

(b)(6)

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

DATE: AUG 06 2013

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner:  
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:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) 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,

*for* *Michael T. Halley*  
Ron Rosenberg  
Acting 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 The director's decision will be withdrawn, and the matter will be remanded for further action consistent with this decision and entry of a new decision.

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a homecare nursing business established in 2001. The extension-petition approval whose revocation is the subject of this appeal had been granted for the petitioner to continue to employ the beneficiary as an H-1B temporary worker in a specialty occupation, in a position to which the petitioner had assigned "Advertising Manager" as the title.

As will be addressed below, the director's decision to revoke the approval of the petition must be withdrawn because the Notices of Intent to Revoke (NOIRs) upon which the decision was based, and also the director's decision to revoke the petition's approval, did not direct the petitioner's attention to the period for which the approval had actually been granted.

The service center's annotations on the Form I-129 as to the extent of time for which the extension was approved establish March 11, 2009 to September 24, 2009 as the period for which the approval was granted. However, the AAO finds, the NOIR upon which the revocation decision was based, and the revocation decision itself, focused exclusively upon the period beginning with a site visit on November 16, 2009 – a date almost two months after the end of the period for which the approval had been granted.<sup>1</sup>

Of course, a petition approval may be revoked at any time, even after the period of approval had expired. However, the NOIR upon which a revocation is to be based must at least relate to that period of approval, whether or not it had elapsed.

The director approved the petition on September 2, 2009.

On August 6, 2010, the director issued the first of the two documents that were described as NOIRs. In pertinent part, this document stated:

It has now come to the attention of [U.S. Citizenship and Immigration Services (USCIS)] that the beneficiary is no longer employed by your office. An Administrative Site Visit was conducted on November 16, 2009. No one was available for interview so attempts were made to contact the petitioner at the telephone number listed on the petition. That number was no longer in service. Contact was made with the attorney of record who provided a valid contact number

---

<sup>1</sup> As will now be related, two NOIR's were issued in this proceeding, and the petitioner's response to the first NOIR clearly attempted to alert the service center that it was mistakenly focusing on a timeframe beyond the period for which the petition had been approved. (It may be that, in drafting the NOIRs, the service center failed to see that the extension petition was approved for only a few months of the "3/10/2009 to 3/10/2011" period sought in the petition.)

for the petitioner. On May 11, 2010, the petitioner, [REDACTED],] contacted USCIS and stated that the beneficiary's employment was terminated in September of 2009. . . .

Therefore, please provide a letter of withdrawal based on the beneficiary no longer being employed by your office.

It is worth emphasizing that, as noted earlier, the extension petition had only been approved for the period March 11, 2009 to September 24, 2009. The problem is not that the November 16, 2009 site visit and the concerns that it raised would not be relevant to a NOIR directed at the particular validity period of the petition; rather, the problem is that the NOIR documents and the revocation decision *failed to relate to the validity period of the petition* the site visit and the concerns that it raised.

The record further reflects that on September 9, 2010, USCIS received a letter from a person identifying himself as petitioner's new counsel. The letter further stated the following:

The beneficiary has not been in the office because the petitioner was concerned about violating immigration law. The petitioner, after receiving [USCIS's] letter of August 6, 2010, copy attached, decided to file for an extension of the beneficiary's H-1B status.<sup>2</sup>

This new counsel also submitted a letter from the petitioner, dated August 25, 2010, stating that "[i]n order not to violate the Immigration law[,] [the beneficiary] has not been present at the office because his H-1B expired [on] 9/24/09."

On November 29, 2010, the director issued a second NOIR document that detailed the grounds for revocation of the approved petition, as follows:<sup>3</sup>

Based on an Administrative Site Visit conducted on November 16, 2009, your office was contacted with follow-up telephone calls. Per the phone calls, it was found that the beneficiary left your company's employment in September 2009. Therefore, on August 6, 2010, you were notified that a request of withdrawal should be provided to this office when the beneficiary stopped working for your office. Your response to the notice was received on September 9, 2010. Instead of withdrawing the petition, you have identified that you wish to continue to employ the beneficiary. In addition,

---

<sup>2</sup> That extension petition is not relevant to this appeal. Accordingly, the AAO will offer no comments with regard to it.

