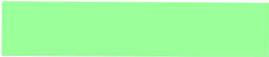


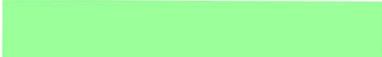
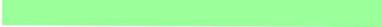


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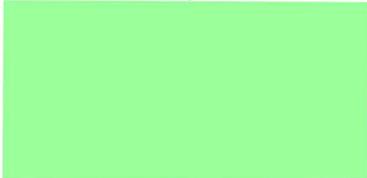


Date: **FEB 26 2013** Office: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, revoked the previously approved nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition's approval will remain revoked.

On the Form I-129 petition, the petitioner claims to be a general construction contractor seeking to employ 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) in a position it designates as an accountant. The director revoked the petition in accordance with the provisions of 8 C.F.R. § 214.2(h)(11)(iii)(A), noting that the beneficiary's statements during a deposition for a pending civil case demonstrated discrepancies regarding the claimed employment of the beneficiary and his qualifications. The director further noted that the petitioner's failure to demonstrate that it was actively conducting business as claimed on the Form I-129 warranted revocation based on the lack of a credible offer of employment at the time of filing.

After issuance of a Notice of Intent to Revoke (NOIR) and review of the petitioner's submissions in response to this notice, the service center director revoked approval of the petition on January 19, 2011.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's NOIR, dated November 26, 2010; (3) the petitioner's response to the NOIR received on December 27, 2010; (4) the director's January 19, 2011 notice of revocation (NOR); and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

A brief summary of the factual and procedural history between the approval and the decision revoking it follows below.

On April 27, 2009, the petitioner filed the Form I-129 (Petition for a Nonimmigrant Worker) to employ the beneficiary in H-1B classification for the period from October 1, 2009 to October 1, 2012. The director initially approved the petition. Upon receipt of new information made available to U.S. Citizenship and Immigration Services (USCIS) after the beneficiary was deposed in Civil Case No 00-00030, the director issued an NOIR. Specifically, the director noted that the beneficiary's claimed employment and work experience as an accountant was questionable based on the beneficiary's claims under oath that he was previously employed as a masonry worker. In addition, the director noted that, given the petitioner's failure to generate income and hire any employees since the date of its incorporation, it was unclear whether a credible offer of employment for the beneficiary in the position of accountant existed at the time of filing. The petitioner was afforded the opportunity to respond to the director's stated grounds for revocation.

In a response received on December 27, 2010, counsel for the petitioner addressed the issues identified by the director. Preliminarily, counsel for the petitioner contended that the beneficiary's prior work experience, whether as an accountant or masonry worker, was not relevant with regard to the beneficiary's qualifications and eligibility for employment in the proffered position. Nevertheless, counsel asserted that the statements contained in a translated letter from [REDACTED]

[REDACTED] dated December 26, 2008, were true and correct. Specifically, this letter stated that the beneficiary had previously been employed by this entity between 1997 and 2006 in the positions of cashier, accountant, general ledger accountant, assistant to financial manager, and financial manager, despite the fact that the beneficiary stated under oath in his deposition that he was employed as a mason for [REDACTED] during this time. From 1998 to 2006, counsel asserts that the beneficiary would work approximately one week per year as a mason for this company when on leave or holiday time. In support of these contentions, counsel submitted an affidavit from the beneficiary attesting to these statements, and in which the beneficiary contended that he was nervous when giving the deposition and was never afforded an opportunity to review the deposition transcript and make necessary corrections.

With regard to the business dealings of the petitioner, counsel contended that the petitioner had recently completed several projects, including a \$3.5 million project for the construction of twenty-four town homes, and contends that additional ongoing projects are being completed. Counsel also submitted copies of bank statements and the petitioner's 2009 Form 1120, U.S. Corporation Income Tax Return. Counsel noted that, while the tax return did not list income or demonstrate the payment of salaries, it listed total assets in the amount of \$3,263,686, which counsel asserts represent deferred development costs reflective of the projects discussed above. Counsel further stated that for 2009-2010, the petitioner had up to 3 employees, and submitted copies of their Forms W-2 [REDACTED] Wage and Tax Statements, for this period.

The director found that the petitioner had failed to overcome the concerns outlined in the NOIR, and on January 19, 2011, the director sent a decision revoking approval of the petition. The director found that, contrary to counsel's assertions, there was insufficient evidence to establish that the petitioner had sufficient H-1B work for the beneficiary, and further noted that the discrepancies in the beneficiary's statements while under oath in the deposition demonstrated that the statement of facts set forth in the petition was not true and correct. Specifically, the director noted that the beneficiary was afforded ample opportunities to state whether he could not understand the questions posed during the deposition, and further noted that, although he was repeatedly asked for his work and employment history, the beneficiary failed to claim that he had ever previously been employed as an accountant.

