

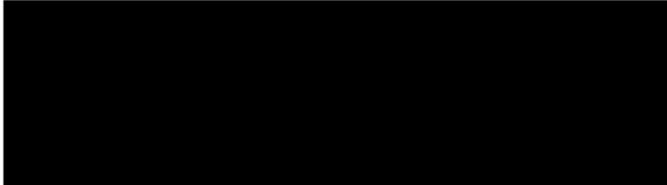
Administrative Appeals Office
U.S. Citizenship and Immigration Services
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

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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

Date: **JUN 08 2012**

Office: CALIFORNIA SERVICE CENTER

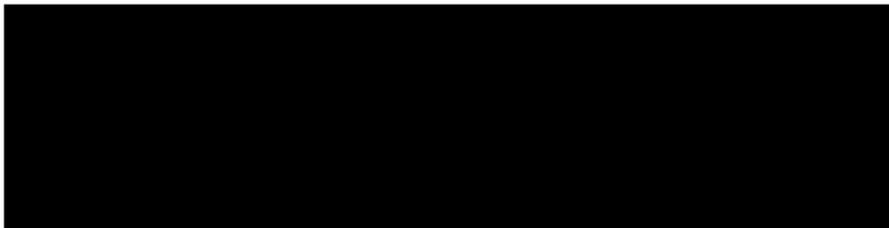


IN RE:



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 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was initially approved by the Director, California Service Center. In connection with a subsequent site visit, the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). The director ultimately revoked the approval of the nonimmigrant petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be a health care facility with 60 employees. It seeks to employ the beneficiary as a teacher for the developmentally disabled 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 the petition on February 23, 2010, determining that the response to the NOIR did not overcome the grounds for revocation set forth in the NOIR. Specifically, the director found that the petitioner failed to establish that the beneficiary was employed full-time and was paid the prevailing wage in accordance with the terms and conditions of the approved petition.

Under U.S. Citizenship and Immigration Services (USCIS) regulations, the approval of an H-1B petition may be revoked on notice under five specific circumstances. 8 C.F.R. § 214.2(h)(11)(iii)(A). To properly revoke the approval of a petition, the director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(h)(11)(iii)(B).

The regulation at 8 C.F.R. § 214.2(h)(11)(iii)(A) provides that:

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 or on the application for a temporary labor certification 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.

To properly revoke the approval of a petition, the director must issue a NOIR that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(h)(11)(iii)(B). In this matter, the record indicates that the director properly issued a detailed NOIR on January 7, 2010 which outlined in detail the grounds for revocation. After considering the petitioner's response dated January 27, 2010, the director revoked the petition's approval, finding that the letter submitted by counsel in response to the NOIR was insufficient to establish that the beneficiary was employed by the petitioner in accordance with the terms and conditions set forth in the petition.

On appeal, counsel for the petitioner asserts that the petitioner was not provided with any fair notice regarding what evidence or documentation the director would find acceptable to rebut the various allegations made in the NOIR. As noted above, the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(B) requires the director issue a NOIR that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. The regulatory requirement for the director does not require the director to specifically state what evidence or documentation would be acceptable in rebutting the grounds of revocation listed in the NOIR. In the present matter, the record indicates that the director provided a detailed statement of the grounds for revocation and the time period allowed for the petitioner's rebuttal. The director also cited to the specific provision of the regulations as a basis for the revocation. Counsel's assertion that the petitioner was not provided a fair notice before the revocation is misplaced. Upon review, the AAO finds that the director properly issued a NOIR under USCIS regulations.

Counsel for the petitioner submitted a timely response to the director's NOIR. Aside from a letter from the petitioner dated December 2, 2009, no additional documentary evidence was submitted. The director determined that the petitioner's response failed to rebut the grounds of revocation indicated in the director's NOIR. Accordingly, the director revoked the approval of the petition, because the petitioner did not establish that it employs the beneficiary in the proffered position and pays the prevailing wage.

In the NOIR, among other things, the director specifically pointed out that it was the intent of USCIS to revoke the approval of the petition in accordance with 8 C.F.R. § 214.2(h)(11)(iii)(3), because the employer violated the terms and conditions of the approved petition. At the time of the site visit, the beneficiary was not working at that location and it could not be determined that the beneficiary was being paid the proffered wage. As such, the director concluded that the petitioner was in violation of the terms and conditions of the approved petition. The petitioner was afforded thirty (30) days from the date of the notice to submit additional evidence or arguments for consideration in these proceedings. The director informed the petitioner that any such evidence or arguments would be reviewed before a final determination in this matter. Moreover, the director warned the petitioner that failure to respond to the NOIR within the time allotted would result in the revocation of the approval of the petition.

In response to the NOIR, as the director correctly pointed out, the petitioner provided copies of statements for health insurance it purchased for the beneficiary for the period ending in July 2009.

Although the health insurance statements suggest that a relationship existed between the beneficiary and the petitioner, these statements alone are not sufficient to demonstrate that the beneficiary was employed during the period covered by the health insurance statements. Moreover, the record contains no documentary evidence, such as personnel records, payroll records, quarterly tax returns, or W-2 forms, demonstrating that the petitioner had in fact employed the beneficiary in the proffered position during the approved period and paid the beneficiary the proffered wage of \$15.68 per hour as attested on the petition and the certified Labor Condition Application (LCA).

In response to the NOIR and again on appeal, counsel for the petitioner asserts that “the petitioner operates actively from the office location at [REDACTED]” and further contends that the petitioner’s offices are located on the second floor of the building. Counsel further asserts that no signage is displayed on the building in accordance with federal law, and claims that the conclusion by the USCIS officer who conducted the site visit that the premises was a private residence was therefore erroneous. The record, however, contains no evidence to corroborate counsel’s statements, such as photographs of the interior of [REDACTED] and the petitioner’s second floor offices. 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).

Counsel asserts on appeal, however, that it submitted expert witness testimony from [REDACTED], in support of the lack of signage on the petitioner’s facility, but that the director failed to consider this evidence. While the AAO acknowledges counsel’s reliance on this document, the fact remains that the record contains no evidence demonstrating that the beneficiary has been employed by the petitioner in accordance with the terms and conditions of employment set forth in the petition. No evidence of wages paid to the beneficiary is submitted in support of eligibility. The fact that the petitioner’s business may or may not be precluded from displaying signage on the exterior of its buildings does not change the fact that the record lacks evidence demonstrating that the petitioner operates a residential home for the developmentally disabled and the address in question and employs the beneficiary in the capacity claimed in the petition. 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)). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner failed to provide sufficient evidence to overcome the grounds for revocation listed in the director’s NOIR, and therefore, the AAO finds that the director correctly revoked the approval of the petition. The AAO also notes that counsel does not even provide such evidence on appeal. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Accordingly, the AAO shall not disturb the director’s revocation of the approval of the petition.

The appeal will be dismissed and the approval of the petition remains revoked. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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