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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: APR 0 1 2013 OFFICE: VERMONT 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 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 in accordance with the instructions on 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,

M Bailey
for
Ron Rosenberg
Acting Chief, Administrative Appeals Office

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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 remains revoked.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on July 10, 2009. In the Form I-129 visa petition, the petitioner described itself as a hospitality management, operations, and development company established in 2005, with five employees.[1] In addition, the petitioner listed its gross annual revenue as $600,000. The petitioner failed to state its net annual income in the Form I-129 petition.[2] In order to continue to employ the beneficiary in what it designated as a financial 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).

The position was approved for what was designated as a financial manager position. However, thereafter an onsite visit was conducted at the beneficiary's work location, as specified in the petition. Upon subsequent review of the record of proceeding upon which approval of the petition was based,

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[1] In the Form I-129, the petitioner designated its business operations under the North American Industry Classification System (NAICS) code 721110 – "Hotels (except Casino Hotels) and Motels."[1] The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

> This industry comprises establishments primarily engaged in providing short-term lodging in facilities known as hotels, motor hotels, resort hotels, and motels. The establishments in this industry may offer food and beverage services, recreational services, conference rooms and convention services, laundry services, parking, and other services.

See U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 721110 – Hotels (except Casino Hotels) and Motels, on the Internet at http://www.census.gov/cgi-bin/sssd/naics/naicsrch (last visited March 20, 2013). The record of proceeding indicates that the petitioning company consists of one hotel. On appeal, counsel states that the petitioner operates a 38 room hotel and currently has four employees. The petitioner did not submit documentation regarding any development or investment projects, or other evidence (aside from the first page of its 2008 tax return) to substantiate its business activities.

[2] The petitioner stated in the Form I-129 its intention to employ the beneficiary in a position it designates as a "Financial Manager." The AAO notes that it is reasonable to assume that the size and/or scope of an employer's business has, or could have, an impact on the duties of a particular position. *See EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's business is relatively small, the AAO reviews the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in position requiring the theoretical and practical application of a body of highly specialized knowledge that may be obtained only through a baccalaureate degree or higher in a specific specialty, or its equivalent. Additionally, when a petitioner employs relatively few people, it may be necessary for the petitioner to establish how the beneficiary will be relieved from performing non-qualifying duties.

the director issued a NOIR, and ultimately did revoke the approval of the petition. Thereafter, counsel for the petitioner submitted an appeal of the decision.

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 and supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

As will be discussed below, the AAO finds that the petitioner has not overcome the specified ground for revocation. Accordingly, the appeal will be dismissed, and the approval of the petition will be revoked.

U.S. Citizenship and Immigration Services (USCIS) may revoke the approval of an H-1B petition, on notice and an opportunity to rebut, 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
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> *(2)* The statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
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> *(3)* The petitioner violated terms and conditions of the approved petition; or
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> *(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.
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> (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.

As a preliminary matter, the AAO finds that the basis specified for the revocation action in the instant matter is a proper ground for such action. The director's statements in the NOIR regarding the evidence indicating that the beneficiary is not employed in the capacity specified in the Form I-129

were adequate to notify the petitioner of the intent to revoke the approval of the petition in accordance with the provision at 8 C.F.R. § 214.2(h)(11)(iii)(A)(*1*).

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 the beneficiary is employed by the petitioner in the capacity specified in the petition. The documents submitted in response to the NOIR and on appeal fail to effectively rebut and overcome the basis for revocation specified at 8 C.F.R. § 214.2(h)(11)(iii)(A)(*1*). Accordingly, the appeal will be dismissed, and approval of the petition will be revoked.

In this matter, the petitioner stated on the Form I-129 and supporting documentation that it seeks the beneficiary's services as a financial manager on a part-time basis (20-40 hours per week) at the rate of pay of $22,786.40-$45,572.80 per year. The AAO notes that the petitioner indicated on the Form I-129 and supporting documentation that the basis for H-1B classification was "[c]ontinuation of previously approved employment without change with the same employer."

