



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **SEP 25 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: SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director initially approved the nonimmigrant visa petition. In response to new evidence 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. Approval of the petition will remain revoked.

The record shows that the petitioner was represented by counsel when the Form I-129 visa petition was filed. However, the record contains no Form G-28, Notice of Entry of Appearance showing that the petitioner is represented on appeal. Further, the petitioner's director of operations signed the Form I-290B. The petitioner will be considered to be self-represented on appeal, and a copy of the decision on appeal will not be provided to the petitioner's previous counsel.

The AAO has determined that the director did not err in her decision to revoke approval of the petition. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will remain revoked.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's notice of intent to revoke (NOIR); (3) the response to the NOIR; (4) the director's revocation letter; and (5) the Form I-290B and the petitioner's submissions on appeal.

On the Form I-129 visa petition, signed by [REDACTED] as the petitioner's administrator, the petitioner described itself as a nursing school with 26 workers. To continue to employ the beneficiary in what it designates as a full-time "Postsecondary Teacher" position, the petitioner endeavors 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 visa petition was accompanied by a letter, dated June 14, 2011, from [REDACTED]. That letter contains the following description of the duties of the proffered position:

- Organize and present materials and situations in the most effective way possible to motivate students to learn
- Educate students through lecture and supplemental presentations
- Teach subject matter and adapt teaching techniques and methods of instruction to meet needs of students
- Identifies appropriate strategies, tactics, material, resources, and programs based on assessment activities
- Develop, plan and participate in training sessions for all classes and ensure program and material developed are compatible with our goals and objectives
- Serve as authoritative resource on patient and health education issues and related matters
- Collaborate with management to help establish short and long term goals, operational plans and programs, direction and priorities

- Serve as advisor to student organizations and committees when they are relevant to course material and programs
- Conduct research
- Regularly review programs and activities to streamline the quality of services
- Maintain required and appropriate records

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a postsecondary teacher position, and that it corresponds to Standard Occupational Classification (SOC) code and title 25-1194.00, Vocational Education Teachers Postsecondary from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level, position.

Based on that evidence, the director approved the visa petition on August 11, 2011. However, on August 2, 2012 the service center director issued a NOIR in this matter. The petitioner's response was received on September 6, 2012. Subsequently, on January 9, 2013, the director revoked approval of the visa petition. The petitioner filed a timely appeal on February 8, 2013.

The director's revocation of approval of the petition was based on her finding that the evidence indicates that the beneficiary is no longer employing the beneficiary in the capacity specified in the petition, and that the petitioner violated terms and conditions of the approved petition.

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 August 2, 2012 NOIR stated the following:

On November 8, 2011, an administrative site visit was performed. The site inspector went to [REDACTED] which was the address listed on the petition as the location where the beneficiary would work. The site inspector reported the following information:

- The beneficiary was not performing the duties as indicated on the I-129;
- The beneficiary's position was that of a Records Custodian, and not a Postsecondary Teacher.

Specifically, the site inspector spoke to the signatory of the petition, [REDACTED] who identified herself as an Administrator. The signatory stated that the beneficiary's duties consisted of grading exams, updating grades on the computer, reviewing transcripts, and making sure all the students are following all the necessary requirements in order to graduate. According to the signatory, the beneficiary also prepares the diplomas for the graduates of the school. The site inspector asked the signatory if the beneficiary taught any classes and the signatory said no. The signatory described the beneficiary's job title as "Records Custodian."

The director offered the petitioner an opportunity to respond to the NOIR. The petitioner provided (1) transcripts of the beneficiary's 2010 and 2011 tax returns; (2) copies of the beneficiary's 2010, 2011, and 2012 Form W-2 Wage and Tax Statements; (3) pay stubs showing amounts paid to the beneficiary for two-week periods spanning from December 23, 2011 to December 20, 2012; (4) attendance sheets; and (5) a letter, dated February 6, 2013 and signed by [REDACTED] as the petitioner's director of operations.

The tax return transcripts, W-2 forms, and pay stubs all show that the petitioner employed the beneficiary. They contain no indication of the duties the beneficiary performed or his job title.

The attendance sheets provided indicate that the beneficiary taught classes on December 5, 6, 19, 20, and 23 of 2011; March 7, 9, 12, 14, and 21 of 2012; June 3, 8, 15, and 29 of 2012; and July 1

and 6 of 2012. Those attendance sheets are insufficient to show that the beneficiary taught classes as a regular instructor, rather than a substitute, and insufficient, therefore, to show that he was ever a full-time instructor. Further, although they indicate that the beneficiary taught classes on and after December 5, 2011, they do not contradict the information obtained from [REDACTED] that, as of November 8, 2011, the beneficiary had ceased teaching and was working as a records custodian. They also do not show that the beneficiary taught any classes prior to November 8, 2011.

