

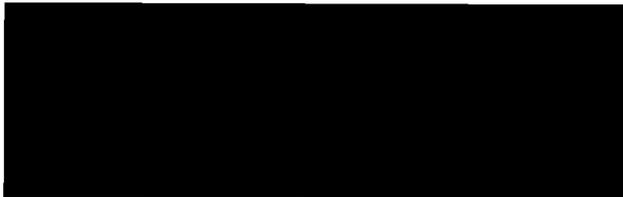
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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Date: **MAR 20 2012** Office: CALIFORNIA SERVICE CENTER

FILE:

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 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: The service center director revoked the approval of the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be summarily dismissed.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on April 21, 2009. The petitioner indicated on the Form I-129 petition that it is a skilled nursing facility.

Seeking to continue to employ the beneficiary, the petitioner filed this H-1B petition in an endeavor 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 director revoked the approval of the petition on March 8, 2010, finding that the statement of facts contained in the petition or on the application for a temporary labor certification were not true and correct, inaccurate, fraudulent, or misrepresented a material fact, and the employer violated the terms and conditions of the approved petition.

On April 7, 2010, counsel for the petitioner submitted a Form I-290B (Notice of Appeal or Motion), along with a brief. In the brief, counsel reiterates the same information from the petitioner's response to the Notice of Intent to Revoke (NOIR). Counsel does not specifically demonstrate how the director erred in concluding that (1) the statement of facts contained in the petition were not true and correct, inaccurate, fraudulent, or misrepresented a material fact or (2) the employer violated the terms and conditions of the approved petition.

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. 8 C.F.R. § 103.3(a)(1)(v).

The petitioner fails to specify how the director made any erroneous conclusion of law or statement of fact in revoking the petition. As the petitioner does not present additional evidence on appeal to overcome the decision of the director, the appeal will be summarily dismissed in accordance with 8 C.F.R. § 103.3(a)(1)(v).

Further, the AAO notes that counsel claims that the unannounced site visit violated the petitioner's due process rights. Counsel claims that the petitioner was deprived of procedural due process because the immigration officer interviewed the beneficiary without the presence of counsel. Counsel cites to 8 C.F.R. § 103.2(a)(3) and *Ali v. INS*, 661 F. Supp 1234 (D. Mass. 1986). In addition, counsel appears to refer to the Due Process Clause of the Fifth Amendment of the United States Constitution, which guarantees minimal requirements of notice and hearing when action by the federal government might deprive one of a significant life, liberty, or property interest. For the sake of completeness, the AAO will assume that counsel raises both regulatory and constitutional challenges to the site visit.

The regulation at 8 C.F.R. § 103.2(a)(3) states, in pertinent part, the following:

An applicant or petitioner may be represented by an attorney in the United States, as defined in § 1.1(f) of this chapter, by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4) of this chapter. *A beneficiary of a petition is not a recognized party in such a proceeding.*

Moreover, the regulations at 8 C.F.R. § 103.3(a)(1)(iii)(b) specifically state that a beneficiary of a visa petition is not an affected party and does not have any legal standing in a proceeding. As the beneficiary has no legal standing in this proceeding, he does not have the right to representation.

With respect to a constitutional due process challenge, the AAO has no authority to entertain constitutional challenges to a USCIS action. *Cf. Matter of Salazar-Regino*, 23 I&N Dec. 223, 231 (BIA 2002) (collecting cases).

Even if the AAO had the authority to entertain constitutional challenges, the petitioner has not shown that any violation of the regulations resulted in "substantial prejudice" to the petitioning company or the beneficiary. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge).

The AAO notes that the field site visit was an administrative inquiry relating to the petitioner's burden of proof. As in all visa petition proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. A site visit may lead to the discovery of adverse information, as in the present case, but it is just as likely to confirm the petitioner's eligibility and lead to an approval.

In addition, the beneficiary's participation in the site visit was entirely voluntary. The beneficiary, as a representative of the petitioner, had the right to assert that the site visit was "unfair" and either refuse or terminate the visit. However, if the petitioner is to meet its burden of proof, the petitioner must provide any requested information that is material to H-1B visa eligibility. If the petitioner were to refuse the site visit, the petitioner might prevent the director from reaching a conclusion as to the petitioner's eligibility. Under these circumstances, the petitioner would have failed to sustain its burden of proof. *Cf. Matter of Marques*, 16 I&N Dec. 314 (BIA 1977).

The AAO also notes that while 8 C.F.R. § 292.5(b) recognizes that an alien has the right to legal representation during an "examination," this regulation does not mandate that U.S. Citizenship and Immigration Services (USCIS) inform him of such a right either before or during the examination. Instead, the Department of Homeland Security (DHS) is only required to advise an alien that he has a right to legal representation upon his arrest and placement in formal proceedings under section 238 or 240 of the Act. *See* 8 C.F.R. § 287.3(c).

Additionally, the AAO also concludes that an administrative inquiry such as a "field site visit" would not be considered an "examination" under 8 C.F.R. § 292.5(b). The term "examination" is not defined by statute or regulation, but the use of the term in the Act implies that it is a formal

adjudication of an applicant or petitioner's eligibility. *See, e.g.,* sec. 335(b) of the Act (setting standards for conducting examinations upon applications for naturalization). A "field site visit," on the other hand, is an informal administrative inquiry and not a formal adjudication.

In summary, there is no legal obligation on the part of USCIS to provide advance notice of a field site visit to a beneficiary, to the petitioner, or to an attorney representing that petitioner. Furthermore, even if the site visit could be considered an "examination" with the corresponding right to legal representation, the regulations do not mandate that USCIS inform the petitioner or beneficiary that he has such a right either before or during the examination.

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 summarily dismissed.