In the Attachment to Form I-129, the petitioner stated that the "Financial Manager directs the preparation of financial reports." In addition, the petitioner described the duties of the proffered position as follows:

> Financial reports summarize and forecast financial position, such as income statements, balance sheets, and analysis of future earnings or expenses. The Beneficiary monitors and controls the flow of cash receipts and disbursements to meet the business and investment needs of the company. Also performs data analysis and provide it to management in form of reports. Analyzes financial details of the new locations before the company makes buy/builds or develop decisions. Beneficiary also assists with obtaining various pro forma reports from seller and banks as well as history of past tax payments from government agencies. The Beneficiary develops policies and procedures for the company operations. He also monitors debt administration by preparing and processing correspondence, calculating debt service, and managing and reconciling debt service accounts. Assists in the preparation of the budget. Manages special projects and other duties as required such as reconciling monthly account statements. Analysis duties include: revenue/claims projections, expense/profitability, staffing/resource planning, budgeting, data, and profit improvement planning/modeling. Communications and ensures adherence to financial reporting and revenue recognition guidelines. Develops, supports, and maintains all aspects of financial and operational information adding value to the process and management of audits/business. Participates in the development of new processes and coordination of resources for financial efficiency enhancements. Develops Financial and Accounting Systems. Regularly reviews audit progress against audit plans for company. Reports results of analysis to appropriate management and works with operations to 'close the gaps'. Supports and enhances the ongoing audit process and management of business unit for both profitability and operational improvements.

Such analysis requires use of Heath-Jarrow-Morton Model - HJM Model. This is a model that applies forward rates to an existing term structure of interest rates to determine appropriate prices that are sensitive to changes in interest rates. We also use Herfindahl-Hirschman Index - HHI-which is commonly accepted measure of market concentration. For credit analysis we employ Jarrow Turnbull Model. This model utilizes multi-factor and dynamic analysis of interest rates.

Such Financial Analysis and Reports will address the following issues:

1. How much is ROI[?]
2. How much is cash investment is required?
3. How much is Cash on Cash[?]
4. How much loan is justified?
5. What type of loan is justified?-SBA, long term, short term
6. How much is ROR[?]
7. How much is ADR?
8. What are results of CMA (Competitive Market Analysis)?
9. What are room revenues?
10. What are terms of financing?

Additionally, the petitioner repeatedly stated in its letter of support that "[the petitioner has] employees who carry out book keeping, auditing, and accounting clerk duties. [The] Financial Manager supervises these employees."

The extension petition was approved for what the petitioner designated as a financial manager position. On October 22, 2009, an administrative site visit was conducted to verify the information within the petition.[3] The officer conducting the site visit interviewed , who was listed as the petitioner's authorized representative on the Form I-129, and the beneficiary. The officer reported that during the interview, the beneficiary stated that he was employed as a financial manager and night clerk for the petitioner.

The director reviewed the report regarding the site visit and then issued the NOIR. The NOIR contained a detailed statement regarding the information that USCIS had obtained from the site visit report and notified the petitioner that it was afforded an opportunity to provide evidence to overcome the stated grounds for revocation.

[3] In response to counsel's assertions in the appeal regarding the site visit, the AAO notes that the 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 for the benefit sought. Here, the director properly notified the petitioner of the information, and the petitioner was provided with an opportunity to respond.

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The petitioner responded to the NOIR with a letter from [4] The letter is dated June 9, 2010. In the letter, Mr. stated that "[the beneficiary] is employed by our firm as a financial manager / night auditor." Mr. continued by stating that "[the beneficiary's] duties include running all daily financial reports, verifying monies received day to day, preparing deposit and credit card processing, run future forecast for potential revenue." Mr. claimed that the petitioner considered these duties "as financial management." The petitioner also submitted a document entitled "Discussion of Regulations Governing Revocation." The document lists the grounds for revocation under 8 C.F.R. § 214.2(h)(11)(iii)(A) and a statement opposing each of the grounds.

The director reviewed the petitioner's response but found the information submitted insufficient to refute the findings in the NOIR. The director noted that Mr. did not specifically address the comments made by the beneficiary or dispute the fact that the beneficiary is working as a night clerk. Furthermore, the director observed that the petitioner had not submitted evidence to substantiate the claim that the beneficiary is performing the duties of a financial manager. The director revoked the approval of the petition on November 29, 2010.

Thereafter, counsel submitted an appeal. On appeal, counsel asserts that the director erred in the decision to revoke the approval of the petition. Furthermore, counsel claims that the beneficiary never stated that he was employed as a clerk. In addition, counsel states that the beneficiary is performing the duties of a financial manager.

In support of the assertions, counsel submitted the following documents: (1) a letter dated July 31, 2009 from ; (2) a written statement dated January 27, 2011 from ; (3) a written statement dated January 27, 2011 from the beneficiary; (4) Form W-2, Wage and Tax Statements, for 2007, 2008 and 2009 issued by the petitioner to the beneficiary; (5) an excerpt from the U.S. Department of Labor's Occupational Outlook Handbook regarding the occupational category "Financial Managers"; (6) documentation relating to the beneficiary, including a copies of his passport, visa and prior approval notices; and (7) copies of previously submitted documents.

