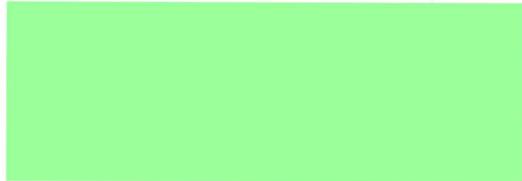




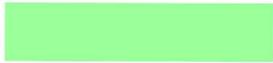
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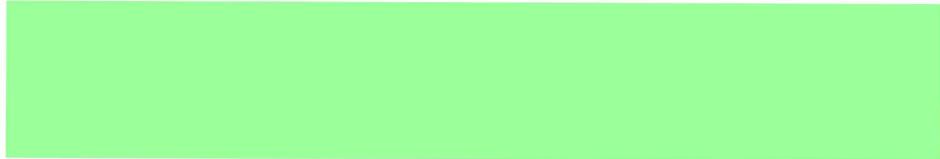


DATE: **SEP 12 2014**

OFFICE: CALIFORNIA SERVICE CENTER

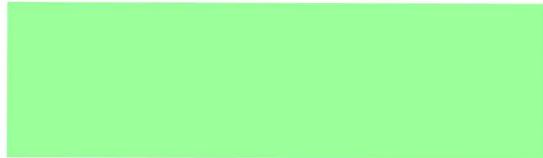
FILE: 

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 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.

I. PROCEDURAL AND FACTUAL BACKGROUND

On the Form I-129 filed on January 23, 2012, the petitioner describes itself as an importer and distributor of furniture. In order to employ the beneficiary in what it designates as a "Cost Accountant Manager"¹ position, the petitioner seeks 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 director approved the visa petition on February 3, 2012; however, on February 13, 2013 the service center director issued an NOIR in this matter. The petitioner's response was received on March 14, 2013. Subsequently, on May 23, 2013, the director revoked approval of the visa petition. The petitioner filed a timely appeal on June 20, 2013.

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.

II. THE LAW

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
 - (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

¹ It is noted that the petitioner, counsel, and the director refer to the proffered position as a "Cost Accountant Manager," "Cost Accounting Manager," and "Cost Account Manager" throughout the record of proceeding. We will refer to the proffered position as a "Cost Accountant Manager" to the extent possible in this decision.

- (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

III. EVIDENCE

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 NOIR; (3) the response to the NOIR; (4) the director's revocation letter; and (5) the Form I-290B and counsel's submissions on appeal.

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a Cost Accountant Manager position, and that it corresponds to Standard Occupational Classification (SOC) code and title 13-2011, Accountants and Auditors from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level, position.

With the visa petition, counsel submitted, *inter alia*, (1) a letter, dated December 26, 2011, from [REDACTED] who identified himself in that letter as the petitioner's director; and (2) a document entitled, "Summary of Oral Contract," also signed by Mr. [REDACTED] as the petitioner's director.

Mr. [REDACTED] December 26, 2011 letter contains the following description of the duties of the proffered position:

The main duties assigned to [the beneficiary] will be as follow:

- to conduct studies which provide detailed cost information not supplied by general accounting systems,
- plan study and collects data to determine cost of business activity, such as furniture and fixture purchase, inventory, transportation, and labor,
- analyze data obtained and record results, using computer,
- analyze changes in product design according to the customers' order, means of transportation, [and] service provided to determine effects on cost,
- analyze actual costs and prepare periodic report comparing standard costs to actual costs;

- conduct management according to the results of reports reflecting specific prices and facts affecting process and profitability of service as well as develop computer-based accounting system.

Mr. [REDACTED] also stated:

Due to the extensive knowledge of business and trade required of this position, it is essential that the person in question have at least a bachelor's degree in accounting or finance.

The position requires the analysis of foreign annual financial reports as well as oral and written communication with business representatives and financial Institutions from Asian countries such as Singapore, Malaysia, China, and Indonesia.

The Summary of Oral Contract contains a description of the duties of the proffered position that is substantially the same as the description found in Mr. [REDACTED] December 26, 2011 letter.

