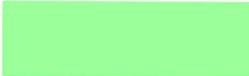




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAY 12 2014** OFFICE: VERMONT SERVICE CENTER FILE: 

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:

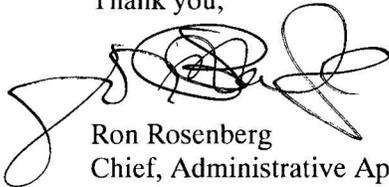


INSTRUCTIONS:

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 of the record, the director issued a notice of intent to revoke (NOIR), and ultimately revoked 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 petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on February 8, 2010. In the Form I-129 visa petition and supporting documentation, the petitioner described itself as an interior decoration business established in 1995. In order to employ the beneficiary in what it designated as a business development analyst position, the petitioner sought to classify her 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 analyst position. However, thereafter an onsite visit was conducted at the beneficiary's work location, 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 revoked approval of the petition. Thereafter, the petitioner submitted an appeal.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's NOIR; (5) the response to the NOIR; (6) the director's revocation notice; and (7) the Form I-290B and supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

I. GROUNDS FOR REVOCATION

U.S. Citizenship and Immigration Services (USCIS) is required to revoke on notice the approval of an H-1B petition when one of five grounds is found. 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.

Here, the director revoked the approval of the petition finding that the beneficiary was not employed by the petitioner in the capacity specified in the petition and that petitioner violated terms and conditions of the approved petition. 8 C.F.R. § 214.2(h)(11)(iii)(A)(1) and (3). As will be evident in the discussion below, the AAO finds that, fully considered in the context of the entire record of proceedings, the evidence submitted in response to the NOIR and on appeal fail to effectively rebut and overcome the grounds for revocation. Accordingly, the appeal will be dismissed, and approval of the petition will remain revoked.

II. PROCEDURAL AND FACTUAL HISTORY

In the petition signed on January 20, 2010, the petitioner indicates that it is seeking the beneficiary's services as a business development analyst on a part-time basis at the rate of pay of \$17.70 per hour for 25 hours per week. In the December 23, 2009 letter of support, the petitioner describes the proposed duties of the beneficiary as follows:

In this capacity, [the beneficiary] will be responsible for enhancing and improving our operations to further business development and expansion. Duties will include analyzing business and operating procedures to devise most efficient method of accomplishing growth. She will review policies and methods of communications. She will gather and organize information on problems and procedure involving present operating procedures in order to assist with management decisions. She will consider available solutions or alternative methods of proceeding and will make recommendations. She will analyze all design services, purchasing and development of decoration projects. She will implement marketing strategies based on the results of the marketing analyses. She will determine advertising strategies for the retail market. She will be responsible for analyzing competitors' business models for comparison as well as performing studies designed to reduce costs.

In addition, the petitioner states, "The position of Business Development Analyst is a professional position requiring the analytical skills and business acumen achieved through the completion of a university degree in the field of business administration."

With the Form I-129 petition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification of "Market Research Analysts" - SOC (ONET/OES Code) 19-3021.00, at a Level I (entry level) wage. The petitioner stated that the beneficiary would be

employed at [REDACTED] in Fort Lauderdale, Florida. No other work locations were provided.

The director found the initial evidence insufficient to establish eligibility for the benefit sought and issued an RFE. The director outlined the specific evidence to be submitted. Thereafter, counsel for the petitioner responded to the RFE by submitting a brief and additional evidence. In the brief, counsel provided a revised description of the duties of the proffered position, and the percentage of time the beneficiary would spend performing the duties of the position. In addition, counsel submitted documents in support of the petition, including: (1) documentation regarding the beneficiary's credentials; (2) photos of the petitioner's offices and products; (3) letters from the petitioner's subcontractors; (4) a copy of the petitioner's bank statement, covering period 01/01/09 through 01/31/09; (5) copies of the petitioner's invoices; (6) an excerpt entitled "Summary Report for: 19-3021.00 Market Research Analysts" from the Occupational Information Network (O*NET) OnLine; and (7) job vacancy announcements.