The AAO reviewed the record of proceeding in its entirety, including the documents submitted with the petition, in response to the NOIR and in support of the appeal, as well as the information obtained during the site visit. The AAO notes that the record of proceeding contains material discrepancies regarding the beneficiary's duties and in what capacity he is employed, and the petitioner has not sufficiently resolved the inconsistences. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies,

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[4] The record of proceeding contains a number of job titles for including chief manager, president, and co-owner.

absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* As will be discussed, the petitioner has not met its burden of proof in this regard.

In the instant case, the petitioner submitted a letter from with the appeal. The letter states that the beneficiary is employed by Mr. company and receives lodging. Notably, the letter fails to provide the beneficiary's job title and duties. Mr. did not provide any 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. The document lacks sufficient information to establish that the beneficiary is performing the duties as attested in the initial petition.

In addition, the petitioner submitted another letter from Mr. and a letter from the beneficiary. Notably, the wording of the letters is similar. In fact, the letters contain some of the same grammatical and punctuation errors. When affidavits are worded the same (and include identical errors), it indicates that the words are not necessarily those of the affiant and may cast some doubt on the affidavits' validity.

The letter from Mr. includes a revised description of the beneficiary's duties and a statement that the beneficiary "takes the responsibility of conducting night audits from time to time." Mr. further claims that "[o]n October 22, 2008, while [the beneficiary] was working on a night audit, a site inspector made a visit to the premises." Mr. reports that he was "also present at the premises at the same time" and that the site visit inspector spoke with him regarding the beneficiary's duties. In addition, Mr. states that the beneficiary described his duties to the site visit inspector and that "he also mentioned that he was there that time to conduct a night audit." Moreover, Mr. asserts that he "specifically remember[s] that [the beneficiary] never used the word 'night clerk.'"

Notably, this information was not previously provided to USCIS in the letter from Mr. that was submitted in response to the NOIR. Mr. did not acknowledge or state any reason for not previously providing this information to the director. Furthermore, Mr. did not provide any further details or specificity as to the basis of his knowledge regarding the beneficiary's conversation with the site inspector, such as the location within the business, duration of conversation, etc.

In addition, the AAO reviewed the letter from the beneficiary. The information provided by the beneficiary is similar to the information provided by Mr. . The beneficiary provides a brief description of his duties and claims that he takes "responsibility of conducting night audits from time to time." According to the beneficiary he was "working on a night audit, [and] a site inspector had made a visit to the premises." He states that Mr. was also present. The beneficiary further asserts that he did not use the word "clerk" when discussing his job duties with the site visit inspector.

The AAO observes that the NOIR specifically stated that the "site inspector also interviewed the beneficiary. [The beneficiary] indicated that he is employed as the Financial Manager and Night Clerk for the petitioner." However, the petitioner did not state the reason that it did not previously provide the beneficiary's statement to the director in response to the NOIR, but instead waited until the appeal to provide the affidavit.

Moreover, upon review of the letters, the AAO observes that although Mr. and the beneficiary claim that the site visit was conducted "while [the beneficiary] was working on a night audit," the record indicates that the site visit was conducted at approximately 11:00 AM. No explanation was provided by Mr. or the beneficiary.

While the written statements may provide some insight into the beneficiary's duties, the petitioner should note that the written statements represent a claim by Mr. and the beneficiary (that the beneficiary is performing the duties of a financial manager), rather than evidence to support the claim. The AAO notes that the beneficiary had been employed by the petitioner for approximately three years when the NOIR was issued, and for approximately 3 ½ years when the appeal was submitted. However, the descriptions provide general duties of the occupation rather than specific information regarding the beneficiary's actual daily duties. The duties of the position as provided by Mr. in response to the NOIR – and the job descriptions provided by Mr. and the beneficiary in the appeal – fail to adequately describe the substantive nature of the work that the beneficiary performs within the petitioner's business operation. They fail 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.

Notably, the job descriptions do not mention many of the duties that the petitioner asserted the beneficiary would perform in the initial petition. Moreover, the petitioner failed to submit documentary evidence to establish the actual day-to-day duties performed by the beneficiary. Furthermore, the petitioner failed to submit probative evidence to corroborate the duties being performed by the beneficiary are in accordance with the job description provided in the initial petition. For instance, in the job description submitted with the initial petition, the petitioner claimed that it uses the Heath-Jarrow-Morton Model-HJM Model and Herfindahl-Hirschman Index-HHI for its financial functions and analysis.[5] The petitioner also claimed that "[it] has employees who carry out

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[5] The AAO notes that the petitioner did not provide any specific information as to the reason that such theoretical models are required for financial analysis applicable to the petitioner's business operations.