<sup>3</sup> The AAO notes that this second NOIR document was addressed to the petitioner c/o [REDACTED]

you have filed an extension petition to continue to employ the beneficiary, with receipt number [REDACTED]

Upon further review of the Administrative Site Visit[,] additional information is being requested in order to establish the valid business operations of your office and the beneficiary's employment in a specialty occupation position with your office.

The site inspector was unable to conduct the site inspection on November 16, 2009 because no one was located at the address, as listed on your petition, [REDACTED]. In addition, it appeared that the location was a residence, and not a business work location. This information, which is contradictory to what was offered in the petition, must be overcome in order for the petition to remain approved.

In this second NOIR document, the director outlined the specific evidence that was required to be submitted in order for the petitioner to demonstrate its legal business operations in the United States and its ability to offer the beneficiary employment in a specialty occupation position. The content of this NOIR indicates that the service center continued to miss the fact that the extension period that had been approved pursuant to the extension petition that is the subject of this appeal had already expired by the time of the site visit. This misapprehension is clearly evidenced by the service center's reference to what it erroneously saw as a failure to withdraw the petition based upon the beneficiary's no longer being employed, when in fact the beneficiary could no longer be employed because the period of validity of the petition extension had already lapsed.

This second NOIR document allotted the petitioner 33 days to respond to the NOIR. On January 5, 2012, the director revoked the petition, upon finding that the petitioner failed to submit a response to the second NOIR document and that, therefore, the petitioner failed to overcome the grounds for revocation of the petition.

On appeal, counsel for the petitioner asserts that the petitioner submitted a response to the first NOIR to the Vermont Service Center on or about September 6, 2010, and attached copies of the documentation that it submitted.

The AAO will now further address its determinations to withdraw the director's decision and to remand the matter for the director to issue a new, expanded NOIR.

USCIS may revoke the approval of an H-1B petition pursuant to the revocation-on-notice provisions at 8 C.F.R. § 214.2(h)(11)(iii), which state 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.

Upon review of the two documents styled as NOIRs, the petitioner's response to the first NOIR, the revocation decision, and the submissions on appeal, the AAO concludes that the revocation of the approval must be withdrawn.

*The revocation of the extension petition's approval must be withdrawn*

As already indicated in the discussions above, the AAO bases its determinations upon its findings that the grounds for revocation specified in the NOIR upon which the revocation was based, as well as the requests for additional evidence embedded in that NOIR, were all directed at times and events after the validity period of the petition had actually expired. As such, those grounds did not relate to the period for which approval of the petition applied and, therefore, they did not present to the petitioner valid grounds for revoking that particular petition. Accordingly, as such, the revocation of the approval of the petition here on review (i.e., Form I-129 H-1B receipt number [REDACTED]) must be withdrawn.

Again, the AAO notes that the period of intended employment specified on the Form I-129 was March 10, 2009 to March 10, 2011. In response to the director's Request for Evidence, dated April 7, 2009, the petitioner submitted a letter in which it correctly indicated that the beneficiary's status

had been extended *only until September 24, 2009*, so that the beneficiary should not have been working for the petitioner on that November 19, 2009 date of the site visit that generated the revocation proceedings in this case. More importantly, the AAO further notes that the markings and approval stamp on the applicable Form I-129 indicate that the petition was actually approved only for the period from March 11, 2009 to September 24, 2009. Thus, the AAO finds that both NOIR documents addressed only a period after the approval of the petition had expired. Consequently, the director's decision to revoke approval of the petition is withdrawn, as both the NOIRs and also the revocation decision itself were directed at the petitioner, its business operations, and its relationship with the beneficiary in a time during which the petition's period of approval had already lapsed.

*A new NOIR should be issued*

However, it is necessary for the AAO to remand this matter for additional action. The reason for the remand is that USCIS should now direct its attention to the period that the NOIR had overlooked, which is the period for which H-1B employment had actually been approved – from *March 11, 2009 to September 24, 2009*.

There are several reasons why issuing a new NOIR is appropriate.

First of all, the matters of concern and the types of evidence requested in the aforementioned NOIRs are good reason for the director to question the nature of the work that the beneficiary was performing during the period of the approved petition. The key, though, is to put the petitioner on notice that the contemplated grounds for revocation relate to the specific period for which the petition extension had been approved (again, March 11, 2009 to September 24, 2009).

