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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: **JUN 06 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:

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The director initially approved the nonimmigrant visa petition. Upon subsequent review of the record of proceeding, 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.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on April 1, 2009. In the Form I-129 visa petition, the petitioner described itself as a wholesale business established in 2006, with six employees. In order to employ the beneficiary in what it designated as a business development specialist 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 business development specialist position. However, thereafter a site visit was conducted at the beneficiary's place of employment, as specified in the petition. Upon subsequent review of the record of proceeding upon which approval of the petition was based, 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.

With regard to the revocation of the approval of a petition, the regulation at 8 C.F.R. § 214.2(h)(11) states the following:

Revocation of approval of petition--(i) General. (A) The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility An amended petition on Form I-129 should be filed when the petitioner continues to employ the beneficiary. If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition. . . .

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 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
- (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.

The AAO notes that on appeal, counsel asserts that "[t]he decision denies the petitioner due process of law protected by the Fifth Amendment to the U.S. Constitution." He continues by stating that "[t]he procedures used by the Service denied the petitioner the opportunity to rebut the facts." The Due Process Clause of the Fifth Amendment of the United States Constitution guarantees minimal requirements of notice and hearing when an action by the federal government might deprive one of a significant life, liberty, or property interest.

A review of the record and the decision indicates that counsel has not shown that there has been "substantial prejudice." See *De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). The petitioner has not demonstrated any error by the director in conducting the review of the petition. Nor has the petitioner demonstrated any resultant prejudice such as would constitute a due process violation. See *Vides-Vides v. INS*, 783 F.2d 1463, 1469-70 (9th Cir. 1986); *Nicholas v. INS*, 590 F.2d 802, 809-10 (9th Cir. 1979); *Martin-Mendoza v. INS*, 499 F.2d 918, 922 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975). In the instant case, the petitioner failed to rebut and overcome all of the bases outlined in the NOIR for revocation of the petition, and the revocation was the proper result under the applicable statutory and regulatory provisions. Accordingly, the claim is without merit. Furthermore, with respect to a constitutional due process challenge, the AAO has no authority to entertain constitutional challenges to a USCIS action. Cf. *Matter of Salazar-Regino*, 23 I&N Dec. 223, 231 (BIA 2002).

Furthermore, the AAO finds that the basis specified for the revocation action 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 provisions at 8 C.F.R. § 214.2(h)(11)(iii)(A)(1) and (2). That is, 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 rebut and overcome the grounds for revocation. Accordingly, the appeal will be dismissed, and approval of the petition will remain revoked.

In this matter, the petitioner stated on the Form I-129 and supporting documentation that it seeks the beneficiary's services as a business development specialist on a full-time basis at the rate of pay of \$17.82 per hour (\$37,065.60 per year). In the H Classification Supplement to Form I-129, the petitioner described the proposed duties as follows:

Research market conditions to develop business. Gather data on competitors and analyze prices, sales, and marketing programs. Establish relationships with clients. Make recommendations to develop sales including sales plans, advertising, diversifying product lines, and developing methods of marketing.

In the petition, the petitioner indicated that the beneficiary had been serving in the proffered position since February 2009. The description provided for the beneficiary's job duties (from February 2009 until the petition was filed) was identical to the above description.

The petitioner did not submit a letter of support. However, the petitioner provided a prevailing wage request and determination in which counsel for the petitioner stated that a "Master of Business Administration" was required for the business development position. Notably, the petitioner also submitted a job posting for the business development specialist position, which indicated that a "Bachelors degree" (no specific specialty) was required for the position. The job duties are identical. No explanation for the variance was provided.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Market Research Analysts" - SOC (ONET/OES Code) 19-3021, at a Level I (entry level) wage.

In addition, the petitioner provided several documents in support of the petition. More specifically, the documentation included the following: (1) an unsigned 2007 tax return and related documents; (2) photos of the petitioner's business; (3) a catalogue of the petitioner's products; and (4) documents relating to the beneficiary's credentials.

The petition was approved for what the petitioner designated as a business development specialist position. On May 5, 2010, an administrative site visit was conducted to verify the information within the petition.¹ The officers conducting the site visit interviewed [REDACTED] the president, who

¹ A site visit is an administrative inquiry relating to the petitioner's burden of proof. Agency verification

was listed as the petitioner's authorized representative on the Form I-129 and LCA. Later, the officers spoke with [REDACTED]. During the site visit, the officer conducting the site visit discovered that (1) the beneficiary was not present at the worksite; (2) the beneficiary was performing duties in San Diego, a location not annotated on the LCA; and (3) the beneficiary was not performing the duties approved for in the Form I-129.

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. In response to the NOIR, counsel claimed that the beneficiary was required "to spend some portion of his time out of the office" in order to perform the duties of a business development specialist. In addition, counsel stated that "[o]n May 5, 2010[,] [the beneficiary] was on a business trip to [REDACTED] on behalf of [the] petitioner to meet [the] petitioner's customer. It was a short trip that lasted less than one day." In addition, counsel claimed that "[t]here are no facts that support the conclusion that the beneficiary is not doing the duties as set out in the petition." Counsel concluded that "it can not [sic] be the basis for a motion to reopen or an intent to revoke."

In response to the NOIR, counsel also submitted: (1) a printout of DOL's Fact Sheet #62J; (2) an excerpt entitled "Market and Survey Researchers" from DOL's *Occupational Outlook Handbook*; (3) a document entitled "Customer List Summary"; (4) a written statement from [REDACTED] (5) a written statement from the beneficiary; (6) a copy of the beneficiary's driver's license, credit card receipts, utility bills, bank statements, and related documents; and (7) two photographs.

