



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

DATE: DEC 30 2013      OFFICE: CALIFORNIA SERVICE CENTER      FILE: [Redacted]

IN RE:      Petitioner: [Redacted]  
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 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.

Thank you,  
  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center ("the director"), revoked the previously approved nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner filed a Form I-129, Petition for a Nonimmigrant Worker (Form I-129), seeking to (1) classify the beneficiary 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); and (2) change the beneficiary's status in accordance with the regulation at 8 C.F.R. § 248.3(a).

The record indicates that, at the time the instant petition was filed, the beneficiary was in the United States in J-2 status, and the petitioner sought to change his status to H-1B nonimmigrant classification upon approval of the petition. After further review, the director determined that the beneficiary was ineligible to change to any status other than H-4 until completion of the J-1 spouse's three-year medical service requirement under section 214(l) of the Act. The director therefore concluded that the underlying petition had been approved in gross error contrary to the eligibility requirements provided for in the regulations and revoked the approval of the petition on notice. The petitioner, through counsel, subsequently filed an appeal of the director's decision to revoke the underlying petition, asserting that United States Citizenship and Immigration Services (USCIS) regulations do not preclude a beneficiary of an approved H-1B petition from changing his J-2 classification to that of an H-1B nonimmigrant.

The AAO initially rejected the appeal citing a lack of jurisdiction over an appeal of a change of status application. See 8 C.F.R. § 248.3(g) and 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). Upon further review of the matter, the AAO determined that the appeal should not have been rejected and notified the petitioner on September 27, 2013 that the appeal would be reconsidered *sua sponte*. The AAO also provided the petitioner 30 days in which to submit a brief in support of the reconsidered appeal. As the briefing period has now passed and the record does not include a supplemental brief from the petitioner, the record is considered complete as currently constituted.

The only issue before the AAO is whether the director appropriately revoked approval of the Form I-129 petition.

The regulation at 8 C.F.R. § 214.2(h)(11)(iii), provides the following grounds for revocation on notice of an H nonimmigrant petition:

Revocation on notice – (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 or on the application for a temporary labor certification was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

In the December 8, 2012 Notice of Intent to Revoke (NOIR), the director stated that the approval of the petition violated 8 C.F.R. § 214.2(h) and/or involved gross error. The director's subsequent revocation of the petition's approval on February 6, 2013 was based solely on the issue of the beneficiary's eligibility to change status from a J-2 nonimmigrant to an H-1B nonimmigrant. Specifically, the director found that the beneficiary is "not eligible to change [his] status from a [J-2] dependent to an H-1B nonimmigrant worker" and, therefore, "the petitioner has not established that the beneficiary qualifies for the approved classification." The director did not identify any other issue as a basis for the revocation on notice action.

As set out above, USCIS is authorized to revoke the approval of H-1B petitions approved in error or on the basis of untrue, incorrect, or inaccurate information. Revocation is also justified if the conditions under which USCIS approved the H-1B petition have altered, either because of a material change in the beneficiary's employment of which the petitioner failed to immediately notify USCIS or because the petitioner violated the language of section 101(a)(15)(H) of the Act, 8 U.S.C. § 1101(a)(15)(H), or 8 C.F.R. § 214.2(h), or the terms and conditions of the approved H-1B petition. As noted above, the revocation decision indicates that the director revoked the approval of the instant petition based solely on the determination that the beneficiary was ineligible to change his status from a J-2 nonimmigrant to an H-1B nonimmigrant. However, the approval of the beneficiary's change of status application, a separate adjudication from the petition adjudication, is not a ground that would allow for the revocation of the underlying H-1B petition's validity.

More specifically, the employment relationship between the petitioner and the beneficiary has not been altered, as required for revocation under the first criterion at 8 C.F.R. § 214.2(h)(11)(iii)(A). At the time the director revoked the instant petition, the beneficiary was still employed in the same specialty occupation by the same employer. The director also did not find that the information provided on the Form I-129 at the time of filing was untrue, incorrect, or inaccurate, the basis on which revocation is authorized under the second criterion at 8 C.F.R. § 214.2(h)(11)(iii)(A). The record contains no evidence that the petitioner committed any violations with regard to the terms and conditions of the approved petition or violated related law or regulation. *See* 8 C.F.R. § 214.2(h)(11)(iii)(A)(3) and (4). Nor does the record include evidence establishing that the approval of the petition violated section 101(a)(15)(H) of the Act or the provisions at 8 C.F.R. § 214.2(h). *See* 8 C.F.R. § 214.2(h)(11)(iii)(A)(5). Accordingly, the AAO finds that the current record offers no basis on which to revoke the approval of the underlying H-1B petition, and that the director's revocation decision was in error.

For the reasons discussed above, the AAO shall sustain the appeal. Accordingly, the AAO will withdraw the director's decision.

The AAO notes that, in withdrawing the decision of the director to revoke the petition, the director's decision attempting to revoke the beneficiary's approved change of status will also effectively be withdrawn as it was based on the revocation of the underlying H-1B petition. As indicated above, the regulation at 8 C.F.R. § 214.2(h)(11) may not be used to revoke a beneficiary's approved change of status unless the underlying petition upon which it is based is properly revoked. To address the issue of whether the change of status application was approved in error, the director must instead reconsider that decision on a USCIS motion.<sup>1</sup>

The burden of proof in visa petition proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

**ORDER:** The appeal is sustained. The director's February 6, 2013 decision revoking approval of the H-1B petition is withdrawn, and the petition is approved.

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<sup>1</sup> As observed in the AAO's initial decision, there is no appeal from the denial of an application to change status filed on a Form I-129. *See* 8 C.F.R. § 248.3(g). We observe here, as well, that USCIS regulations do not provide a methodology to revoke an approved change of status application, except indirectly when the underlying petition is properly revoked. Procedurally, if the director determines that only a beneficiary's change of status application was improperly approved contrary to law or Service policy, the director must reconsider the change of status proceeding on a service motion to address the erroneous approval. *See* 8 C.F.R. § 103.5(a)(5). As the reconsidering of such a proceeding may result in a decision unfavorable to the affected party, the officer shall give the affected party 30 days after service of the motion to submit a brief. *See* 8 C.F.R. § 103.5(a)(5)(ii).