

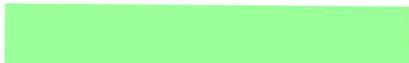


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JAN 28 2014** OFFICE: VERMONT SERVICE CENTER



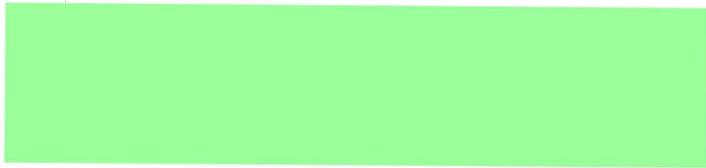
IN RE: Petitioner:



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:



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 director initially approved the nonimmigrant visa petition. Upon subsequent review, 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 Form I-129 (Petition for a Nonimmigrant Worker) to the California Service Center on June 4, 2012. On the Form I-129 visa petition, the petitioner describes itself as an enterprise engaged in fashion manufacturing and sales that was established in 1995. In order to employ the beneficiary in what it designates as a fashion coordinator position, the petitioner sought to classify 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). The instant petition was approved on July 18, 2012.

Subsequently, the director determined that the petitioner had filed another H-1B petition (EAC 12 168 50970) on behalf of the beneficiary during the same fiscal year. See 8 C.F.R. §214.2(h)(2)(i)(G). This other petition was approved on July 17, 2012. The director issued a notice of intent to revoke the approval of the instant petition, as well as a notice of intent to revoke the approval of the other H-1B petition. The record of proceeding indicates that the petitioner did not respond to the NOIR for the instant petition and the director revoked the approval, stating the following:

On November 26, 2012, U.S. Citizenship and Immigration Services (USCIS) notified you of its intent to revoke the petition that you filed on June 4, 2012. You were granted an opportunity to submit any evidence you thought would overcome the grounds of revocation.

While you responded to the intent to revoke for [REDACTED], and that petition has been reaffirmed, USCIS has not received a response to the notice that was issued for this petition. The grounds of revocation have not been overcome and the approval of your petition is revoked. *Matter of Esmine*, 19 I&N Dec. 450 (BIA 1987).

Thereafter, new counsel for the petitioner submitted an appeal of the decision. On appeal, counsel for the petitioner claims that the instant petition was "merely a copy of the initial original petition submitted for adjudication." Counsel further states that since "this [r]evocation is based on an error in the system which most likely occurred as the result of the combination of the Service Center's oversight in issuing a second receipt number and [previous counsel's] inadequate explanation of the second 'copy only' submission," the petitioner "should be allowed to officially withdraw the petition if the Service Center is unable to remove petition [REDACTED] from the system as a mistakenly issued receipt number."

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 director's revocation notice; and (4) 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.

Upon review, the AAO finds that the director's statements in the NOIR were adequate to notify the petitioner of the intent to revoke approval of the petition in accordance with the statutory provisions at 8 C.F.R. § 214.2(h)(11)(iii)(A)(4) and (5).

The only issue before the AAO is whether the director's revocation was proper and if the petitioner "should be allowed to officially withdraw the petition."

The regulations at 8 C.F.R. §214.2(h)(2)(i)(G) states:

Multiple H-1B petitions. An employer may not file, in the same fiscal year, more than one H-1B petition on behalf of the same alien if the alien is subject to the numerical limitations of section 214(g)(1)(A) of the Act or is exempt from those limitations under section 214(g)(5)(C) of the Act. If an H-1B petition is denied, on a basis other than fraud or misrepresentation, the employer may file a subsequent H-1B petition on behalf of the same alien in the same fiscal year, provided that the numerical limitation has not been reached or if the filing qualifies as exempt from the numerical limitation. Otherwise, filing more than one H-1B petition by an employer on behalf of the same alien in the same fiscal year will result in the denial or revocation of all such petitions.

Here, counsel claims that the instant petition was a copy of a petition rather than a new H-1B filing. However, the petitioner did not designate the submission as a copy when it was filed with USCIS. The director reviewed the submission, issued a receipt number, and eventually approved the request for H-1B classification for the submission. It must be noted that the petitioner was notified that the submission was considered a new and separate petition. The petitioner had an opportunity to address this issue and/or withdrawal the petition upon receiving (1) the receipt notice, (2) the approval notice, and (3) the NOIR. The petitioner did not do so.

The petitioner did not respond to the NOIR issued for this petition and, thereafter, the director rendered a decision, finding that the grounds for revocation had not been overcome.¹ On appeal, new counsel acknowledges that the petitioner and its prior counsel did not respond to the NOIR for the instant petition. Furthermore, in the appeal brief, counsel indicates that the petitioner recognizes that the instant petition should not have been granted. Thus, the basis for the revocation of the instant petition has not been overcome.

In the appeal, counsel requests that the petitioner be permitted to withdraw the petition. The regulation at 8 C.F.R. § 103.2(b)(6), however, precludes this, because USCIS has already issued a

¹ In the appeal, counsel states that the petitioner's prior attorney provided an "inadequate explanation of the second 'copy only' submission." The petitioner and its current counsel do not claim that the prior attorney provided ineffective assistance of counsel. Nevertheless, the AAO notes that such an assertion would require: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

decision on the petition. Notwithstanding this provision, even if the grounds of ineligibility in this matter were to be overcome on appeal, this request to withdraw the petition now renders it subject to immediate and automatic revocation without prior notice. Specifically 8 C.F.R. §214.2(h)(11)(B)(ii) states:

(ii) Immediate and automatic revocation. The approval of any petition is immediately and automatically revoked if the petitioner goes out of business, files a written withdrawal of the petition, or the Department of Labor revokes the labor certification upon which the petition is based.

Thus, even assuming *arguendo* that counsel's request to withdraw the petition was granted, it would result in automatic revocation. USCIS cannot treat the filing as though it never occurred.

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.² Accordingly, the appeal is dismissed. The approval of the petition remains revoked.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition remains revoked.

² 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.