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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

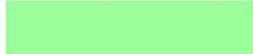


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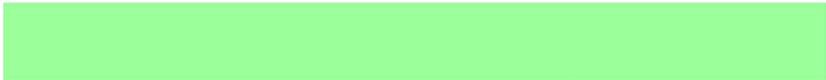


DATE: FEB 06 2015

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The director revoked approval of the nonimmigrant visa petition, and 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. INTRODUCTION

On the Form I-129 visa petition, the petitioner describes itself as a 165-employee information technology company<sup>1</sup> established in [REDACTED]. In order to employ the beneficiary in what it designates as a full-time programmer analyst position at a salary of \$101,000 per year,<sup>2</sup> 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 petitioner filed the petition on March 13, 2013, and the director approved it on May 20, 2013. According to the petitioner, the beneficiary would provide his services to the petitioner's end-client, the [REDACTED] place of business in [REDACTED] Illinois from June 26, 2013 until June 25, 2016.

U.S. Citizenship and Immigration Services (USCIS) randomly selected the petition for an administrative site visit (ASV), and the ASV took place on September 20, 2013. The site investigator visited the beneficiary's claimed worksite at [REDACTED] place of business, and the investigator was notified that the beneficiary was no longer assigned to that worksite and had not been there since June 2013.

The director issued a notice of intent to revoke (NOIR) approval of the petition on March 10, 2014, which notified the petitioner that she was contemplating revoking approval of the petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(I), which provides for the revocation of an approved H-1B petition when the beneficiary is no longer employed by the petitioner in the capacity specified in the petition.

The director did not find the petitioner's response to the NOIR persuasive, and she revoked the approval of the petition on May 1, 2014. Counsel submitted a timely appeal.

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<sup>1</sup> The petitioner provided a North American Industry Classification System (NAICS) Code of 541211, "Offices of Certified Public Accountants " U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=541211&search=2012> NAICS Search (last visited Jan. 13, 2015). The record of proceeding contains no explanation for the discrepancy between the NAICS code it provided and its description of itself as an "Information Technology Company."

<sup>2</sup> The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Computer Systems Analysts" occupational classification, SOC (O\*NET/OES) Code 15-1121, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels.

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

## II. STANDARD OF REVIEW

In the exercise of our administrative review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), unless the law specifically provides that a different standard applies. In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

\* \* \*

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

\* \* \*

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

*Id.* at 375-76.

We conduct our review of service center decisions on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145. In doing so, as noted above, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the

preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were correct. Upon our review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the evidence of record does not establish that the petitioner's claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the evidence of record does not contain relevant, probative, and credible evidence that leads us to believe that the petitioner's claims are "more likely than not" or "probably" true.

III. AUTHORITY TO REVOKE APPROVAL OF AN H-1B PETITION

In general, the authority to revoke approval of an H-1B petition is found at 8 C.F.R. § 214.2(h)(11), which states, in pertinent part, 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 under section 101(a)(15)(H) of the Act and paragraph (h) of this section. An amended petition on Form I-129 should be filed when the petitioner continues to employ the beneficiary. . . .
- (B) The director may revoke a petition at any time, even after expiration of the petition.

\* \* \*

(iii) *Revocation on notice—*

- (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

- (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. . . .

We find that the content of the NOIR comported with the regulatory notice requirements, as it provided a detailed statement that conveyed the ground for revocation encompassed by the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(A), and that it also allotted the petitioner the required time for the submission of evidence in rebuttal that is specified in the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(B).

#### IV. DISCUSSION

As noted, the petitioner stated in the petition that the beneficiary would provide his services to its end-client, [REDACTED] place of business in [REDACTED] Illinois from June 26, 2013 until June 25, 2016. The petitioner provided a work address for the beneficiary of [REDACTED] Illinois on the Form I-129, and the Labor Condition Application (LCA) was certified for employment at the same address. The site investigator, however, was notified that the beneficiary had ceased working at that address in June 2013.

In response to the NOIR, counsel claimed that the beneficiary in fact did not cease providing services to [REDACTED] in June 2013. In his April 8, 2014 letter counsel claimed that, to the contrary, the beneficiary worked at the [REDACTED] worksite in [REDACTED] Illinois until January 19, 2014, when he was transferred to another project. Counsel submitted a letter from [REDACTED] dated April 3, 2014, in which [REDACTED] made the same assertion. Counsel also submitted a copy of a staffing agreement executed between the petitioner and [REDACTED] on July 15, 2008. Finally, counsel noted that the petitioner had filed an amended H-1B petition so that the petitioner could assign the beneficiary to work for a different end-client and submitted copies of documents submitted with that petition.<sup>3</sup>

Although he did not raise the issue in his April 8, 2014 response to the NOIR, on appeal counsel questions whether the individual with whom the USCIS site investigator spoke, whom counsel

<sup>3</sup> That petition, [REDACTED] was filed on October 29, 2013 and approved June 5, 2014. We noted that this petition was signed and filed subsequent to the site investigation.

claims was another contractor assigned to work for [REDACTED] "would have access to the Petitioner's personnel information about the filing of the Beneficiary's H-1B petition and in particular the salary that the Petitioner is paying the Beneficiary." Counsel also reiterates the assertions he made below regarding the beneficiary's claimed employment at the [REDACTED] worksite until January 19, 2014; references the amended petition for employment at another worksite which allegedly began January 20, 2014 and submits copies of documents submitted with that filing; and submits copies of the beneficiary's 2012 and 2013 Forms W-2 and pay statements covering the period June 1, 2013 through May 14, 2014.

