U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 04 031 51601 Office: CALIFORNIA SERVICE CENTER Date: JUN 28 2006

IN RE: Petitioner:
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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The petition will be remanded for the filing of a complaint with DOL and the entry of a new decision after DOL's determination on the complaint.

The petitioner is a company dedicated to the use of imaging sensor technologies for the research, development, and commercialization of "next generation" medical diagnostic instruments and advanced radiation measurement instrumentation for space and terrestrial scientific applications by government agencies. Citizenship and Immigration Services (CIS) approved the previous petition for the petitioner to employ the beneficiary as an H-1B nonimmigrant worker in a specialty occupation – electronics engineer - 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). In order to continue this employment beyond the period approved in the initial petition, the petitioner endeavors to continue the beneficiary's H-1B classification and extend her stay.

The director's denial of the petitioner's request for extension of the validity of the original petition rests on evidence of record that the petitioner has been paying less than the salary that it had stated it would pay the beneficiary. As noted by the director, at part 5 of the instant Form I-129 the petitioner stated the beneficiary's salary as $52,000 per year. The director stated, in part:

> According to USCIS's record, on the previous petition (WAC 01 066 53959), the beneficiary's proffered position was a full-time job with a salary of $56,992.00 a year for three years. The submitted evidence shows that the beneficiary was paid only $38,705.36 a year on her W-2 Wage and Tax Statement [for] 2003.

The director determined that the petitioner had not satisfactorily explained the discrepancy between the beneficiary's actual salary and the salary that the petitioner had attested that it would pay. As a consequence of this determination, the director decided that the petitioner "has clearly provided clear misrepresentation through the inconsistent and completely conflicting employment record," and that, "as such the reliability of all of the evidence provided with the present petition is in question and will be accorded no evidentiary value." The director referred to precedent decisions and the regulation at 8 C.F.R. § 103.2(b) for the principle that a petitioner must establish eligibility at the time of filing.

On appeal, counsel argues that the prevailing wage for the beneficiary's position was $48,464.00, and that this prevailing wage was met by the beneficiary's having "received in total compensation of [sic] $52,973.00 which included guaranteed benefits such as legal fees, health benefits, 401K contributions, [and] vacation accrual." Counsel asserts in particular that the director erred by not considering the Department of Labor's (DOL) acknowledgement that OES is a "total compensation wage" calculation rather than a "straight salary wage determination." Counsel submits a brief and the following allied documents: (1) three pages of information, in question-and-answer format, from the Internet site of the American Immigration Lawyer's Association; (2) a draft "salary analysis" computation sheet, apparently produced by the petitioner, to support $38,705.36 as the beneficiary's salary and $52,973.56 as the "total paid" that she has received in salary, cost of counsel, CIS filing costs, visa application fee for the beneficiary's family, and seven items identified as fringe benefits; and (3) miscellaneous documentary evidence of the fringe benefits.

The director erred by disregarding the evidence of record that the proffered position is a specialty occupation and that the beneficiary is qualified to serve therein. The director correctly determined that there was a material difference between the salary stated in the initial petition and the salary reported to the Internal Revenue Service. However, this discrepancy is not a proper basis for denial of the petition. The proper course of action is the lodging of a complaint with the Wage and Hours Division of DOL.

The evidence of record and counsel's brief on appeal indicate that that the petitioner has not been paying, and apparently will continue to not pay, the wages that it agreed to pay as a condition for certification of the LCAs that it filed with the initial petition and the instant request for extension of the validity of that petition.

The AAO finds no merit to counsel's argument that the petitioner has complied with DOL standards for the wage that it must pay under the LCA.

