

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE: JUN 28 2013

OFFICE: CALIFORNIA SERVICE CENTER

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: SELF-REPRESENTED

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 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 May 12, 2011. In the Form I-129 visa petition, the petitioner described itself as a business providing medical and cardiology consultant services established in 1979, with six employees.¹ On the Form I-129, the petitioner listed its gross annual income as \$760,000 and net annual income as \$225,000. In order to continue to employ the beneficiary in what it designated as a computer analyst/programmer position, the petitioner sought to continuously 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 computer analyst/programmer position. 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 the director revoked the approval of the petition. Thereafter, 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.

¹ For H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. It is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

The AAO notes that it is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's business is relatively small, the record is reviewed for evidence that the petitioner's operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in position requiring the theoretical and practical application of a body of highly specialized knowledge that may be obtained only through a baccalaureate degree or higher in a specific specialty, or its equivalent. Additionally, when a petitioner employs relatively few people, it may be necessary for the petitioner to establish how the beneficiary will be relieved from performing non-qualifying duties.

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. . . .

Under the provisions outlined in 8 C.F.R. § 214.2(h)(11)(iii), U.S. Citizenship and Immigration Services (USCIS) will revoke the approval of an H-1B petition. Specifically, 8 C.F.R. § 214.2(h)(11)(iii) 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.

As a preliminary matter, the AAO finds that the bases specified for the revocation action are proper grounds for such action. The director's statements in the NOIR 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),(2),(3), (4) and (5). The documents submitted in response to the

NOIR failed to rebut and overcome the grounds for revocation. The director determined that the petitioner failed to establish that the beneficiary is employed in the capacity specified in the petition. Upon review of the record of proceeding, the AAO agrees that the petitioner has not overcome the grounds for the revocation of the petition and 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 computer analyst/programmer on a full-time basis at the rate of pay of \$67,912 per year. In its letter of support, dated May 5, 2011, the petitioner described the duties of the proffered position as follows:

As a computer analyst[,] [the beneficiary] is carrying out the responsibility of analysis, design, development of Medical Database Objects along with development of dataflow diagrams through Flow Charting. His job involves him in Systems Study, Flow-Charting and Medical Database Development through database objects, Database Development through Interactive SQL and Transact SQL, source coding using T-SQL. Besides he is also performing the tasks regarding Testing & implementation of Medical database modules about Patients' and Providers, Patient's Insurances and Insurance companies, Installation of Operating Systems such as Windows 2003 Server, NT, XP, 2K and networking. His duties apart from designing and development of Database Modules of Applications along with the appropriate Interfaces also cover Operations, Maintenance and enhancement of current applications based upon the current and future requirements.

In the petition, the petitioner indicated that the beneficiary had been serving in the proffered position since December 2001. Further, the petitioner stated that the beneficiary "has been a good employee with good technical skills" and that he "has carried out the job responsibilities well and to our satisfaction." The AAO notes that the petitioner did not provide the requirements (if any) for the computer analyst/programmer position. For a petitioner to demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, the petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. In the instant case, the petitioner failed to state any requirements for the position.

The petitioner submitted an evaluation of the beneficiary's credentials from The Knowledge Company. The evaluation indicates that the beneficiary "Bachelor of Commerce and Bachelor of Laws from [redacted] University together are equivalent to a bachelor's degree in Business and Law offered by an accredited university in the United States." The petitioner provided copies of the beneficiary's diplomas and transcripts, along with certificates issued to the beneficiary and a letter from a prior employer.

In addition, the petitioner provided several documents in support of the petition. More specifically, the documentation included the following: (1) Form W-2, Wage and Tax Statement, for 2010; and (2) pay statements from January to April 17, 2011.

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 "Computer Systems Analyst" - SOC (ONET/OES Code) 15-1051, at a Level II (qualified) wage.

In the petition, the petitioner indicated that the beneficiary had been serving in the proffered position since December 5, 2001. The petition was approved for what the petitioner designated as a computer analyst/programmer position. In August 2011 and in September 2011, administrative site visits were conducted to verify the information within the petition.² The site visit and subsequent investigation revealed that the petitioner is a medical office with six employees, and that two of the employees work as computer analysts/programmers.

The officer spoke to the beneficiary and was asked about his job duties and credentials. He stated that he worked with [REDACTED] and did database management and system management. The beneficiary's description of his job duties was general and he did not provide any additional details. When asked about his education, the beneficiary had difficulty recalling the year in which he completed his studies in computer applications. The site inspector was shown the beneficiary's work station, although there was nothing at the desk identifying it as the beneficiary's work space.

During the interview, it was learned that the president, and that the person the beneficiary stated was assigning him work, is the beneficiary's brother. Notably, all of the documentation submitted in support of the H-1B filing was signed by another individual, the vice president [REDACTED]. In addition, USCIS found publically available information that listed the beneficiary's position within the company as an office manager and not as a computer analyst/programmer.

The director reviewed report regarding the site visit and the publically available information, 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 the NOIR, the director notified the petitioner that USCIS had received information indicating that the beneficiary was not employed in the capacity specified in the H-1B petition and that there were issues that raised questions regarding the veracity of the petitioner's offer of employment as stated in the H-1B petition.