The director reviewed the response and accepted counsel's argument that the beneficiary's travel to San Diego was functional towards his position and not a permanent place of employment. However, the director found the information submitted insufficient to refute the findings in the NOIR that the beneficiary was not performing services in a specialty occupation as attested in the initial petition. The director revoked the approval of the petition on December 9, 2010. Thereafter, counsel submitted an appeal. In support of the appeal, counsel submitted a brief.

The AAO reviewed the record of proceeding in its entirety, including the documentation 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

methods may include but are not limited to review of public records and information; contact via written correspondence, the Internet, facsimile or other electronic transmission, or telephone; unannounced physical site inspections; and interviews. *See generally* sections 103, 214, and 291 of the Act, 8 U.S.C. §§ 1103, 1184, and 1361 (2006); 8 C.F.R. § 103.2(b)(7). 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.

petitioner has not sufficiently resolved the inconsistencies. 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, 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 and counsel primarily rely upon two letters in support of the assertion that the beneficiary was performing the duties of the proffered position as stated in the H-1B petition. Specifically, the petitioner submitted a letter from [REDACTED]. The letter is dated November 1, 2010. In the letter, Mr. [REDACTED] states that he is the owner of [REDACTED] located in [REDACTED] California and that the business is a customer of the petitioner. He continues by stating that "[o]n May 5, 2010, [the beneficiary] visited my business on behalf of his employer [the petitioner]." Mr. [REDACTED] indicates that "[the beneficiary] introduced himself as the Business Development Specialist for [the petitioner]. He stated that his job is to use market research to develop business for [the petitioner]." According to Mr. [REDACTED] the beneficiary then asked him several questions regarding his satisfaction with the petitioner's products and services, the market in general, other wholesalers, and the economy. Mr. [REDACTED] states that the beneficiary "was here less than one hour and left." Mr. [REDACTED] claims that the beneficiary "was not here as a strikebreaker" and that the beneficiary does not work for the [REDACTED].

In addition, the petitioner submitted a letter from the beneficiary, which is also dated November 1, 2010. The beneficiary states that he works for the petitioner as a business development specialist and claims that as part of his job duties, he "must meet and establish relationships with clients." He reports that on May 5, 2010, he was "on a one day business trip to [REDACTED] to visit customers." He further claims that he performs the job duties as set out in the petition.

The AAO notes that the written statements provided by Mr. [REDACTED] and by the beneficiary are not affidavits as they were not sworn to or affirmed by Mr. [REDACTED] and by the beneficiary before an officer authorized to administer oaths or affirmations who has, having confirmed the their identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, do they contain the requisite statement, permitted by Federal law, that the signer, in signing the statement, certifies the truth of the statement, under penalty of perjury. 28 U.S.C. § 1746.

Moreover, the AAO observes that the letter from Mr. [REDACTED] accounts for approximately one hour of the beneficiary's time during his period of employment with the petitioner. No further supporting documentation from Mr. [REDACTED] (or any other customers) regarding the beneficiary's activities on the day of the site visit was provided. Thus, while the AAO reviewed the letter in its entirety, its probative value is limited.

Furthermore, while the beneficiary's written statements may provide some insight into his duties, the petitioner should note that the written statement represents a claim by the beneficiary, rather than evidence to support the claim.

The AAO notes that the beneficiary had been employed by the petitioner for approximately one year and eight months when the NOIR was issued. However, the letter contains general duties of the occupation rather than specific information regarding the beneficiary's actual daily duties. The duties of the position as provided by the beneficiary in response to the NOIR fail to adequately describe the substantive nature of the work that he performs within the petitioner's business operations. It fails 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 petitioner did not submit a written statement from its authorized official regarding the site visit and the duties of the proffered position.² Moreover, the petitioner failed to submit documentary evidence to establish the actual day-to-day duties performed by the beneficiary.

Upon review of the record of proceeding, the AAO agrees that the petitioner did not overcome the basis for the revocation of the petition. In the instant case, there is a lack of documentation to corroborate the assertion that the beneficiary is performing the duties as described in the initial petition. The petitioner failed to provide sufficient probative evidence to substantiate its claim regarding the beneficiary's duties as a business development specialist. Specifically, the petitioner failed to submit independent, objective evidence to refute or otherwise explain the petitioner's statements to the USCIS officers regarding the beneficiary's duties. The petitioner has not sufficiently explained and overcome the implication of the statements made to the site visit inspectors. Furthermore, although the beneficiary asserts that he is performing the duties set out in the petition, the petitioner did not submit sufficient 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 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 to qualify the proffered position as a specialty occupation.

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 sufficient 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. 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

² Notably, as discussed by the director, during the site visit, the petitioner's president stated that the beneficiary was in [REDACTED] collecting money from a client. In addition, the president stated that the beneficiary also did accounting work, tax, inventory, and calling/talking to customers.

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. 591-92.

In the appeal, counsel asserts that "[t]he beneficiary does the job duties that are set out in the petition." 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 grounds specified in the NOIR and the subsequent revocation decision.³ The petitioner has not sufficiently 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 burden of proof in this proceeding rests solely with the petitioner. Section 291 of the Act. The petitioner has not sustained that burden.

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

³ 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 is revoked for the reasons discussed above, the AAO will not further discuss the additional issues and deficiencies that it observes in the record of proceedings.