Regarding the existence of a credible offer at the time of filing, the director noted that, while the petitioner submitted some evidence that business was being conducted since the filing of the petition, the regulations require that a petitioner establish eligibility at the time of filing, and not after the petitioner becomes eligible based on future occurrences. The director further noted that, despite the submission of evidence of current and ongoing contracts, the petitioner's income for both 2008 and 2009 was negative, thereby raising questions regarding the legitimate need for a full-time accountant at the time the petition was filed in April 2009. Noting these unresolved discrepancies, the director concluded that the statements set forth in the initial petition were not true and correct and that the petitioner violated H-1B requirements because no specialty occupation position was immediately available for the beneficiary upon admission to the United States.

On appeal, counsel for the petitioner asserts that the revocation was erroneous. Specifically, counsel asserts that the director failed to afford the petitioner additional time to acquire ten years of payroll records from both [REDACTED] and [REDACTED] which would corroborate the claims of the beneficiary regarding his past employment. Counsel asserted that the records were just becoming available and requested an additional 30 days to submit a brief and additional evidence.

Counsel supplemented the record with a brief dated March 16, 2011, which was accompanied by additional evidence. Counsel cites four bases upon which in contends that revocation was erroneous: (1) no specific section of 8 C.F.R. § 214.2(h)(11)(iii)(A) was identified by the director; (2) no detailed statement of factual grounds was provided; (3) the director improperly denied the petitioner's request for an extension of time to respond to the NOIR; and (4) the evidence submitted in response to the NOIR and on appeal overcomes the grounds for revocation.

The AAO turns first to the basis for the director's revocation, and whether this basis provided the director with sufficient grounds for revoking the H-1B petition under the language at 8 C.F.R. § 214.2(h)(11)(iii)(A), the regulation outlining the circumstances under which an H-1B Form I-129 petition's validity must be rescinded.

The regulation at 8 C.F.R. § 214.2(h)(11)(iii), which governs revocations that must be preceded by notice, states:

(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.

(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.

Contrary to counsel's contentions on appeal, the AAO finds that the content of the NOIR comported with the regulatory notice requirements, as it provided a detailed statement that conveyed grounds for revocation encompassed by the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(A), and 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). Contrary to counsel's contentions, there is no statute or regulation that requires USCIS either to grant an extension of time in which to respond to an NOIR or to respond to the petitioner's request for such an extension.

The director specifically cited to 8 C.F.R. § 214.2(h)(11)(iii)(A)(2) and articulated in detail the deficiencies in the evidence which led to the finding that the statements set forth in the petition were not true and correct. As detailed above, 8 C.F.R. § 214.2(h)(11)(iii)(A)(2) specifically provides that the approval of an H petition must be revoked on notice if it is found that the statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact. Therefore, the AAO finds the first three bases upon which counsel relies as a basis for appeal in this matter have not been established.

As will be discussed below, the AAO further finds that the director's decision to revoke approval of the petition accords with the evidence in the record of proceeding (ROP), and that neither the response to the NOIR nor the submissions on appeal overcome the grounds for revocation indicated in the NOIR. Accordingly, the AAO shall not disturb the director's decision to revoke approval of the petition.

The petitioner maintains that the beneficiary will work as an accountant for the petitioner's general construction business, and that his primary duties will entail analyzing accounting records, preparing tax returns, and interpreting accounting data. The petitioner further claimed that the beneficiary was employed by [REDACTED] from 1997 to 2006 as an accountant and financial manager.

However, when questioned regarding his employment history and experience, the beneficiary stated under oath in a deposition in the previously-identified civil case that he worked as a mason during the same time period for [REDACTED]. While counsel correctly asserts that the beneficiary's previous employment history is not relevant to whether the beneficiary is qualified to perform the duties of a specialty occupation position, this employment history as explained under oath is significant in that it directly contradicts statements set forth on the Form I-129 petition, which was certified by the petitioner to be true and correct under penalty of perjury at the time of filing.

Although the petitioner was afforded the opportunity to address these inconsistencies in response to the NOIR, the petitioner and counsel failed to provide a sufficient explanation regarding these discrepancies. Moreover, on appeal, the petitioner submits a statement from [REDACTED] dated June 3, 2005, stating that the beneficiary worked for [REDACTED] as a mason for 40 hours per week from July 10, 1998 to the present. This statement clearly

contradicts the beneficiary's affidavit where he claims to have worked for that company on a seasonal or intermittent basis for one week per year. 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).

Again, the regulation at 8 C.F.R. § 214.2(h)(11)(iii), which governs revocations that must be preceded by notice, states that the director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that 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. See 8 C.F.R. § 214.2(h)(11)(iii)(A)(2). Based on the numerous inconsistencies and lack of documentary evidence to either support the petitioner's claims or clarify the discrepancies in the record, it cannot be determined that the beneficiary's employment history as stated on the Form I-129 petition is true and correct. An inaccurate statement anywhere on the Form I-129 or in the evidence submitted in connection with the petition mandates its denial. See 8 C.F.R. § 214.2(h)(10)(ii); see also 8 C.F.R. § 103.2(b)(1).