The petition was approved for what the petitioner designated as a business development analyst position. Subsequently, an administrative site visit was conducted and the site inspector determined that the petitioner and beneficiary were not located at the address specified in the H-1B petition.¹ However, the petitioner had not notified USCIS of a change in location. The site inspector contacted [REDACTED] the signatory on the H-1B petition.² The site inspector reported that Ms. [REDACTED] said that the beneficiary's duties consisted of designing interiors, closets, and finishing blinds, as well as contacting customers. Ms. [REDACTED] faxed payroll documents to the officer.

After reviewing the information in the record of proceeding and the site visit report, the director issued a NOIR. The NOIR notified the petitioner of the information contained in the site inspector's report and that it was afforded an opportunity to provide evidence to overcome the stated grounds for revocation. The petitioner and counsel responded to the NOIR. Specifically, the petitioner and counsel submitted, in part: (1) a new LCA that provided a new worksite – in Aventura, Florida (Miami-Miami Beach-Kendall, FL Metropolitan Division) – as the beneficiary's place of employment;³ (2) copies of pay checks issued to the beneficiary from the petitioner; (3) copies of

¹ USCIS must be able to verify the information provided in the petition to further determine eligibility for an immigration benefit and/or compliance with applicable laws and authorities. To that end, 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 8 C.F.R. §§ 103, 204, 205, and 214, 8 U.S.C. §§ 1103, 1155, 1184 (2013).

² The record of proceeding contains a number of titles for [REDACTED] including secretary, manager, 50% shareholder, and owner.

³ Counsel claims that the petitioner changed its address in August 2010. It must be noted that the representative from [REDACTED] Inc., the lease management company for the building, stated that the petitioner moved in May 2010. Further, a printout from the Florida Department of State - Division of Corporations (provided by the petitioner) indicates that the petitioner changed its address on April 21, 2010.

the petitioner's quarterly reports for quarters ending on March 31, 2011 and June 30, 2011; (4) an affidavit from the petitioner; (5) the petitioner's evaluation of the beneficiary's work; and (6) documentation described by the petitioner as the beneficiary's work product.

The director reviewed the response and found the evidence submitted insufficient to overcome the grounds for revocation. The director revoked the approval of the petition on March 13, 2013. Thereafter, the petitioner submitted an appeal.

III. REVIEW OF THE DIRECTOR'S DECISION

The AAO reviewed the record of proceeding in its entirety, including the documentation submitted with the petition, in response to the RFE, in response to the NOIR, and in support of the appeal, as well as the information obtained from the site visit report.

In the instant case, the petitioner primarily relies upon an affidavit from Ms. [REDACTED] in support of the assertion that the beneficiary was performing the duties of the proffered position as stated in the H-1B petition.⁴ The affidavit is dated October 7, 2011. In the affidavit, Ms. [REDACTED] states that she "was never asked over the phone about the beneficiary's job duties." She further claims that she "never informed that person or anybody else, that the beneficiary's duties are those described in the Notice of Intent to Revoke." In addition, Ms. [REDACTED] asserts that she "would never make such a statement because it does not reflect the real duties of [the beneficiary]." Moreover, she claims that the beneficiary is responsible for the following duties:

[The beneficiary is] responsible for enhancing and improving our operations to further business development and expansion; analyze business and operating procedures to devise most efficient method of accomplishing growth; review policies and methods of communications; gather and organize information on problems and

Although this issue will not be addressed here, the AAO notes that a change in the place of employment of a beneficiary to a geographical area requiring a corresponding LCA be certified to DHS with respect to that beneficiary may affect eligibility for H-1B status and is, therefore, a material change for purposes of 8 C.F.R. § 214.2(h)(2)(i)(E) and (11)(i)(A). When there is a material change in the terms and conditions of employment, the petitioner must file an amended or new H-1B petition with the corresponding LCA. 8 C.F.R. § 214.2(h)(2)(i)(E).