Upon review, we find that the evidence of record does not overcome the director's May 1, 2014 decision revoking approval of the petition. Counsel's assertions with regard to the ability of the individual with whom the site investigator spoke to access the beneficiary's "personnel information" are not persuasive. First, the director noted in the NOIR that this individual was aware of the beneficiary, aware that the H-1B petition had been filed on his behalf, aware of his duties, and aware of his salary. The director, therefore, properly questioned whether the beneficiary was still working at the [REDACTED] site pursuant to the approved petition. Second, and as will be discussed below, the evidence of record does not overcome the issues set forth in the NOIR.

Again, the USCIS site investigator was notified that the beneficiary had ceased working at the [REDACTED] worksite in June 2013, and the petitioner, through counsel, claims that the beneficiary actually worked there until January 19, 2014. The evidence of record, however, does not support that claim by a preponderance of the evidence.

The April 3, 2014 letter from [REDACTED] stating that the beneficiary worked at the [REDACTED] Illinois worksite until January 19, 2014 is noted. However, the author of that letter does not indicate why the USCIS site investigator was told that the beneficiary stopped working there in June 2013 or otherwise address the ASV.

Furthermore, the pay statements submitted by the petitioner undermine its claims, as well as those of the individual who wrote the [REDACTED] letter, that the beneficiary actually worked at the [REDACTED] Illinois worksite until January 19, 2014. According to those pay statements, the beneficiary relocated from Illinois to Texas no later than the pay period beginning August 16, 2013,<sup>4</sup> and Illinois state income taxes were last withheld from his salary on August 15, 2013. If the beneficiary was in fact working at a [REDACTED] Illinois worksite as claimed until January 19, 2014 it is unclear why he was living in [REDACTED] Texas and why no Illinois state income taxes were withheld from his salary after August 15, 2013. They do not indicate that the beneficiary was working at any address in Illinois, let alone the specified on the Form I-129 and in the LCA, at the time of the administrative site visit on September 20, 2013.

Nor does the July 15, 2008 staffing agreement aid the petitioner in overcoming the director's revocation decision because, by its very terms, the agreement only commences on the effective date

<sup>4</sup> The pay statement for the pay period beginning August 16, 2013 and ending August 31, 2013 provided an address for the beneficiary as [REDACTED] Texas; withheld no Illinois state income taxes; and stated the following: (1) that "effective this pay period [his] state tax jurisdiction ha[d] been changed; (2) that "effective this pay period [his] address ha[d] been changed."

of a corresponding purchase order. Therefore, this staffing agreement, alone, is not evidence of any work available for the beneficiary to perform. Moreover, the record of proceeding does not contain any purchase orders, let alone one referencing the beneficiary's project.

Finally, the amended H-1B petition referenced by counsel does not establish that the beneficiary worked at the [REDACTED] worksite until January 19, 2014, either, as that petition called for the beneficiary to begin performing services at a worksite in [REDACTED] Florida on September 29, 2013.<sup>5</sup>

The director revoked the approval of the petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(1), which provides for the revocation of an approved H-1B petition when the beneficiary is no longer employed by the petition in the capacity specified in the petition. The petitioner specified in the petition that the beneficiary would be working in [REDACTED] Illinois from June 26, 2013 until June 25, 2016. However, an administrative site visit conducted on September 20, 2013 indicated that the beneficiary was no longer working at that location.

As discussed above, when considered both separately and in the aggregate, the evidence submitted by the petitioner in response to the NOIR and on appeal does not overcome the director's decision revoking approval of the petition. Furthermore, the pay statements which indicate that the beneficiary relocated from Illinois to Texas in August 2013 affirmatively support the director's decision. The evidence of record therefore does not establish that the petitioner was employing the beneficiary in the capacity specified in the petition, and consequently we affirm the director's May 1, 2014 decision revoking its approval.

## V. CONCLUSION AND ORDERS

We agree with the director's finding that the evidence of record does not establish that the petitioner was employing the beneficiary in the capacity specified in the petition. Accordingly, the director's May 1, 2014 decision revoking approval of the petition will not be disturbed.

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. Approval of the petition remains revoked.

**FURTHER ORDERED:** The director shall review the approval of the H-1B petition with receipt number [REDACTED] for possible revocation consistent with the issues identified in this decision.

<sup>5</sup> The period of requested employment in the Form I-129 began September 29, 2013, and the period of requested employment in the LCA began September 24, 2013.