As noted above, the visa petition was approved on February 3, 2012. Subsequent to the petition's approval, on February 13, 2013, the director issued an NOIR to the petitioner, stating that USCIS had obtained new information regarding the beneficiary's employment with the petitioner. Specifically, the NOIR stated:

[O]n June 2, 2011, an administrative site visit was performed at the address listed on the petition as the location where the beneficiary would work. This site visit was conducted on the previous petition filed by the petitioner on the beneficiary's behalf [REDACTED]. According to the site inspector, the beneficiary indicated during the interview that she is employed as an Operations Manager and has been acting as the Operations Manager for the past 3 years.

The director offered the petitioner an opportunity to respond to the NOIR. In response, counsel submitted: (1) a statement, dated September 4, 2012, signed by the beneficiary; (2) a statement, dated March 9, 2013, from Mr. [REDACTED]; (3) an organizational chart of the petitioner's operations; (4) print-outs of e-mails; (5) sample work product of the beneficiary; and (6) counsel's own undated response to the NOIR.

In her September 4, 2012 statement, the beneficiary acknowledged that she was interviewed at work on June 2, 2011, but denied that she ever stated that she worked as anything other than the petitioner's cost account manager.

In his March 9, 2013 statement, Mr. [REDACTED] stated that he is the petitioner's director, that the beneficiary is the petitioner's cost accounting manager and has never performed any duties of an operations manager, and that [REDACTED] is the petitioner's operations manager.

The petitioner's organizational chart identifies 27 people the petitioner employs. It shows that it employs Mr. [REDACTED], previously identified as its director, as its CEO; that it employs Mr. [REDACTED] as its Operations Manager; and that it employs the beneficiary as its Cost Accountant Manager. The organizational chart shows that the beneficiary does not have any subordinates. It does not indicate that anyone holds the position of president in the petitioner's organization, and does not show that the petitioner employs a bookkeeping clerk or accounting clerk.

In an e-mail exchange, the beneficiary and Mr. [REDACTED] discuss the dissatisfaction of [REDACTED] one of their representatives, with the commissions the petitioner pays. In a June 3, 2011 e-mail to the beneficiary, Mr. [REDACTED] stated, "[REDACTED] made us a lot of good money [REDACTED] in good times, while I and u [sic] as key mgt have had to deal with shareholders." Later in the same e-mail, Mr. [REDACTED] states, "[O]ur cost structure has changed and we need to be able to be profitable to be fair to ourselves and shareholders, and u as stakeholder." Thus, Mr. [REDACTED] characterized the beneficiary as being part of the petitioner's key management and as a stakeholder.

In a June 8, 2011 e-mail that is part of the same exchange, in discussing the possible need to replace [REDACTED] as a representative of the petitioner, Mr. [REDACTED] asked the beneficiary, "Would u be able to get another hungry rep in WORST case situation?" Mr. [REDACTED] thus indicated that the beneficiary had some authority related to recruiting and hiring representatives.

In a March 12, 2012 e-mail, Mr. [REDACTED] an employee of the petitioner, states that he is the petitioner's "Warehouse/Operations Manager." In a June 19, 2012 e-mail, Mr. [REDACTED] signature line identifies him as "Warehouse Operations." The e-mails provided pertain to adjustments to orders placed on the petitioner's behalf.

In her undated response to the RFE, counsel stated that the beneficiary did not indicate that she worked as the petitioner's operations manager and that, because she has a heavy accent, the officer conducting the administrative site visit may have misunderstood her. Counsel stated that the documents produced by the beneficiary "demonstrate that there is no possible way that the beneficiary could have working [sic] on these reports and performing duties of an operations Manager at the same time because there would simply not be enough hours in the day."

After reviewing the petitioner's response to the NOIR and finding the evidence submitted insufficient to refute the findings in the NOIR, the director revoked the approval of the instant visa petition finding that the petitioner has not demonstrated that it is employing the beneficiary as its Cost Accounting Manager.

In the brief submitted on appeal, counsel asserted that evidence relied upon in the notice of revocation was not included in the NOIR and that this lack of notice limited the petitioner's ability to respond to the adverse evidence. Specifically, counsel states that the petitioner was not given prior notice of the e-mails that identified the beneficiary as key management and a stakeholder, and that indicated that she makes hiring decisions.