Counsel does not contest the director's finding that the initial petition had stated that the beneficiary would be paid "a salary of $56,992.00 a year for 3 years" but that the "W-2 Wage and Tax Statement 2003" submitted by the petitioner states a lower wage of $38,705.36. Rather, counsel contends that the petitioner paid the wage stated on an LCA by a combination of: (1) the $38,705.36 reported on the beneficiary's W-2 Form; (2) these outlays for the beneficiary: the cost of counsel, CIS filing costs, and the visa application fee for the beneficiary's family; and (3) the money spent on these "fringe benefits": 401K, 401k discretionary contribution, Healthnet, life insurance, worker's compensation, payroll tax, and vacation accrual. According to counsel, DOL has determined that the wage a petitioner states on an LCA can be, in counsel's words, a "total compensation wage which takes into account even the use of discretionary bonuses, commissions, cost-of-living allowances and the like." Thus, counsel asserts that the actual dollar amount paid a beneficiary in wages or salary can be less than the wage stated on the related LCA. Counsel presents no statutory or regulatory authority to support his contention. The only document cited by counsel is "AILA [American Immigration Lawyers Association] DOL liaison Minutes 3-22-2001," which appears to be excerpted in the four pages submitted on appeal from the AILA Internet site. The statements in these Internet pages are not clear, as printing on the right side of each page is missing. Furthermore, the AAO accords no precedential value to a private organization's report on its recollection of a meeting with government agency representatives.

By signing the current LCA, the petitioner agreed that the beneficiary's pay would be $52,000 per year for the period December 30, 2003 to December 30, 2006. However, the import of counsel's statement on appeal is that during this period the petitioner would be paying materially less than $52,000 per year in wages, because the petitioner would continue its practice of paying as the LCA prevailing wage a combination of dollars paid directly to the beneficiary (and reported on the W-2 Form), plus the petitioner's outlays for fringe benefits and other items benefiting the beneficiary or his family. Accordingly, if the beneficiary is presently employed by the petitioner, the evidence indicates that the petitioner is engaged in a continuing violation of the Employer Labor Condition Statement, at subparagraph (1) at section E of the current certified LCA, that, for the period December 30, 2003 to December 30, 2006, it would "Pay nonimmigrants at least the local prevailing wage or the employer's actual wage, whichever is higher," that is, $52,000 per year, as stated at the Rate of Pay section of page 2 of the current LCA

The issues of violation of LCA conditions, misrepresentation of material facts on an LCA, and appropriate penalties are matters for DOL adjudication pursuant to the complaint, investigation, and disposition provisions of section 212(n) of the Act, 8 U.S.C. § 1182(n).[1] Because it appears that the petitioner may be engaged in a continuous violation of the LCA prevailing wage condition of the current LCA, which is valid until December 30, 2006, the director should file a complaint with the DOL Wage and Hour Division.[2] CIS is authorized to file a complaint, in accordance with 20 C.F.R. § 655.806(a) and subsection (4) of the definition of "aggrieved party" at 20 C.F.R. § 655.715 (that is, as "a government agency which has a program that is impacted by the employer's alleged non-compliance with the labor condition application.")

In accordance with the above discussion, the director's decision will be withdrawn and the matter remanded for the service center to file a complaint alleging the petitioner's non-compliance with the LCA and to enter a new decision in conformity with DOL's determination of the merits of the complaint. The complaint should be in writing, and it must set forth sufficient facts for DOL to determine if there is reasonable cause to believe that a violation as described at 20 C.F.R. §§ 655.806 has been committed, and therefore that an investigation is warranted. The director shall suspend adjudication of the instant petition until DOL renders a determination in response to the complaint. If DOL determines that a violation has been committed, the director shall take such action as may be appropriate under 8 C.F.R. § 214.2(h)(5). Thereafter, the director shall adjudicate the petition and render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. If adverse to the petitioner, the decision shall be certified to the AAO for review. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's May 13, 2004 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.

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[1] Of course, in addition to penalties that the DOL may levy, the CIS regulation at 8 C.F.R. § 214.2 (h)(4)(i)(B)(5) mandates that "for a period of at least one year from the date of such notice" CIS shall not approve petitions under section 204 or 214(c) of the Act with respect to an employer that a DOL notice to CIS identifies as having "failed to meet a condition of paragraph (B) of section 212(n)(1) of the Act, has substantially failed to meet a condition of paragraphs (C) or (D) of section 212(n)(1) of the Act, has willfully failed to meet a condition of paragraph (A) of section 212(n)(1) of the Act, or has misrepresented any material fact in the [LCA] application."

[2] Section 212(n)(2)(A) of the Act, 8 U.S.C. § 1182(n)(2)(A), provides that DOL will investigate only complaints that are filed not later than 12 months after the date of a failure to comply with an LCA condition or misrepresentation on the LCA, respectively.