In his February 6, 2013 letter submitted on appeal, [REDACTED] addressed the evidence uncovered at the site visit as follows:

The [petitioner] underwent a major re-organization considering its successful enrollment increase and new Federal status having granted to provide Federal Student Loans (Title IV). The previous signatory of the original petition, the owner and founder of the school, [REDACTED] has retired from her post and is no longer on payroll since the last quarter of 2010. However, she continuously maintained significantly diminished role and would visit the school once or twice a week to aid smooth transition to her successor, the undersigned, [REDACTED]

In November 2012 [sic], the USCIS conducted a site visit. On that day, [REDACTED] happened to be present. When asked about the position of the beneficiary, she thought that it has something to do with the Department of Education's extensive record keeping requirements for Title IV implementation, thus she mentioned that [the beneficiary's] position was that of a record custodian and not as a postsecondary teacher. She thought that the organizational changes being made was concentrated mainly to the successful implementation of the Federal Student Loan Program and that the beneficiary was dedicated solely for this effort since most of the school officers are mainly teachers anyway and the beneficiary is no different. The temporary position was created to comply with the requirements for the Federal Student Loans (Title IV) only and while holding the records management position, [the beneficiary], held teaching loads as well.

As a Postsecondary Teacher, the beneficiary teaches Career Opportunities, Growth and Development, and Leadership and Supervision in the Vocational Nursing Program which has six classes at any given time. The Petitioner recognizes the beneficiary's many years of experience in education would enable him to handle a wide variety of functions which perfectly fits the school's small but efficient operation. The school believes in him, so aside from teaching, he was also promoted as Director of Admissions. He works closely with the Director of Nursing in the process of selecting applicants as well as in collaborating with management in promoting the programs offered by the school. Aside from the beneficiary's valuable help to the school when he was asked to temporarily "assumed" the position of "records custodian" during the Title IV implementation and as Director of Admission, the petitioner believes that the functions outlined in the original I-129 application are

still being performed by the beneficiary and is compensated in accordance with the Labor Condition Application (LCA).

appears to assert that the signatory of the visa petition, who owns the petitioner and who was, when she signed it, the petitioner's administrator, and who continues to be present at the school once or twice a week, does not know who at the school is a teacher and who there holds other positions. The petitioner, with only 26 total employees, is sufficiently small that even a casual visitor might quickly learn which employees were teachers and which were not.

That the petitioner's owner and former administrator, who is present at the school once or twice per week, would not know which employees teach classes and which have other duties is not credible. Further, did not state that she was not sure whether the beneficiary performed any teaching duties. She did not suggest that someone more acquainted with the petitioner's operations might be able to provide more accurate information. Instead she provided a fairly detailed description of the beneficiary's duties and stated, unequivocally, and likely accurately, that the beneficiary was not teaching, but was the petitioner's records custodian. For this reason, the petitioner has not shown that the beneficiary has worked, since the visa petition was approved, as a postsecondary teacher. Upon review, the AAO finds that the beneficiary is no longer employed by the petitioner in the capacity specified in the petition.

Further, even if version of events were accurate, he has admitted that, in addition to the duties contained in June 14, 2011 letter, the beneficiary has worked as the petitioner's records custodian and has been promoted to its Director of Admissions position. The duties described in the petitioner's administrator's June 14, 2011 letter indicate that, as a portion of the duties of the proffered position, the beneficiary would "maintain required and appropriate records." Although the description of duties does not appear to contemplate that the duties pertinent to records keeping would become the sole focus of the beneficiary's work for the petitioner, the duty description does contain duties related to the maintenance of records.

The duty description, however, contains no duties pertinent to serving as the petitioner's Director of Admissions. Whatever duties the beneficiary might perform as the petitioner's Director of Admissions would be inconsistent with the description of the duties he was initially projected to perform as a postsecondary teacher, and inconsistent with his working as a postsecondary vocational education teacher, the position for which the LCA was certified. Notwithstanding assertion that the beneficiary continues to perform the duties of the proffered position as well as the duties of Director of Admissions, the beneficiary is clearly no longer employed solely in the proffered position, even if assertions are assumed to be accurate. The duties of a Director of Admissions are not included in the duties of a postsecondary teacher. statement on appeal pertinent to the petitioner's present employment is a sufficient reason to find that the petitioner is no longer employing the beneficiary in the proffered position.

Pursuant to H-1B visa classification, a petitioner is not permitted to employ a beneficiary in any capacity other than that for which the LCA is certified and for which the visa petition was granted.

Failing to employ the beneficiary as a postsecondary teacher and/or employing the beneficiary as a Director of Admissions is a violation of the terms and conditions of the approved H-1B visa petition. *See* 8 C.F.R. § 214.2(h)(11)(iii)(A)(3).

The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner's response to the NOIR failed to overcome the grounds specified in the NOIR for revoking the petition.

The director's decision will be affirmed and approval of the visa petition will remain revoked for the above stated reasons. 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 not been met.

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