IV. ANALYSIS

We observe, pertinent to the notice issue raised by counsel, that the notice required in 8 C.F.R. § 103.2(b)(16)(i) pertains only to evidence of which the petitioner is unaware. There is no indication in the record that the petitioner would have been unaware of the visa petitions it filed and the contents thereof and, thus, notice of the contents of those documents was not required pursuant to 8 C.F.R. § 103.2(b)(16)(i). In addition, even if the petitioner was unaware of this information, notice of the evidence relied upon was provided in the decision of denial. What remedy would appropriately cure the procedural defect urged by counsel, beyond the appeal process itself, is unclear. In any event, the issue of notice is now moot, as the petitioner has been informed of the adverse evidence, and providing an additional notice of the adverse evidence would serve no purpose. Further, counsel responded to that evidence on appeal. We find that any procedural error has thus been cured. However, as a matter of discretion, we will not rely upon the visa petitions signed by the beneficiary, of which counsel claims to have had insufficient notice.

The admission of the beneficiary that she was working in some capacity other than the proffered position is sufficient, if believed, to show that she has worked in that other capacity. The petitioner's response on appeal is that the beneficiary asserts that she never made the statement attributed to her. Counsel also asserted that the costing sheet and budget documents demonstrate that the beneficiary did not work as the petitioner's operations manager because the time required for their production would preclude having enough additional time to perform operations manager duties. Counsel provided insufficient support for her assertion that producing the documents submitted was very time consuming. Further, although those documents credit the beneficiary for their production, there is insufficient evidence that the beneficiary acted alone in their production.

Further, the petitioner also asserted that the e-mails demonstrate that Mr. [REDACTED] and not the beneficiary, is the petitioner's warehouse manager. In fact, the March 12, 2012 e-mail provided indicates that nine months after the site visit at which the beneficiary was interviewed, Mr. [REDACTED] stated that he was then the petitioner's "Warehouse/Operations Manager." The June 19, 2012 letter indicates that, an additional three months after that, Mr. [REDACTED] e-mail signature line indicated that he worked in "Warehouse Operations." Especially given the beneficiary's admission that she is the petitioner's operations manager, and had worked in that position for three years, those e-mail entries are insufficient to show that Mr. [REDACTED] and not the beneficiary, is the petitioner's operations manager.

Insufficient reason exists to doubt that the site visit was competently conducted and faithfully reported. The AAO finds the explanation offered unpersuasive. The petitioner has not demonstrated that it continues to employ the beneficiary in the capacity specified in the visa petition. The visa petition will remain revoked pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(1).

The AAO now turns to the 8 C.F.R. § 214.2(h)(11)(iii)(A)(5) basis of the decision of revocation. The visa petition and the LCA state that the proffered position is a "Cost Accountant Manager" position. During the site visit, the beneficiary described her position as operations manager. That position is distinctly different from a cost accountant manager position, and has distinctly different

job duties. That the beneficiary characterized her job as an operations manager position suggests that the beneficiary would not perform the duties described by Mr. [REDACTED]. That the petitioner employs Mr. [REDACTED] and characterizes his position as operations manager is insufficient to reconcile the discrepancy between Mr. [REDACTED] list of duties and the beneficiary's assertion that she is the petitioner's operations manager. Because that discrepancy has not been reconciled, the petitioner has not established, by a preponderance of the evidence, the duties that the beneficiary would perform.

Further, although the job title cost accountant manager, as stated on the visa petition, is nominally supervisory, the organizational chart shows that the beneficiary has no subordinates and that the petitioner does not employ a bookkeeping clerk, an accounting clerk, or anyone in any position that would typically report to a cost accountant manager, cost account manager, or managerial accountant. The evidence submitted by counsel conflicts with the implicit assertion that the beneficiary has supervisory responsibilities.

