



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 28157749

Date: OCT. 17, 2023

Appeal of Nebraska Service Center Decision

Form I-129, Petition for a Nonimmigrant Worker (H-1B)

The Petitioner seeks to employ the Beneficiary under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both: (a) the theoretical and practical application of a body of highly specialized knowledge; and (b) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director of the Nebraska Service Center revoked the petition's approval because the Petitioner did not respond to the Director's notice of intent to revoke within the prescribed period. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

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
 - (2) The statement of facts contained in the petition...was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or

- (3) The petition 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.

The regulations require that USCIS provide notice consisting of a detailed statement of the grounds for revocation and provide an opportunity for the petitioner to respond to the notice of intent.

The Director's statements in the notice of intent to revoke (NOIR) notified the Petitioner of the reasons for revocation and afforded them an opportunity to respond. But the Petitioner did not submit a timely response.¹ Subsequently, the Director revoked the petition's approval.

The Petitioner appeals the Director's revocation of the petition's approval and submits a brief supported by copies of the Forms I-129, Petition for Nonimmigrant Worker filed on behalf of the Beneficiary by the Petitioner and the Beneficiary's current employer,² a copy of email correspondence with a USCIS employee who administered an administrative site visit at the Petitioner's office with documentation attached to the email responsive to the USCIS employee's requests, and unnotarized affidavits from the Beneficiary and the Petitioner's vice president, human resources.³

II. ANALYSIS

Upon de novo review on appeal, we conclude that a remand is warranted in this matter.

The Director's decision to revoke the petition's approval did not follow proper revocation procedures. The Director did not cite to one of the revocation criteria enumerated at 8 C.F.R. § 214.2(h)(11)(iii)(A)(I)-(5) as the basis for revocation in their decision. The Director appears to justify their revocation of the petition's approval because the Petitioner did not timely respond to their NOIR. An H-1B petition's approval may only be revoked on notice for one of the criteria contained at 8 C.F.R. § 214.2(h)(11)(iii)(A)(I)-(5). And the regulatory criteria do not permit revocation of the

¹ USCIS records reflect the Director's NOIR was dispatched to the Petitioner and their counsel on September 22, 2022. The record does not contain clear evidence supporting the Petitioner's claims of non-receipt of the Director's NOIR. In the absence of clear evidence to the contrary, adjudicators must presume that government officials properly discharged their official duties. *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Matter of P-N-*, 8 I&N Dec. 456, 458 (BIA 1959). This "presumption of regularity" requires us to presume the accuracy of information recorded in USCIS systems.

² The evidence the Petitioner introduced into the record indicates the Beneficiary has changed employer. USCIS records reflect the Beneficiary has subsequent to their change of employer departed the United States, applied for and been issued a U.S. visa, and been readmitted to the United States in H-1B status to work for their new employer.

³ The Petitioner provides the argument and supporting documentation on appeal which they should have provided in a timely response to rebut the Director's NOIR. Multiple precedent decisions address whether newly submitted evidence on appeal will be considered. *See Matter of Obaighena*, 19 I&N Dec. 533, 537 (BIA 1988); *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *see also Matter of Jimenez*, 21 I&N Dec. 567, 570 n.2 (BIA 1996). Generally, when a Petitioner is put on notice of required evidence and given a reasonable opportunity to provide it in the record, we will not consider new evidence on appeal. But we have chosen to exercise our discretion in this matter and evaluate the new information, documentation, and explanation provided by the Petitioner for the first time on appeal. And while we may not discuss every document submitted, we have reviewed and considered each one.

approval of a petition for failure to timely respond to a NOIR alone.⁴ So the Director's decision must be withdrawn and remanded for the Director to conduct further proceedings and specifically articulate under which one or more of the regulatory criteria at 8 C.F.R. § 214.2(h)(11)(iii)(A)(1)-(5) requires the revocation of the petition's approval.

