

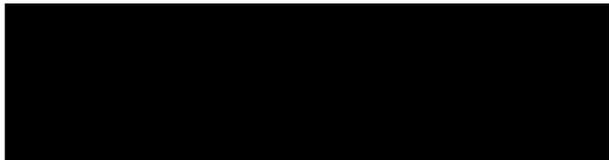
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FILE: WAC 04 063 50183 Office: CALIFORNIA SERVICE CENTER Date: DEC 12 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:
[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, 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 did revoke, approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The decision of the director will be withdrawn. The petition will be approved.

The petitioner is a reinforcing steel subcontractor that seeks to employ the beneficiary as a cost engineer. The petitioner, therefore, endeavors 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 record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's notice of intent to revoke (NOIR) approval of the petition; (3) the petitioner's response to the NOIR; (4) the director's revocation; and (5) the Form I-290B and supporting brief. The AAO reviewed the record in its entirety before issuing its decision.

The director revoked the approval of the petition on the basis of his determination that the petitioner's statement on the Labor Condition Application (LCA) was not true and correct, the petitioner violated the terms and conditions of the approved petition, and the petitioner violated H-1B requirements through its failure to pay the proffered wage listed on the petition and the LCA. The director noted that the petitioner's claim that wages paid to the beneficiary includes deductions for medical, life and dental insurance, is erroneous.

In its decision, the director cited to 20 C.F.R. § 655.715 Subpart H which states the following:

For the purposes of subparts H and I of this part:

* * *

Wage rate means the remuneration (**exclusive of fringe benefits**) to be paid, stated in terms of amount per hour, day, month or year....(Emphasis added).

On appeal, counsel for the petitioner contends that the petitioner provided sufficient rebuttal evidence in response to the director's intent to revoke. Counsel cites to 20 C.F.R. § 655.731(c) which describes deductions that may reduce the cash wage below the level of the required wage. Counsel contends that an authorized deduction includes the beneficiary's contributions to premiums for medical, life and dental insurance. Counsel explains that the beneficiary's salary, including the deduction for contributions to health insurance, is above the prevailing wage and thus the petitioner did not violate the H-1B requirements.

The regulation at 20 C.F.R. § 655.731(c) states the following:

(c) Satisfaction of required wage obligation.

- (1) The required wage must be paid to the employee, cash in hand, free and clear, when due, except that deductions made in accordance with paragraph (c)(9) of this section may reduce the cash wage below the level of the required wage. . . .

Thus, only deductions which are specifically authorized by 20 C.F.R. § 655.731(c)(9) may reduce the beneficiary's salary below the level of the prevailing wage. The regulation at 20 C.F.R. § 655.731(c)(9) permits three types of deductions:

- (9) "Authorized deductions," for purposes of the employer's satisfaction of the H-1B required wage obligation, means a deduction from wages in complete compliance with one of the following three sets of criteria (i.e., paragraph (c)(9)(i), (ii), or (iii))--
 - (i) Deduction which is required by law (e.g., income tax; FICA); or
 - (ii) Deduction which is authorized by a collective bargaining agreement, or is reasonable and customary in the occupation and/or area of employment (e.g., union dues; contribution to premium for health insurance policy covering all employees; savings or retirement fund contribution for plan(s) in compliance with the Employee Retirement Income Security Act, 29 U.S.C. 1001, et seq.), except that the deduction may not recoup a business expense(s) of the employer (including attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer, e.g., preparation and filing of LCA and H-1B petition); the deduction must have been revealed to the worker prior to the commencement of employment and, if the deduction was a condition of employment, had been clearly identified as such; and the deduction must be made against wages of U.S. workers as well as H-1B nonimmigrants (where there are U.S. workers); or
 - (iii) Deduction which meets the following requirements:
 - (A) Is made in accordance with voluntary, written authorization by the employee (Note to paragraph (c)(9)(iii)(A): an employee's mere acceptance of a job which carries a deduction as a condition of employment does not constitute voluntary authorization, even if such condition were stated in writing);
 - (B) Is for a matter principally for the benefit of the employee (Note to paragraph (c)(9)(iii)(B): housing and food allowances would be considered to meet this "benefit of employee" standard, unless the employee is in travel status, or unless the circumstances indicate that the arrangements for the employee's housing or food are principally for the convenience or benefit of the employer (e.g., employee living at worksite in "on call" status);

- (C) Is not a recoupment of the employer's business expense (e.g., tools and equipment; transportation costs where such transportation is an incident of, and necessary to, the employment; living expenses when the employee is traveling on the employer's business; attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer (e.g., preparation and filing of LCA and H-1B petition)). (For purposes of this section, initial transportation from, and end-of-employment travel, to the worker's home country shall not be considered a business expense.);
- (D) Is an amount that does not exceed the fair market value or the actual cost (whichever is lower) of the matter covered (Note to paragraph (c)(9)(iii)(D): The employer must document the cost and value); and
- (E) Is an amount that does not exceed the limits set for garnishment of wages in the Consumer Credit Protection Act, 15 U.S.C. 1673; and the regulations of the Secretary pursuant to that Act, 29 CFR part 870, under which garnishment(s) may not exceed 25 percent of an employee's disposable earnings for a workweek.

Pursuant to 20 C.F.R. § 655.731(c)(9)(ii), the deduction of premiums for medical, life and dental insurance qualifies as a deduction which is "reasonable and customary in the occupation and/or area of employment (e.g., union dues; contribution to premium for health insurance policy covering all employees; savings or retirement fund contribution for plan(s) in compliance with the Employee Retirement Income Security Act, 29 U.S.C. 1001, et seq.)," as long as the employer shows that similar deductions are taken from all employees. The petitioner indicated on the Form I-129 that the beneficiary would be paid a salary of \$47,133 per year, which is the prevailing wage for the occupation. On appeal, counsel outlined the beneficiary's work hours in 2004 and 2005, his earned wages for each year, less the premium paid for insurance. The petitioner also submitted payroll records for other employees establishing that similar deductions were taken for insurance premiums from other employees. The petitioner also submitted payroll records through the third week of November for 2004 and 2005 reflecting that the gross wages paid for the weeks worked exceeded the prevailing wage for both of these years. Thus, the petitioner has overcome the director's concerns.

For the reasons discussed above, the appeal will be sustained. The director's revocation decision will be withdrawn, and the petition will be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 the Immigration and Nationality Act, 8 U.S.C. § 1361. Here, the petitioner has met that burden.

ORDER: The appeal is sustained. The director's June 5, 2006 decision is withdrawn. The petition is approved.