The lack of any bookkeeping or accounting clerks suggests another reason to question the assertion that the beneficiary would perform only the duties described in Mr. [REDACTED] description. As the petitioner does not employ a bookkeeper or accounting clerk, and as there is no evidence that the beneficiary would be relieved from performing the company's general, financial record keeping, such as recording the petitioner's financial transactions, updating statements, and checking financial records for accuracy (all duties of a bookkeeping clerk and/or accounting clerk), it appears likely that the beneficiary will perform at least some of those duties. For this additional reason, it is not clear that the duty-descriptions provided by Mr. [REDACTED] are accurate.

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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record with 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.* At 591-592. Consistent with *Matter of Ho*, the petitioner is obliged to reconcile that discrepancy with independent objective evidence.²

² The record suggests yet another reason to believe that the beneficiary is not employed in the capacity specified in the visa petition. The petitioner's registration with the Illinois Secretary of State indicates that the beneficiary is the petitioner's president. That the beneficiary is the petitioner's president suggests that the beneficiary may exercise such a degree of control over the petitioner that the petitioner and beneficiary do not have a true employer-employee relationship within the meaning of 8 C.F.R. § 214.2(h)(4)(ii), and the petitioner may not have standing to file the instant visa petition as the petitioner's employer. It is also a reason to question whether the beneficiary is really employed by the petitioner only as its Cost Accountant Manager. The petitioner was not apprised of the fact that the website of the Illinois Secretary of State lists the beneficiary as its president and has not been accorded the opportunity to contest that information and the inferences that may be drawn from it. Although the identity of the petitioner's president is a matter known to the petitioner, and does not trigger any right to notice pursuant to 8 C.F.R. § 103.2(b)(16)(i), we choose, again, as a matter of discretion, not to rely on that evidence in today's decision. We observe, however, that if the petitioner had otherwise overcome the basis for revocation, the petitioner would be obliged to address the

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Accordingly, as the evidence of record does not satisfy any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation, and approval of the petition on that basis violated subsection (h) of 8 C.F.R. § 214.2. The visa petition will therefore remain revoked pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(5).

An additional reason exists that the instant visa petition is not approvable. The petitioner filed a previous visa petition, [REDACTED] on behalf of the beneficiary. It was approved for employment from March 2, 2011 to March 1, 2012. Approval of that visa petition was revoked on February 15, 2013. The petitioner appealed that revocation to the AAO. That appeal was dismissed on August 21, 2014.

The instant visa petition states on Page 2, at Item 2.b, that it is a petition for continuation of previously approved employment without change with the same employer. At Item 4.c, the petitioner indicated that the petitioner is requesting extension of the beneficiary's stay.

An extension petition may be filed only if approval of the visa petition it seeks to extend remains valid. 8 C.F.R. § 214.2(h)(14). The instant extension visa petition was, in fact, filed prior to the revocation of the approval of the visa petition it seeks to extend. However, as stated in 8 CFR 103.2(b)(1), a petitioner must establish eligibility not only at the time of filing. The petitioner "must continue to be eligible through adjudication."

If approval of a visa petition has been revoked, it does not remain valid. *C.f. Matter of Al Wazzan*, 25 I&N Dec. 359, 367 (AAO 2010).

Approval of the visa petition that the petitioner is seeking to extend [REDACTED] was revoked and the appeal taken from that revocation was dismissed. For that reason, the instant

issues of whether the beneficiary is the petitioner's president, as Illinois records currently reflect; whether the petitioner concealed that information in submissions to USCIS; whether, if the beneficiary is the petitioner's president, the petitioner may be considered the beneficiary's intending employer within the meaning of section 101(a)(15)(H)(i)(b) of the Act, and whether the beneficiary's being the petitioner's president would indicate that she is not employed merely as the petitioner's cost accountant manager.

extension petition may not be approved.³ The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The previous visa petition which the instant petition seeks to extend is no longer valid; therefore, the instant petition must be denied and the appeal dismissed.

V. CONCLUSION

As discussed above, the AAO agrees with the director's grounds for revoking the approval of this petition.⁴ Accordingly, the appeal will be dismissed, and approval of the petition will remain 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.

³ Whether the dismissal of the appeal of [REDACTED] is now the subject of a motion is irrelevant, as the filing of a motion to reopen does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

⁴ Because the grounds specified in the director's revocation decision preclude approval of the petition, the AAO will not discuss any additional issues it has observed in its review of this matter.