The Heath-Jarrow-Morton Model is defined as "[a] model that uses forward interest rates to determine prices for securities that are affected by changes in interest rates. The model is quite complex and used mainly by arbitrageurs. It may also be used in asset liability management."

Arbitrageur is defined as "[o]ne who profits from the differences in price when the same, or extremely similar, security, currency, or commodity is traded on two or more markets. The arbitrageur profits by simultaneously purchasing and selling these securities to take advantage of pricing differentials (spreads) created by market conditions."

Herfindahl-Hirschman Index is defined as the following:

> [1] A measure of market concentration, it depends on the number of firms and their size relative to the market. It is calculated by summing up the squares of market shares of each firm. For example, a market where the HHI comes to more than 1800 will be considered a concentrated market. Mergers or acquisitions that change the HHI by more than 100 points in a concentrated market may raise antitrust concerns within the Department of Justice.

book keeping, auditing, and accounting clerk duties [and that the] Financial Manager supervises these employees."[6] Thus, according to the petitioner, the beneficiary's work includes supervisory duties of employees who perform bookkeeping, auditing, and accounting clerk duties. Additionally, the petitioner stated that the beneficiary "[d]evelops financial and accounting systems." Moreover, the petitioner reported that the beneficiary "[a]nalyzes financial details of the new locations before the company makes buy/builds or develop decisions." The petitioner indicated that the beneficiary "develops policies and procedures for the company operations." Further, the petitioner also claimed that the beneficiary is involved in the financial analysis and reporting of ADR (American Depositary Receipts).[7]

In the instant case, the only financial documentation provided by the petitioner was the first page of its 2008 Federal Tax Return (which was submitted with the initial petition). The AAO observes that the petitioner employed an outside accounting firm to prepare the form. Notably, several of the entries are illegible. The tax return indicates that the petitioner's ordinary business income was

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> [2] An index of market concentration the U.S. Department of Justice uses to determine whether a monopoly is forming. The scale goes from zero to 10,000, with 10,000 indicating that a single company controls 100% of the market share in a given industry. An HHI of less than 1000 indicates a market with little concentration, which the Justice Department prefers. Any merger or acquisition leading to an increase of more than 100 when the HHI was previously greater than 1,800 may lead to antitrust action against the company involved.

Jarrow Turnbull Model is defined as "[a] model for pricing credit investment vehicles. The Jarrow Turnbull model considers interest rates and how they relate to the probability of default."

All definitions are from David L. Scott, *Wall Street Words: An A to Z Guide to Investment Terms for Today's Investor* (2003), Houghton Mifflin Company.

Based upon the evidence provided by the petitioner (including the only financial document submitted regarding the petitioner's business operations, i.e., the first page of the petitioner's 2008 tax return), the petitioner has not established that its business operations have the complexity or the scale to require a financial manager to perform such analysis. It appears that the petitioner's claim that it utilizes the Heath-Jarrow-Morton Model and the Herfindahl- Hirschman Index was provided to fortify the petition.

[6] No documentation was provided regarding the referenced employees that the beneficiary supervises. In the appeal, counsel stated that the petitioner has four employees. In a letter dated September 24, 2012, counsel for the petitioner indicated that serves as General Manager, serves as Chief Manager, serves as a partner of the company.

[7] American Depositary Receipt is defined as a negotiable certificate issued by a U.S. bank representing a specified number of shares (or one share) in a foreign stock that is traded on a U.S. exchange. ADRs are denominated in U.S. dollars, with the underlying security held by a U.S. financial institution overseas. ADRs help to reduce administration and duty costs that would otherwise be levied on each transaction. *See* David L. Scott, *Wall Street Words: An A to Z Guide to Investment Terms for Today's Investor* (2003), Houghton Mifflin Company.