On appeal, the Petitioner deemphasizes the potentially material nature of the Beneficiary's promotion from assistant vice president to vice president.⁵ They highlight similarities between the job description for the assistant vice president position contained in the Beneficiary's most recent (at that time) performance evaluation and a "synopsis of job duties and responsibilities"⁶ the Beneficiary submitted to a USCIS representative following an administrative site visit. Generally, a change in job title in isolation does not necessarily constitute a material change requiring an amended petition. For example the mere fact that a "person has a particular title - such as partner, director, or vice president - should not necessarily be used to determine whether he or she is an employee or a proprietor." See *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988) (stating that a job title alone is not determinative of whether one is employed in an executive or managerial capacity). Nevertheless, we are required to evaluate the employment of an individual to conclude whether a particular position is a specialty occupation. See *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000). If there is a change to an individual's employment, *Defensor* requires we evaluate its materiality to ensure a specialty occupation persists notwithstanding the change.

While examining the record in further proceedings on remand, the Director may choose to consider the following that we have observed in the course of our de novo review. Specifically, it appears the Petitioner's representation of their assistant vice president position in the petition may be inaccurate. The description of duties of the assistant vice president position in the petition does not mention any supervisory duties. However, the Beneficiary stated in their most recent (at that time) performance evaluation that they had "increased [their] remit to manage a team of direct reports." The Beneficiary's manager corroborated the Beneficiary's statement when they evaluated the Beneficiary favorably for "manag[ing] a team of team of [sic] two individuals" and "leading [their] new direct reports in the production of the PB and O&A businesses." So the Director may choose to further evaluate whether the assistant vice president job description the Petitioner provided at the time of filing the petition reflecting no supervisory or team leadership duties was correct and accurate in light of the information contained in the Beneficiary's performance evaluation in that position containing contrary

⁴ For example, if a hypothetical NOIR cited 8 C.F.R. § 214.2(h)(11)(iii)(A)(1) as a basis for intended revocation, and the petitioner did not respond to that NOIR, the director could very reasonably conclude that since the NOIR's concerns regarding 8 C.F.R. § 214.2(h)(11)(iii)(A)(1) had not even been addressed, they had not been overcome. That director would then revoke the petition's approval utilizing the revocation authority granted by 8 C.F.R. § 214.2(h)(11)(iii)(A)(1) because the concerns laid out in the NOIR had not been overcome.

⁵ The Petitioner also cites 5 U.S.C. § 706 to contend that the Director acted in an arbitrary and capricious manner because of the time between the administrative site visit performed in this matter and the issuance of the NOIR. We disagree. In the first instance, 5 U.S.C. § 706 concerns federal court review of agency action. And, the statute requires the court to compel agency action, i.e. perform a non-discretionary action that the agency has not taken yet. Plainly, the NOIR has been issued, so there is no action remaining to be taken. And, the Petitioner does not identify what specific section of the statute would potentially be implicated in this matter. Thus, we consider the Petitioner's contention misplaced in the context of these current proceedings.

⁶ It bears mention that the title of the job with the duties and responsibilities contained in the "synopsis of job duties and responsibilities" does not appear anywhere in the document. And there are no other markings or identifying characteristics that sufficiently indicate whether the document corresponds to the Petitioner's vice president position or even a document relating to the Petitioner.

information.⁷ If not, the Director may wish to evaluate whether the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(A)(2) requires revocation of the petition's approval. And if the Beneficiary was performing duties not included in the assistant vice president job description at the time the petition was filed, the Director may elect to evaluate whether that would lead them to conclude that the Beneficiary's performance of those duties was unauthorized and violated the terms and conditions of employment such that the regulations require revocation of the petition's approval pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(3)

III. CONCLUSION

We are withdrawing the Director's decision and remanding this matter for further processing. The Director may choose to consider our observations as they evaluate the record. And if appropriate the Director may issue a NOIR that specifically identifies at least one of the five H-1B revocation criteria. We express no opinion regarding the ultimate resolution of this case on remand.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

⁷ This may be especially relevant as it could mandate a wage level increase such that the accompanying certified labor condition application (LCA) may be rendered non-correspondent to the petition.