rights associated it. Thus, although the information is copyrighted by another source, the documentation submitted by the beneficiary asserts that the petitioner has legal rights to the material. The AAO further finds that the impact of the petitioner's copyright notice and the context in which the document was presented to U.S. Citizenship and Immigration Services (USCIS) was to attribute to the petitioner concepts, work, and work product that actually were not its own, in order to fortify the petition.

The petitioner submitted several documents in response to the NOIR and with the appeal. However, the AAO observes that the crux of the failure to establish eligibility for this benefit is not whether the petitioner has established that it has an ongoing business with KGK or with other clients, but rather whether it has credibly established that it will provide qualifying H-1B employment to the beneficiary in accordance with the applicable statutory and regulatory provisions.

Here, the petitioner has failed to adequately address and explain the significant inconsistencies in the record to establish eligibility for the benefit sought. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Doubt cast on any aspect of the

petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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).

Based upon a complete review of the appeal and the record of proceeding, the petitioner has failed to overcome the revocation grounds specified in the NOIR and the subsequent revocation decision.² The petitioner has not sufficiently established that it would employ the beneficiary in the capacity specified in the petition and it has not established that the statement of facts contained in the petition is accurate.

The burden of proof in this proceeding rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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

² The AAO conducts 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, the AAO will not further discuss the additional issues and deficiencies that it observes in the record of proceedings.