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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: **MAY 07 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. 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,

Michael T. Kelly
102 Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director revoked the approval of the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The director's decision will be withdrawn, and the matter will be remanded for further action consistent with this decision and entry of a new decision.

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a hospitality business established in 1993. In order to continue to employ the beneficiary in what it designates as a night auditor position, the petitioner seeks to extend his classification 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 director approved the petition on August 10, 2010. Subsequent to the petition's approval, the Fraud Prevention Manager at the Embassy of the United States of America in Ottawa, Canada (hereinafter referred to as the Embassy) returned the petition to the director for review. In the letter accompanying the petition on its return, the Embassy notified U.S. Citizenship and Immigration Services (USCIS) that during the course of a visa interview with the beneficiary, which was held on September 22, 2010, information came to light that was not available to USCIS at the time the petition was approved, but that bears upon the merits of that approval.

On August 10, 2011, the director issued a Notice of Intent to Revoke (NOIR) that contained a detailed statement of the grounds for revocation of the approved petition as identified in the Embassy's letter. The NOIR stated that during the beneficiary's interview at the Embassy, information was obtained that appeared to indicate that fraud, material misrepresentation or other unlawful means were used to obtain the petition's approval. Specifically, the NOIR stated that the information that was obtained appeared to indicate that the beneficiary was not performing the duties related to the occupation described in the initial petition. Also, it appears that the aforementioned Embassy letter was included in the NOIR as an attachment.

Also, the NOIR specified the time period allowed for the petitioner's rebuttal. The petitioner was given 33 days to respond to the NOIR. On January 23, 2012, the director revoked the petition, upon finding that the petitioner failed to submit a response to the NOIR and that, therefore, the petitioner failed to overcome the grounds for revocation of the petition.

On appeal, counsel for the petitioner asserts, in part, that the director's grounds for revocation of the petition were erroneous and that neither the petitioner, nor the petitioner's attorney of record, nor the beneficiary received a copy of the NOIR. (Counsel is mistaken, of course, to the extent that counsel suggests or implies that the beneficiary is an affected party to an H-1B specialty occupation petition or is otherwise entitled to service of a NOIR.)

On appeal, counsel also asserts, mistakenly, that the doctrine of estoppel applies in this case so as to preclude USCIS from revoking the H-1B petition since the previous H-1B petitions filed by the petitioner on behalf of the beneficiary were all approved. Counsel also requests *nunc pro tunc* relief so that the petitioner and his dependents may apply for adjustment of status when the priority date

for the petitioner's approved Form I-140, Immigrant Petition for Alien Worker (Form I-140), becomes current. In support of these assertions, counsel submitted a brief and additional evidence.

The AAO will first address why the petitioner's estoppel claim does not succeed.

The AAO, like the Board of Immigration Appeals, is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of USCIS from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). Estoppel is an equitable form of relief that is available only through the courts. The jurisdiction of the AAO is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See DHS Delegation Number 0150.1* (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). The jurisdiction of the AAO is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). Accordingly, the AAO has no authority to address the petitioner's equitable estoppel claim.

Next, the AAO is not authorized to grant the petitioner's request for *nunc pro tunc* relief. It must be noted for the record that, even if eligibility for the benefit sought was otherwise established, as the authority of the AAO is limited to that specifically granted or delegated to it by the Act, its implementing regulations, and the Secretary of the U.S. Department of Homeland Security pursuant to 8 C.F.R. § 2.1, the AAO cannot grant counsel's *nunc pro tunc* request. As the law does not provide a discretionary basis to do so, the AAO has no authority to grant counsel's *nunc pro tunc* request in this matter.

The AAO will now address its determinations to withdraw the director's decision and to remand the matter for the director to issue a new, expanded NOIR.

Upon review, the AAO finds sufficient indication in this particular record of proceeding that the petitioner probably had not received the NOIR. Accordingly, the AAO will withdraw the director's decision to revoke approval of this petition.

It is necessary for the AAO to remand this matter for additional action, however, as the NOIR in question asserted factual matters that would require the director to revoke the approval of the petition if they are not effectively rebutted by responsive evidence from the petitioner. Thus, the petitioner must be afforded an opportunity to review and to attempt to rebut those grounds, by service of a NOIR upon it that specifies those grounds. However, the remand is also necessary, because, as will now be noted, the AAO has identified additional grounds for revocation of the petition's approval that should also be specified within a NOIR.

The AAO notes that, aside from and in addition to, the adverse information that was the basis of the original NOIR, the record of proceeding indicates additional grounds for revocation-on-notice proceedings, namely, the failure of the evidence of record to establish the proffered position as a specialty occupation in the first place.