Also, the AAO notes that, aside from and in addition to the adverse information that was the basis of the aforementioned NOIRs, the record of proceeding indicates additional grounds for revocation-on-notice proceedings, namely, the apparent failure of the evidence of the record at the time of approval to (a) establish the proffered position as a specialty occupation in the first place, and also to (b) establish the beneficiary as qualified to serve in a specialty occupation.

Also, upon review of the entire record of proceeding, the AAO notes that the duties listed by the petitioner do not appear sufficient to establish that the beneficiary would have had to theoretically and practically apply at least a bachelor's degree level of highly specialized knowledge in a specific specialty, as would be required to establish a specialty occupation in accordance with the definitions of "specialty occupation" at section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii).

In this regard, the AAO finds that the descriptions of the proposed duties in the record of proceeding when the extension petition was approved are relatively abstract statements of generalized functions. As such, they did not appear to relate detailed, specific information showing either the substantive nature of any actual work that the beneficiary would perform in exercising those functions or any necessary correlation between any such work and the petitioner's asserted need for at least a bachelor's degree, or the equivalent in a specific specialty.

In the same regard, the AAO also observes that the record of proceeding upon which the director approved the extension petition does not appear to contain any evidence indicating that the duties as described in that record comprised a position within any occupational category for which the U.S. Department of Labor's *Occupational Outlook Handbook* reports that at least a bachelor's degree, or the equivalent, in a specific specialty, is required for entry.

Next, the AAO also notes evidentiary deficiencies regarding the beneficiary's qualifications to serve in a specialty occupation. The AAO observes that the provided [REDACTED] evaluation of the beneficiary's foreign education and experience did not appear to meet USCIS requirements, as no evidence was submitted to establish that the [REDACTED] evaluator's (Dr. [REDACTED]) evaluation of the beneficiary's experience satisfies the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(D)(I), i.e., that he was "an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience." Also, the [REDACTED] evaluation, equating the beneficiary's two-year foreign degree program with a U.S. Bachelor's degree in business administration, does not appear to meet USCIS degree equivalency requirements as enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(C) and (D).

In short, it appears also that the approval of the extension petition was erroneous in that it was granted without sufficient evidence that the beneficiary would be actually employed in a specialty occupation position, and also without sufficient evidence that the beneficiary was qualified to serve in a specialty occupation. Thus, the director should consider specifying these aspects also as grounds for revocation, as they indicate that the petition approval should also be considered for revocation as a violation of the regulatory requirements for a specialty occupation at paragraph h of 8 C.F.R. § 214.2.

The AAO further finds that the factors that the director cited in the second NOIR – particularly the finding that the site visit discovered that the asserted place of business was a residence and the concerns that the petitioner may not actually have been employing the beneficiary in a specialty occupation position – provide good and sufficient cause for the director to now include in a new NOIR such observations and requests for information regarding proof of the petitioner's business operations and its employment of the beneficiary as were noted in the aforementioned second NOIR document. While the new NOIR must articulate that what is being considered for revocation is the approval that was granted for the period March 11, 2009 to September 24, 2009, the new NOIR *can* reference the aforementioned site-visit and its adverse indications, *provided* that the NOIR relates them to the director's concerns about what was going on in that March 11, 2009 to September 24, 2009 period covered by the approval.

Now, the director may, of course, set the scope of the new NOIR, and any evidence requested thereunder, to the extent that he or she finds is merited by the aspects of the approved petition that causes him or her concern that the petition approval should be revoked.

In summary, then, in addition to withdrawing the director's decision, the AAO is now remanding

the matter for the director to take the following actions, all in compliance with the revocation-on-notice provisions at 8 C.F.R. § 214.2(h)(11)(iii): (1) serve a new NOIR upon the petitioner; (2) adjudicate the merits of revoking the approval of the petition on the grounds that will be specified in the new NOIR, with that adjudication to include consideration of whatever submissions the petitioner may timely submit in response to that new, yet-to-be-issued NOIR, and (3) issue a new decision based upon that adjudication of the merits of the grounds for revocation specified in the new NOIR.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has been met in part. Accordingly, the director's decision will be withdrawn and the matter will be remanded for entry of a new decision.

**ORDER:** The director's decision, dated January 5, 2012, to revoke approval of the H-1B petition is withdrawn; and the petition is remanded to the director for further revocation-on-notice action consistent with the above decision, and entry of a new decision.