$124,119. Although the petitioner claims that it employs five people, it appears that the amount paid by the petitioner in salaries and wages in 2008 was no more than $42,772.[8]

There is a lack of documentation to corroborate the assertion that the beneficiary is performing the duties as described in the initial petition. For example, the petitioner did not provide any evidence that the beneficiary supervises employees. Additionally, the record of proceeding does not contain any evidence establishing that the beneficiary uses the Heath-Jarrow-Morton Model-HJM Model and Herfindahl-Hirschman Index-HHI for the petitioner's financial functions and analysis. Furthermore, there is no indication from the documentation submitted that the petitioner's financial operations involve foreign stocks, securities, market shares, etc. The petitioner failed to submit evidence substantiating its statement that the beneficiary "[d]evelops financial and accounting systems" and "[a]nalyzes financial details of the new locations before the company makes buy/builds or develop decisions." An additional example is that there is no evidence to support the statement that the beneficiary performs financial analysis and reporting of ADR. Upon review of the record of proceeding, the AAO finds that the petitioner failed to substantiate its claim regarding the beneficiary's duties as a financial manager.

The AAO agrees that the petitioner did not overcome the basis for the revocation of the petition. Specifically, the petitioner failed to submit independent, objective evidence to refute or otherwise explain the beneficiary's own statement to a USCIS officer that he is employed as a night clerk, a position that is not considered a specialty occupation. The petitioner has not sufficiently explained and overcome the implication of the statement made to the site visit inspector. Furthermore, although the beneficiary asserts in the appeal that he did not use the word "clerk" when discussing his job duties with the site visit inspector, the petitioner did not submit probative evidence to establish that the beneficiary is performing the duties as attested in the initial petition. The AAO finds that the petitioner has provided insufficient probative documentation to substantiate its claims regarding its business activities and the actual work that the beneficiary is performing to establish eligibility for this benefit. That is, there is a lack of substantive, documentary evidence to substantiate its claim that the beneficiary is performing the caliber of work as stated in the initial petition. The record of proceeding does not establish that the beneficiary has been employed in the capacity specified in the petition.

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. The record of proceeding lacks documentary evidence that establishes or corroborates the substantive nature of the beneficiary's duties. 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.

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[8] The AAO reviewed the petitioner's submission of the first page of its 2008 Federal Tax Return, and observes that line 9 "Salaries and Wages" is illegible. However, Line 21 states "Total Deductions. Add lines 9 through 20." The petitioner entered the amount $478,438 on line 21. By subtracting the amounts that are visible (on lines 16 through 26), the maximum amount that could be stated on line 13 for "Salaries and wages" is $42,772. On appeal, the petitioner submitted Form W-2, Wage and Tax Statements, issued to the beneficiary for 2007, 2008 and 2009. The W-2 form for 2008 indicates that the beneficiary received $25,400 in wage. Thus, $17,372 was paid by the petitioner to its other employees in 2008.

Comm. 1972)). As previously mentioned, 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).

Counsel asserts on appeal that the beneficiary did not state that he is a clerk, and that the beneficiary is performing the duties of a financial manager. However, 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).

Based upon a complete review of the appeal and the record of proceeding, the petitioner has failed to overcome the revocation ground specified in the NOIR and the subsequent revocation decision. The petitioner has not established that it would employ the beneficiary in the capacity specified in the approved petition. Accordingly, the appeal is dismissed. The approval of the petition remains revoked.

The AAO will now address an issue regarding another petition submitted by the petitioner on behalf of the beneficiary after the revocation of the instant petition. Specifically, a review of USCIS records indicates that on July 18, 2012, a date subsequent to the revocation of the instant petition , the petitioner filed a Form I-129 petition seeking nonimmigrant H-1B classification on behalf of the beneficiary. USCIS records also indicate that the petitioner stated on the Form I-129 that the basis for H-1B classification was "[c]ontinuation of previously approved employment without change with the same employer." The petition was approved on November 7, 2012. However, pursuant to 8 C.F.R. § 214.2(h)(14), a petition extension may be filed only if the validity of the original petition has not expired. In the instant case, the petition that the petitioner sought to extend was revoked on November 29, 2010.[9] Thus, the petition extension was filed after the original petition had expired. Accordingly, the AAO will further order that the director review the extension petition and consider whether initiation of revocation action on the affected petition is appropriate.

The burden of proof in this proceeding rests solely with the petitioner.[10] Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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[9] The AAO also observes that the instant petition was originally approved with validity dates from July 14, 2009 to July 13, 2012. The extension petition was submitted on July 18, 2012 – five days after the original petition's expiration. Thus, for this reason also, the AAO requests that the director review the extension petition and consider whether initiation of revocation action on the affected petition is appropriate.

[10] 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 remains revoked for the reasons discussed above, the AAO will not further discuss the additional issues and deficiencies that it observes in the record of proceeding.

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

FURTHER ORDERED: The service center director shall review the approval of the H-1B petition with receipt number for possible revocation consistent with the eligibility issues identified in this decision.