Thus, in addition to withdrawing the director's decision, the AAO will remand the matter, for the director to: (1) serve a new, expanded NOIR upon the petitioner, in accordance with the provisions at 8 C.F.R. § 214.2(h)(11)(iii); (2) adjudicate the merits of revoking the approval of the petition on the grounds specified in the NOIR, with that adjudication to include consideration of whatever submissions the petitioner may timely submit in response to that new, yet-to-be-issued NOIR; and (3) issue a new decision based upon that adjudication of the merits of the grounds for revocation specified in the new NOIR.

USCIS may revoke the approval of an H-1B petition pursuant to the revocation-on-notice provisions at 8 C.F.R. § 214.2(h)(11)(iii), which state 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.

In light of the apparent failure of service of the NOIR that was issued, and in light of the specialty-occupation issue identified by the AAO as an additional basis for considering revocation of the approval of the petition, the AAO will remand the matter to the director, for the director to issue a new NOIR, in place of the one that apparently had not been received by the petitioner.

The new NOIR should, at a minimum: (1) again articulate the grounds for revocation specified in the initial NOIR – namely, the adverse information contained in the aforementioned Embassy letter; (2) again cite and include as an attachment or enclosure the aforementioned Embassy letter; and (3) articulate, as an additional basis for revocation of the approval of the petition, that the petition appears to have been approved without sufficient evidence to establish the proffered position as a specialty occupation.

With regard to the specialty occupation issue, the AAO brings to the director's attention the fact that, regardless of the job title of auditor (specifically, "night time auditor") that the petitioner assigned to the position, the Form I-129 and its allied papers (including the *Occupational Outlook Handbook* chapter submitted in support of the petition) and the Labor Condition Application (LCA) submitted for this petition all indicate that - even if all of the information in the petition truly and accurately represented the position that the beneficiary was being hired to fill - the proffered position would not belong to an occupational classification exceeding the educational requirements of the one named in the LCA, namely, "Bookkeeping, Auditing Clerks, and Accounting Clerks." However, the AAO notes that the pertinent chapter of the *Occupational Outlook Handbook* indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not normally a minimum requirement for entry into that occupational group. Further, the AAO observes that, as presently constituted, the evidence in the record of proceeding does not establish that approval of the petition in question was based upon sufficient evidence to establish that the proffered position qualified as a specialty occupation or that it satisfied any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Accordingly, the NOIR should be expanded to include not only the content of the original NOIR (that is the matters discussed in the original NOIR letter, accompanied by a copy of the Embassy letter as an attachment) but to also include sufficient information to notify the petitioner that failure to establish a specialty occupation position is also being considered as a separate and independent basis for revoking approval of the petition. In this latter regard, the contents of the new NOIR should include a specific observation that, while counsel asserted on appeal that the beneficiary was working as an "accountant," the LCA identified the position's job title as "night auditor" and the LCA designation for the proffered position corresponds to the occupational classification of "Bookkeeping, Accounting, and Auditing Clerks" – SOC (ONET/OES) Code 43-3031.00 – and not to the occupational group of Accountants, which falls within the SOC (ONET/OES) Code 13-2011.01. The NOIR should of course alert the petitioner to any other aspects of the record of proceeding that indicate that the approval of the petition was granted without sufficient evidence that the proffered position qualified as a specialty occupation, in violation of the H-1B specialty occupation requirements specified in the pertinent provisions of the regulations at 8 C.F.R. § 214.2(h).

Next, in light of counsel's assertion on appeal that the Form I-140 petition () was approved for the same position, the AAO observes that it would be appropriate for the director to consider what bearing the issues in the H-1B revocation-on-notice proceeding may have with regard to the approval that has been granted for the Form I-140 petition.

In addition, the AAO notes the following aspects of the petition that can be flagged for further research or investigation, if any, that the service center might deem appropriate: (1) The official who signed the petition and the hiring or designated official of the employer who signed the LCA both have the same last name as the beneficiary; and (2) The Tennessee Secretary of State – Corporation Division report lists the beneficiary as the registered agent for the petitioner.

As an administrative note regarding where to send the new NOIR, the service center should note the attorney who has entered his appearance, via a Form G-28, as representing the petitioner on appeal. This is a different attorney (with a different address) than the one who had represented the petitioner prior to the entry of the director's decision to revoke the petition's approval.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met in part. Accordingly, the director's decision will be withdrawn and the matter will be remanded for entry of a new decision.

ORDER: The director's decision, dated January 23, 2012, to revoke approval of the H-1B petition is withdrawn; and the petition is remanded to the director for further revocation-on-notice action regarding that approval, and entry of a new decision.

FURTHER ORDER:

The director should consider whatever bearing the H-1B revocation-on-notice proceeding may have with regard to the approval that has been granted for the Form I-140 petition for the same position.