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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

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Date: **APR 0 5 2012** Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California Service Center denied the nonimmigrant visa petition, and affirmed its decision after granting a motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner states that it is a medical research foundation that seeks to employ the beneficiary as a therapeutic management development specialist. 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 director denied the petition, finding that the petitioner had not complied with the requirements for filing a Form I-129, Petition for a Nonimmigrant Worker. Specifically, the director found that the petitioner had not obtained a certified Labor Condition Application (LCA) prior to the filing of the petition.

On motion, counsel for the petitioner claimed that due to exceptional circumstances, the petition was filed without the requisite certified LCA, and requested that the case be reopened and adjudicated on the merits based on the good faith effort made by the petitioner and beneficiary to comply with the regulatory requirements.

The director reopened the proceedings, issued a second request for evidence (RFE), and subsequently denied the petition on January 11, 2010, finding that the petitioner had failed to establish that a reasonable and credible offer of employment existed. On appeal, counsel submits a brief and additional evidence and contends that the director's findings were erroneous.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's initial RFE dated September 1, 2009; (3) the petitioner's response to the RFE dated September 29, 2009; (4) the director's denial dated October 21, 2009; (5) the petitioner's motion to reopen filed on November 23, 2009; (6) the director's RFE dated December 3, 2009; (7) the petitioner's response to the RFE dated December 28, 2009; (8) the director's denial dated January 11, 2010; and (9) Form I-290B and documentation in support of the appeal.

The issue before the AAO is whether a reasonable and credible offer of employment exists for the beneficiary.

Part 6 of Form I-129 requires the petitioner to certify, under penalty of perjury, that the petition and evidence submitted with it is true and correct. Moreover, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(2) requires that the petitioner submit a statement that it will comply with the terms and conditions of the LCA for the duration of the beneficiary's stay.

The nonimmigrant petition in this matter, filed by the petitioner on July 31, 2009, requests a change in the beneficiary's previously-approved employment along with a concurrent request for an extension of stay. Specifically, the petitioner seeks to employ the beneficiary as a therapeutic management development specialist on a part time basis (i.e., 21 hours per week) at a rate of $20.44 per hour.

In the RFE dated December 3, 2009, the director requested evidence demonstrating the earnings history of the beneficiary, such as her income tax returns, W-2 forms, and paystubs for the past three months.

In a response dated December 28, 2009, the petitioner submitted a copy of the beneficiary's Form 1040, U.S. Individual Income Tax Return, as well as copies of the beneficiary's paystubs from September and October 2009. The director noted that the beneficiary's gross annual income for 2008, as set forth on her tax return was $23,677.00, and that her hourly rate of pay according to her paystubs was $13.50.

The director denied the petition, finding that a reasonable and credible offer of employment did not exist. Specifically, the director noted the previously-approved H-1B petition for the beneficiary (EAC 06 226 52092) filed by the petitioner on August 2, 2006 indicated that the beneficiary would earn an annual salary of $68,500.00. However, the beneficiary's tax return for 2008 showed only $23,677.00 in earned income for that year. The director also noted that the beneficiary's most recent paystubs indicated that the beneficiary was receiving an hourly wage of $13.50 per hour, and that her bi-weekly income for 80 hours per week was $1,080.00.

On appeal, counsel and the petitioner address these issues. Regarding the hourly wage of $13.50 per hour, counsel claims that it simply must be the result of a typographical or clerical error. Counsel also claimed that the current amount paid of $1080.00 bi-weekly is more that the proffered wage of $20.44 for 21 hours per week in the instant petition, which amounts to $858.48. Counsel infers, therefore, that the reduction of the beneficiary's employment to part-time is reflected in this decrease in salary.

The appeal also includes a letter from [redacted]ecretary for the petitioner, who also emphasizes that the newly-proposed part-time wage of $858.48 bi-weekly is less than the beneficiary's current bi-weekly salary of $1080.00, thereby establishing that the beneficiary will in fact be earning less by changing her employment to a part-time basis as set forth in the petition. Neither counsel nor the petitioner address the discrepancies between the beneficiary's income for 2008 and the proffered wage in the prior petition.

Upon review, the AAO concurs with the director's conclusions. Form I-129 indicates that the beneficiary entered the United States on February 3, 2006. There is no claim that she was not working for the petitioner in accordance with the prior petition in 2008, despite the fact that her earned income for that year is grossly lower than the proffered wage. Moreover, there is no explanation with regard to the fact that the beneficiary's pay stubs submitted in response to the RFE clearly indicate that she was working full-time (80 hours per week) for $13.50 per hour.

The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Simply asserting that the hourly rate and hours worked on the beneficiary's timesheets constitutes a clerical error does not qualify as independent and objective evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998). Furthermore, evidence that the petitioner creates after USCIS points out the deficiencies and inconsistencies in the petition will not be considered

independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice.

The petitioner has failed to submit any independent, objective evidence to explain how the beneficiary will legitimately earn $20.44 per hour on a part-time basis performing the same duties in the same position for which she is currently earning only $13.50 per hour on a full-time basis. Although the petitioner submits an employment agreement on appeal, this agreement, dated March 8, 2010, was not in effect at the time the petition was filed on July 31, 2009. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Based on the evidence submitted, it appears that the petitioner failed to comply with the terms and conditions of employment under the prior petition in 2008 and 2009, since the petitioner paid the beneficiary at most a wage of $13.50 per hour, or $28,080.00 annually. Since the proffered wage according to the previous petition was $68,500.00, the petitioner was not complying with the terms and conditions of employment. Therefore, the petitioner's claim in this matter that the beneficiary will earn substantially more per hour for the same position on a part-time basis lacks credibility and cannot be accepted as true. 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 (BIA 1988).

The petitioner has failed to establish that the petitioner followed the terms and conditions of the previously-approved petition. Therefore, absent independent, objective evidence to the contrary, it must be presumed based on the evidence in the record that the petitioner will not pay the proffered wage listed on the instant petition and the LCA. In the present matter, either the petitioner did not comply with this requirement, misrepresented that they had complied, or the director committed gross error in approving the previous petition. Regardless, the approval of the initial petition may be subject to revocation based on the evidence submitted with this petition. *See* 8 C.F.R. § 214.2(h)(11)(iii).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has failed to sustain that burden, and the appeal shall accordingly be dismissed and the petition denied on this basis.

Beyond the decision of the director, the AAO finds that the petitioner failed to establish filing eligibility at the time the Form I-129 was received by U.S. Citizenship and Immigration Services (USCIS).

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows: