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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

DATE: **AUG 15 2013**

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

for 
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center 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 remain revoked.

In the Petition for a Nonimmigrant Worker (Form I-129)¹, the petitioner describes itself as a data processing, consulting and software development business established in 2008. The petition approval whose revocation is the subject of this appeal had been granted for the petitioner to employ the beneficiary as an H-1B temporary worker in a position to which the petitioner had assigned “System Analyst/UNIX Security Admin.” as the title. The director approved the petition on April 1, 2011.

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 petitioner’s response to the NOIR; (4) the director’s revocation letter; and (5) the Form I-290B (Notice of Appeal) and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

As will be discussed below, the AAO has determined that the petitioner has failed to overcome the grounds upon which the director revoked the approval of the petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

U.S. Citizenship and Immigration Services (USCIS) may revoke the approval of an H-1B petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii), which governs revocations that must be preceded by notice and 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

¹ The Form I-129 was filed on January 14, 2011.

(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.

At the outset, the AAO finds that the content of the NOIR comported with the regulatory notice requirements, as it provided a detailed statement that conveyed the grounds for revocation encompassed by the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(A). It also allotted the petitioner the required time for the submission of evidence in rebuttal that is specified in the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(B).

Subsequent to the petition's approval, the Embassy of the United States of America in New Delhi returned the petition to the USCIS Kentucky Consular Center, with a memorandum from the embassy's Non-Immigrant Visa Unit Chief requesting "review and possible revocation" based upon the following information that the memorandum related about that unit's involvement with processing the beneficiary's visa application:

Summary: The petitioner is unwilling or unable to provide qualifying employment.

The beneficiary, [name provided in the memorandum], appeared for a visa interview on May 2, 2011. When asked about his prospective employment in the United States, he said that he would be working as a systems analyst for the petitioner on an internal project. The interviewing officer asked for further documentation.

The requested documents arrived at Post on May 11, 2011. Upon review, Post noted that, according to the petitioner's [Form] I-129, the beneficiary would be working at the petitioner's offices in [redacted]. The LCA [(Labor Condition Application)], however, cites [redacted] as the work location. On the petitioner's tax return, [redacted] (a single family home) is listed as the company address. Furthermore, according to the petitioner's 2010 Federal tax return, salaries paid to the company's four employees totaled \$190,288 USD, but according to the employee list submitted, the total salaries should be \$315,400 USD. The same return shows ordinary business income for the year as \$2,095. Post wonders, given that figure, how the company can afford the \$72,696 salary of the beneficiary. On the same tax returns, the Cost of Goods Sold (Line 2 of the 1120S), the petitioner shows an expenditure of \$34,721 as "Other Costs" with no explanation.

A review of the purported internal project reveals that the beneficiary is not referenced as a project resource. Nor is there any description of the actual work [that] the beneficiary will be doing on the project. Despite Post's request, the beneficiary did not submit the letter of the petitioner to USCIS.

Post reviewed the petitioner's website. All of the information on the website confirms that the petitioner is a client-based IT services company. There is nothing on the website to suggest that the petitioner is involved in software development. Additionally, according to the 2010 U.S. Corporation Income Tax Returns, the petitioner is a self-described IT consulting company and does not engage in any substantive product development activities at its premises.

After quoting the regulatory provisions at 8 C.F.R. 214(h)(2)(i)(F)(1) regarding the terms and conditions that an agent performing the function of an employer must provide, the Embassy's memorandum closed as follows:

As Post believes that the petitioner is not engaged in internal development, and no detailed itinerary of services or indication of a client agreement was provided by the beneficiary, Post concludes that the proffered position does not exist.

In light of the above, Post believes that [the beneficiary] is not eligible for the H-1B visa because the petitioner is unable or unwilling to provide qualifying employment.

Thereafter, the director issued a NOIR to the petitioner. It should be noted that, as will be evident below, the NOIR's language reflects that the NOIR included a copy of the Embassy's memorandum to USCIS.

In pertinent part, the NOIR stated:

On April 1, 2011, USCIS approved the petition and forwarded the approval to the U.S. embassy for processing. After interviewing the beneficiary, the embassy in New Delhi returned the petition to USCIS with new information that was not available at the time of the approval. A copy of the investigative report or memorandum requesting review and possible revocation is enclosed and is discussed in more detail below.

Discussion of Investigative Report or Memorandum

In the initial filing you provided your address on the petition as [REDACTED]. The LCA lists the place of employment as [REDACTED]. Provide a copy of the lease or mortgage information for each of these addresses. Also provide an explanation for the use of both locations as your company address.

The beneficiary provided a copy of your company's 2010 financial documentation. In reviewing these documents it was noted that you had \$34,271 entered as "Other Costs" for that year with no explanation. Further, this document depicts your business as an IT consulting company, which contradicts your assertions that the beneficiary would be working on an internal development project.

Suggested Documentation to Overcome Grounds for Revocation

Provide evidence that you have specialty occupation work available for the entire requested H-1B validity period. The following list contains suggested evidence that may be submitted. This list is not inclusive; you may submit other similar types of evidence that you feel will establish sufficient specialty occupation work for the beneficiary.

- Copy of relevant portions of valid contracts, statements of work, work orders, service agreements, and letters between you and the authorized officials of the ultimate end-client companies to whom the end product or services worked on by the beneficiary will be delivered;
- Copies of company brochures, pamphlets, internet website, or any other printed work published by you that outlines, in detail, the products or services provided by your company;
- Copies of critical reviews of your software in trade journals that describes the purpose of the software, its cost, and its ranking among similarly produced software manufacturers;
- Copy of the marketing analysis for your final software product;
- Copy of a cost analysis for your software product.

The AAO finds that the content of the NOIR - including its statements regarding the embassy memorandum, the copy of that memorandum enclosed with the NOIR, and the types of evidence that the NOIR suggested that the petitioner consider submitting to resolve the director's concerns - placed the petitioner on notice that the director intended to revoke the approval of the petition because, contrary to the attestations in the petition, it appeared that the petitioner had not secured for the beneficiary the work that had been specified in the petition.

The petitioner provided a timely response to the NOIR. After reviewing the petitioner's response to the NOIR and finding the evidence submitted insufficient to refute the findings in the NOIR, the director revoked the approval of the petition on June 18, 2012.

As will be evident in the discussion below, the AAO finds that the petitioner's response to the NOIR failed to overcome what the NOIR focused upon as a lack of substantive evidence that the petition's representations about the services to be performed by the beneficiary were true and accurate.

That NOIR response consists of a May 4, 2012 letter from the petitioner's counsel, wherein counsel introduces the response's enclosures, and the enclosures themselves, which are copies of (1) several documents submitted to support counsel's assertion that the petitioner had three "projects currently being developed"; (2) the petitioner's Form 1120S (U.S. Income Tax Return for an S Corporation, for 2010) and an IRS Form 7004 (Application for Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns); and (3) a single-page spreadsheet which was submitted as listing the petitioner's payments to contractors for the period January 1 2010 to December 31, 2010.

The director was apparently satisfied that the above-noted spreadsheet and tax documents resolved his concerns about the petitioner's financial status, as the decision to revoke approval of the petition does not reference that aspect of the NOIR. Accordingly, the AAO need only address the three projects asserted in the NOIR response.

Counsel's May 4, 2012 letter in response to the NOIR identified the first of the three "projects currently being developed" as a "project . . . with JP Morgan Chase Bank." The letter states:

This project involves developing software using Java/J2EE Web Services for Linux Patching Dashboard which will be developed onsite for JP Morgan Chase.

With regard this particular project, counsel submitted copies of two documents, namely: (1) a document entitled, "Professional Services Short Form Agreement," entered into by the petitioner and JPMorgan Chase Bank, National Association (hereinafter referred to as the Agreement), and (2) a document entitled, "Linux Server Patching Solution, Phase 1, Proposal – 12/19/2011, JPMC – Princeton ITS Confidential" (hereinafter referred to as the Proposal document).

The Agreement has an effective date of February 6, 2012, which indicates that the Agreement was not in effect at the time that the petitioner filed the H-1B petition on January 14, 2011. In this regard, the AAO notes that, to merit approval of its H-1B petition, the petitioner must have established eligibility at the time of filing the nonimmigrant visa petition. See 8 C.F.R. § 103.2(b)(1). Also, a visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Additionally, in Section 1, the Agreement states that "[t]he parties will agree on the goods and services that [the petitioner] will provide . . . and other transaction-specific terms through schedules to this Agreement." In addition, Section 5.1 of the Agreement states that "[the petitioner] will provide the services described in each Schedule ("Services") in accordance with this Agreement and that Schedule. [The petitioner] will provide the Services at and from the location(s) identified in the applicable Schedule. . . ." However, the petitioner did not provide a copy of any such Schedule. Without submission of an applicable Schedule, the petitioner failed to establish any contractual obligation for the petitioner to provide, and JP Morgan Chase Bank to accept, any particular services, let alone services which would be performed by the beneficiary as a systems analyst

within the scope of the type of position for which the director approved the petition. As submitted into the record, this "Professional Services Short Form Agreement" does not establish any particular services to be provided, the location of such services, the dates and duration of the services, or whether the beneficiary would be assigned to the project pursuant to the Agreement. Accordingly, the AAO ascribes no probative value to this document, as it does not establish the substantive nature of any work that had been secured for the beneficiary within the scope of the position for which the petition was approved.

As previously noted, counsel stated that "[t]his project involves developing software using Java/J2EE Web Services for Linux Patching Dashboard which will be developed *onsite* for JP Morgan Chase." (Emphasis added.) The Proposal document states the following:

[The petitioner] proposes to implement the solution using 1 onsite resource for 10 weeks working closely with DTS staff at JPMC location. . . . This proposal is valid till 31-Jan-2012.

Obviously, the language of the Proposal document indicates that the project discussed therein is merely a proposal and there is no evidence in the record that the proposal described in the Proposal document was ever accepted by JP Morgan Chase.

In addition, the language in the Proposal document indicates that one onsite resource would be provided for 10 weeks at JP Morgan Chase's location. The AAO notes that if the beneficiary were to be the one onsite resource allocated to the project, it would contradict the petitioner's statement in the petition that the beneficiary would work at the petitioner's location. In this regard, the AAO also notes that, on appeal, counsel acknowledges that "[t]he citing of the Proposal as to performing services at the client was only a proposal that was not in the final contract." A copy of any such final contract, however, was not submitted into the record of proceeding. 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). Finally, the 10 weeks referenced in the Proposal would not cover the entire requested H-1B employment period.

For all of the reasons discussed above, neither the Agreement nor the Proposal document are substantive evidence that any related work had been secured for the beneficiary in any capacity. Thus, the AAO finds that the Agreement and the Proposal are not indicative that the beneficiary would be performing the services for which the petition had been approved.

With regard to the second project asserted by counsel, counsel's NOIR-response letter stated that the petitioner "is also currently developing software [for a] 'Simple Timesheet' and will make it available for [f]ree as Software as Service." In support of his assertion, counsel submitted a copy of an undated, five-page "Executive Summary" addressing "Project: Simple Timesheet – keep it simple," which was produced by the petitioner at an unspecified time.

The AAO notes that there was no indication anywhere within the petition when it was filed that this project existed even as a concept. In this regard, the AAO notes that this documentation was not submitted at the time of filing. Moreover, the petitioner did not list this project on the "Form I-129 Attachment" nor in the "Itinerary" document. Also, there is no indication within this "Executive Summary" that the beneficiary would work on this project at all, in any capacity. Further, the AAO notes that counsel stated that "[i]n [the] future there will be [a] commercial component"; however this submission is not supported by any documentary evidence to that effect. As previously noted, 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. at 534; *Matter of Laureano*, 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Finally, in light of the fact that the submitted documentation provides no information regarding the dates and duration of this claimed project and in light of what the AAO finds to be merely superficial and skeletal information provided about the claimed project, the petitioner fails to establish that the project itself had ever advanced even close to a stage that would require the beneficiary's services as a systems analyst.

Next, the NOIR response letter indicates that the asserted "third project" also has not advanced to any stage that includes the systems analyst work for the beneficiary that was identified as the subject of the petition.² With regard to this third project, the NOIR-response letter merely states:

There is a third project which involves software for data drivers which is being developed in house. The project has yet to be started and is in the developmental stage.

As this claimed project "has yet to be started and is in the developmental stage," the information presented by counsel does not indicate the existence of specialty occupation work for the beneficiary. As previously stated, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 248.³

² The AAO notes that counsel did not identify this third project by name. The AAO further notes that counsel submitted a five-page document, dated March 27, 2012, entitled, "Functional Requirements Document for POS System, [REDACTED] – Confidential," which appears to relate to this third project. In any event, this document nowhere mentions the beneficiary or the beneficiary's position, and it does not in any way substantiate that the beneficiary would be performing whatever work might possibly, at some unspecified time in the future be generated by whatever project it is that this document is associated with.

³ As such, eligibility for the benefit sought must be assessed and weighed based on the facts as they existed at the time the instant petition was filed and not based on what were merely speculative facts not then in existence.

Counsel submitted a timely appeal. On the Form I-290B, counsel submits the following as, in the words of the form, "a statement explaining any erroneous conclusion of law or fact in the decision being appealed":

In the [NOIR] there was no request from the Service as to where the individual will be working. The response submitted particularly described as to what the responsibilities were for the Beneficiary, and that these programs were being developed at the home office. There was no question in the [NOIR] as to where the [beneficiary] will be working. See Exhibit A[,] [NOIR]. The [beneficiary], as stated in the original [petition] would be working at the Petitioner's home office.

Nothing has changed in that respect. The Service is now stating that that [sic] the Service does not know where the Beneficiary is working. Again, I state that there was no question as to where the Beneficiary would be working, because the beneficiary was always working at the petitioner's home office as stated in the original [petition].

What was requested were the particular job description[s] that the Beneficiary was responsible for. The Denial is not proper in that it was never an issue as to where the Beneficiary was working. The Service asked for the programs that the beneficiary will be producing and that was provided.

The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

At this time[,] the Service can not [sic] now deny the application on information as to what was not previously requested and deny the application based upon the fact that nothing was provided as to where the Beneficiary was working in that there was no issue regarding this fact. The Beneficiary was always working at the home office of the Petitioner. The only change was relocation of the Petitioner's business address. Please see Exhibit B Lease (1st and last pages) showing change of Petitioner's address as well as [the] original Certificate of Incorporation and cover letter from Petitioner which includes reference to contract with [the] client.

On a sheet marked "I-290 B CONTINUATION," counsel closes with the following statements:

The citing of the Proposal as to performing services at the client [(i.e., apparently, the so-called JP Morgan Chase project claimed in the NOIR-response letter)] was only a proposal that was not in the final contract.

See also Itinerary of beneficiary[,] Exhibit C.

On appeal, counsel also supplemented the Form I-290B with a cover letter (containing no substantive statements) and copies of the following documents: (1) the director's decision revoking the approval of the petition; (2) the NOIR; (3) two pages of a lease agreement, executed on December 20, 2010, which reflect the petitioner, on that date, renting office space at [redacted] and "Exhibit A" thereto; (4) the petitioner's Certificate of Incorporation; (5) a July 19, 2012 e-mail from the petitioner's president to the petitioner's counsel, stating that the beneficiary was hired to perform his work at the aforementioned [redacted] address; and (6) a previously submitted, one-page document entitled "Itinerary" which asserts, without supporting documentation, the following "Duties for [the] Beneficiary" (here quoted verbatim) to be performed at the aforementioned [redacted] location during the specified periods: (a) Create Process and Procedures Document ("From 1-Feb-11 To 28-Feb-11"); (b) work on user on-boarding process ("From 28-Feb-11 To 30-Mar-11"); and (c) Unix Security Engineering/System Admin Level 2 & 3 Support; Visiting Datacenters for System Build/Setup. Configuring Unix Security and Identity and Access management Software, Reporting, etc. ("From 1-Apr-11 To 28-Feb-14").

At the outset, the AAO finds that the "Itinerary" document merits no evidentiary weight towards establishing what, if anything, the beneficiary would do in position for which the petition was approved. The record of proceeding does not provide any documentation substantiating what particular work, if any, those three listings of "Duties" have or would generate for the beneficiary at any time during the period of the approval that has been revoked. Further, the AAO finds that those

⁴ The lease was executed by the petitioner (as tenant) and the landlord on December 20, 2010, for the premises located at [redacted]. The lease term is "three (3) years, commencing on January 1, 2011, and ending on December 31, 2013." A full copy of the lease had been submitted with the petition.

generally described duties are not in themselves sufficient to establish that the performance of any position with which they would be associated would require the practical and theoretical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, as would be required to establish a position as an H-1B specialty occupation in accordance with the governing statutes and regulations.

Next, the AAO finds that the submissions on appeal fail to articulate and establish any particular respect in which the director's decision erred in its application of the revocation-on-notice regulations to the evidence in this record of proceeding. Rather, based upon its review of the record of proceeding, the AAO concludes that the director's decision to revoke the approval of the petition comports with the evidence of record, which evidence, the AAO finds, supports the director's decision to revoke the approval of the petition because the petitioner has not established that the beneficiary would be employed by the petitioner in the capacity stated in the petition and because it therefore appears that the statements in the petition regarding the proffered position and the work that the beneficiary would perform in it were at least inaccurate and not true and correct. See 8 C.F.R. § 214.2(h)(11)(iii)(A)(2) (which provides for revocation-on-notice if "[t]he statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact.")

Accordingly, for all of the reasons discussed in this decision, the appeal will be dismissed, and the approval of the petition will remain revoked.

The petitioner should also note that, even if the petitioner had overcome the grounds that the director's decision specified for revocation of the approval of this petition, approval of the petition could not be granted or reinstated at this time. This is because the AAO's review of the record of proceeding in the course of this appeal revealed additional aspects of the petition that would require the AAO to remand the petition to the director to resume the revocation-on-notice process by issuing a new NOIR that would notify the petitioner of, and allow the petitioner to submit evidence to rebut, at least an additional ground for considering revocation of approval of the petition, namely, that it appears that the petition was approved without sufficient evidence to establish that the proffered position was in fact a specialty occupation position in the first place. This aspect of the record of proceeding would constitute a basis for the director to consider initiation of revocation-on-notice proceedings under the provision at 8 C.F.R. § 214.2(h)(11)(iii)(A)(5), as that provision calls upon a director to "send to the petitioner a [NOIR]" if the director finds that "[t]he approval of the petition violated paragraph (h) of this section or involved gross error."

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 not been met.

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