In response to the NOIR, the petitioner's president submitted a letter stating that he is "the doctor, director and manager and nothing happens in this office without my approval or directions." He

² A site visit is an administrative inquiry relating to the petitioner's burden of proof. Agency verification 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.

continued by stating that he is "the sole owner/stock holder of [the petitioning company]." The petitioner's president further claimed that "the beneficiary is working within the scope of job [sic] description as provided in the original petition and extensions." According to the president, while the company "provide[s] cardiology services as a regular doctor's office," the petitioner "also [has] been in the process of developing or modifying applications for medical use," and that "it is very different from a regular doctor's office." The president stated that "[t]he petitioner has additional independent contractors working besides 6 full time employees."³

Further, although the NOIR focused on the petitioner's need to provide corroborating documentation, the petitioner's response did not include such evidence. That is, the petitioner did not provide any supporting evidence to corroborate the claims of its president.

The director reviewed the response and determined that the petitioner's letter did not overcome the grounds for revocation. Accordingly, on October 1, 2012, the director revoked the approval of the petition. Thereafter, the petitioner submitted an appeal of the director's decision. The petitioner's president submitted a letter stating his disagreement with the director's decision to revoke the approval of the petition. With the appeal, the petitioner's president provided additional evidence, including (1) an email sent to Wiki support on October 10, 2012; and (2) copies of documents described as "applications and programs [the petitioner is] working on."⁴

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. However, the AAO finds that the petitioner failed to overcome the basis of the director's denial. 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 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.

³ No additional information or documentation was provided regarding the job titles and duties of the "additional independent contractors" and the petitioner's "full time employees."

⁴ In regards to the evidence submitted on appeal, the AAO notes where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO need not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the NOIR. *Id.* The petitioner has not provided a valid reason for failing to provide the documentation in response to the NOIR. Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted for the first time on appeal. Nevertheless, the AAO reviewed the evidence submitted on appeal.

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

For H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. It is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

In the instant case, the petitioner relies primarily upon statements from the petitioner's president in support of the assertion that the beneficiary performs the duties of the proffered position as stated in the H-1B petition. The petitioner's president claimed that the company is "developing or modifying applications for medical use." He also stated that "in order to support the computerized services ranging from nuclear cardiology to patient management; to keep the network, computers and applications running appropriately, and to develop new programs/applications, the petitioner needs two or more computer analysts/programmers." The petitioner claimed that the beneficiary's work has an impact on the petitioner's "effort to innovate and develop medical applications." As noted, the petitioner failed to provide supporting evidence with its response to the NOIR, but did provide additional evidence on appeal. No explanation was provided for failing to previously submit the documentation. The AAO notes that while the written statements from the petitioner's president may provide some insight into the beneficiary's duties, the petitioner should note that the written statements represent a claim by its president rather than evidence to support the claim.

Further, the AAO notes that the beneficiary had been employed by the petitioner in the proffered position for over ten years when the NOIR was issued.⁵ However, the beneficiary provided a vague general statement regarding his duties to the officer during the site visit, and the letters from the petitioner's president (submitted in response to the NOIR and on appeal) contain general duties of the occupation rather than specific information regarding the beneficiary's actual daily duties.⁶ The duties

⁵ In the Form I-129 petition, the petitioner stated, "Alien has been performing the . . . duties since the initial approval of his H-1B from December 2001."

⁶ The petitioner did not provide sufficient details regarding the nature and scope of the beneficiary's employment or substantive evidence regarding the actual work that the beneficiary performs. The tasks as

of the position as provided fail to adequately describe the substantive nature of the work that the beneficiary 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.

On appeal, the petitioner submitted documents that its president describes as the "Beneficiary's work." The documentation includes copies of several screen shots from "EMR-Microsoft Visual Basic.NET [design]-about.vb [Design]" entitled "Electronic Medical Records," as well as several pages of Visual Basic script along with blank forms relating to the petitioner's medical practice (such as forms entitled "Prescription Form" and "Treadmill Stress Test"). The petitioner's president stated that "these documents show that the beneficiary is working in the capacity as stated in the I-129 Nonimmigrant Petition." Although the beneficiary had been employed in the proffered position for over a decade, the AAO notes that the evidence is not attributed to the beneficiary and the documentation does not provide his name or other identifying information. The evidence lacks sufficient information to determine who created the "work", when it was created, the amount of time spent developing or modifying it, etc.

Moreover, the petitioner did not provide any further specific information regarding its "effort to innovate and develop medical applications" or the beneficiary's work "developing or modifying applications for medical use." The record of proceeding lacks probative evidence regarding aspects such as steps taken, when this project(s) began, the duration (or expected duration) of the project(s), the beneficiary's specific role on the project(s), whether the application(s) are used exclusively internally or if they are offered externally, the terms of any agreements, etc. The petitioner failed to provide substantive information or documentation to establish the relevant factors that may have occurred regarding this process and substantiate its claim that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

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 computer analyst/programmer. Specifically, the petitioner failed to submit sufficient independent, objective evidence 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

described fail to communicate (1) the actual work that the beneficiary performs, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The petitioner's assertions are conclusory and unpersuasive, as they are not supported by sufficient substantive evidence.

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 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.

Based upon a complete review of the appeal and the record of proceeding, the petitioner has failed to overcome the basis for revocation as specified in the NOIR and the subsequent revocation decision.⁷ 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 petition remains revoked.

FURTHER ORDERED: The service center director shall review the approval of the H-1B petition with receipt number [REDACTED] for possible revocation consistent with the eligibility issues identified in this decision.

⁷ 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 proceeding.