⁴ The Quarterly Wage Reports indicate that the petitioner has two employees: Ms. [REDACTED] and the beneficiary. It is reasonable to assume that the size and/or scope 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, USCIS reviews the record for evidence that its 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.

procedure involving present operating procedures in order to assist with management decisions; consider available solutions or alternative methods of proceeding and will make recommendations; analyze all design services, purchasing and development of decoration projects; implement marketing strategies based on the results of the marketing analyses; determine advertising strategies for the retail market; responsible for analyzing competitors' business models for comparison as well as performing studies designed to reduce costs; execute strategic sourcing, make decisions and operational plans to lead strategic productivity initiatives that will generate cost savings and process improvement while maintaining high levels of customer service; develop and analyze new opportunities that will enhance the client base network through business process and sourcing analysis; and measure and assess customer satisfaction and forecast and track marketing and sales trends, analyzing collected data.

The beneficiary had been employed by the petitioner for approximately 18 months when the petitioner responded to the NOIR. However, the affidavit contains general duties of the occupation rather than specific information regarding the beneficiary's daily duties. The duties of the position as provided by Ms. [REDACTED] in response to the NOIR 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. Further while the affidavit provides some insights into Ms. [REDACTED]'s statements to the inspector, the petitioner should note that the affidavit represents a claim by an individual, rather than evidence to support that claim.

In response to the NOIR and with the appeal, the petitioner submitted documents that it refers to as the samples of the beneficiary's work product. However, the record of proceeding lacks evidence supporting a conclusion that the data, evaluation and analysis was prepared by the beneficiary. There is no indication that the beneficiary was involved in the preparation of the documentation. It does not contain the beneficiary's name or any other information connecting her to the documents.⁵ Thus, the evidence is of limited probative value. The petitioner failed to submit documentary evidence to establish the actual day-to-day duties performed by the beneficiary.

The petitioner submitted several documents regarding its business operations in response to the NOIR and with the appeal, including the petitioner's 2012 tax return and letters from companies that

⁵ The AAO notes that significant portions of the "Marketing Plan" are copied virtually verbatim from several Internet sources. Notably, a portion of the "Marketing Plan" comes from a website, which states the following:

We strongly do not recommend using any direct quotes from these essays for credit – you will most likely be caught for copying/pasting off the Internet, as it is very easy to trace where the essay has been taken from by a plagiarism detection program.

"lend" their services.⁶ However, the AAO observes that the crux of the failure to establish eligibility for this benefit is not whether the petitioner has an ongoing business, but rather whether it has credibly established that it will provide qualifying H-1B employment to the beneficiary in accordance with the applicable statutory and regulatory provisions.

IV. CONCLUSION AND ORDER

Upon review of the record of proceeding, the AAO finds that the petitioner did not overcome the grounds for revoking the approval of the petition. 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 analyst. Specifically, the petitioner failed to submit independent, objective evidence to refute or otherwise explain the statements to the inspector regarding the beneficiary's duties. Furthermore, although the petitioner asserts that the beneficiary is performing the duties set out in the petition, the petitioner has provided insufficient probative documentation to substantiate its claim and to establish 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.⁷ 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. 582, 591-92 (BIA 1988).

⁶ The petitioner submitted an unsigned copy of its 2012 tax return. The ordinary business income is at a loss of \$22,248, the petitioner indicated that it has total assets of \$29,523.

The petitioner submitted several letters from other companies. Notably, the wording of the letters is similar. In fact, the letters contain some of the same grammatical and punctuation errors. When letters are worded the same (and include identical errors), it indicates that the words are not necessarily those of the affiant and may cast some doubt on the documents.

⁷ In the appeal, counsel asserts that "[t]he beneficiary has been employed in the specialty occupation established by the terms and conditions of the approved 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.⁸ Accordingly, the appeal is dismissed. The approval of the petition remains revoked.

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. Approval of the petition remains revoked.

⁸ 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.