While the beneficiary's employment history is not in itself critical for purposes of determining whether a specialty occupation position exists in this matter, the contradictory statements provided by the beneficiary under oath during his deposition negate the evidentiary value of the petition and the supporting documents.¹ Consequently, this omission, coupled with the contradictory statements given by the beneficiary under oath where he claims to have worked as a mason from 1997 to 2006, cast doubt upon the statements of the petitioner set forth in the petition. Further, as noted above, as an inaccurate statement anywhere on the Form I-129 requires its denial, the petition would never have been approved had such inaccuracies been known at the time the petition was initially adjudicated.

¹ It is further noted that in its June 4, 2009 response to the director's RFE, the petitioner submitted an evaluation of the beneficiary's foreign educational credentials, which stated that they were equivalent to that of a U.S. bachelor's degree in business administration. Although the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation, it should be noted that, in the event the petitioner had credibly established that a specialty occupation position existed for the beneficiary at the time of filing, the beneficiary would not be qualified to perform the duties of a specialty occupation. Specifically, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007). Therefore, even assuming that the beneficiary's foreign education is also credible, possessing the equivalent of a U.S. bachelor's degree in business administration, without more, does not establish that the beneficiary is qualified to perform the duties of a specialty occupation.

Pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(2), an approved petition is revocable if 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. In this matter, the widespread yet unresolved discrepancies in the record lead to the conclusion that the statement of facts contained in the petition is not true and correct. A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir. 2003). However, anytime a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after USCIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N at 591. In this case, the discrepancies and errors catalogued above lead the AAO to conclude that the evidence of record is not credible. Accordingly, the petitioner has not established eligibility for the requested nonimmigrant visa classification, and the director did not err in revoking the approval of the petition based on the inaccuracies identified herein.

Additionally, pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(1), an approved petition is revocable if the beneficiary is no longer employed by the petitioner in the capacity specified in the petition. In this matter, it is unclear whether the beneficiary was ever employed in the capacity specified in the petition, since the record contains no evidence that the petitioner was conducting business at the time of filing, thereby negating the petitioner's claim that it had need for the immediate services of an accountant.

The minimal evidence submitted in response to the NOIR revealed nothing that would support the petitioner's need for an accountant. Although the petitioner submitted copies of completed and future construction contracts, as well as a copy of its tax returns and checking account statements, no evidence demonstrating that the beneficiary was exclusively performing accounting duties for the petitioner was submitted. At the time of filing, the petitioner indicated on the Form I-129 petition that it had 0 employees, and reiterated this claim in its response to the RFE. The tax returns submitted reveal negative income for the tax years 2008 and 2009. Although the petitioner was afforded an opportunity to supplement the record with evidence showing the legitimate need for an accountant at the time of the petition's approval, the petitioner failed to do so. Simply claiming that it had immediate need for the beneficiary's services, without corroborating evidence, is insufficient. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Moreover, the AAO notes the petitioner's submission of W-2GU forms for 2009 as evidence that the petitioner began hiring employees for that calendar year. However, a review of the petitioner's 2009 federal tax return does not identify the amounts listed on the Forms W-2GU in the salaries and wages box, where such payments would be recorded. Again, 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. *Matter of Ho*, 19 I&N Dec. at 591 (BIA 1988).

The record does not establish, therefore, how the petitioner can employ the beneficiary as a full-time accountant or in what capacity the beneficiary's services are required, especially in light of the evidence that the petitioner has no employees and operates on a negative income. While the record contains evidence regarding "projects" upon which the company will work, there is no documentary evidence to show that the petitioner actually is conducting business as claimed in these project specifications and on the Form I-129 petition. Consequently, the AAO finds that the director correctly revoked the approval of the petition for this additional reason. Despite being afforded the opportunity to demonstrate eligibility in this matter, the petitioner failed and/or refused to do so. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Accordingly, the AAO shall not disturb the director's revocation of the approval of the petition.

The appeal will be dismissed and the approval of the petition remains revoked. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

Lastly, 8 C.F.R. § 214.2(h)(11)(iii)(A)(3) and (4) call for the revocation of a petition on notice where the petitioner either violated the terms and conditions of the approved petition or the requirements of section 101(a)(15)(H) of the Act or 8 C.F.R. § 214.2(h). In failing to employ the beneficiary in the proffered position of accountant in accordance with the terms and conditions of the approved petition and as required by the pertinent H-1B statutory and regulatory requirements, the petition's approval is subject to revocation on notice for this additional reason, and the assertions and evidence presented on appeal have failed to demonstrate that the petitioner did not violate these provisions.

For the reasons set forth above, however, the petitioner has failed to overcome the bases for revocation identified by the director. Therefore, the additional grounds for revocation on notice need not and will not be further discussed. The appeal will be dismissed, and the petition will remain revoked.

ORDER: The appeal is dismissed. The petition's approval is revoked.