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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

U.S. Citizenship and Immigration Services

**PUBLIC COPY**

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[redacted]

Date: MAR 05 2012 Office: CALIFORNIA SERVICE CENTER File: [redacted]

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:

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,

Michael T. Kelly

for Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on December 18, 2009. The petitioner stated that its type of business is information technology services, and that it has ten employees. The petitioner failed to provide its gross annual income and net annual income, instead enclosing "draft financials" for 2007 and "financials" for 2006.[1]

Seeking to employ the beneficiary in what it designates as a vice-president of sales (VP Sales) position, the petitioner filed this H-1B petition in an endeavor to classify him 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 on January 14, 2010, finding that the petitioner had previously failed to pay the beneficiary the requisite wage and that the petitioner failed to credibly establish that it would comply with the terms and conditions of employment. On appeal, counsel asserts that the petitioner has met its obligations and that the finding was therefore unfounded.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

The Department of Labor (DOL) regulations at 20 C.F.R. § 655.731 require that a petitioner who successfully petitions for and subsequently employs an alien beneficiary pursuant to H-1B visa classification must abide by the terms of the approved Labor Condition Application (LCA) that supports the visa petition.

In this case, the petitioner provided a certified LCA in support of the petition that indicated the occupational classification for the position is "Sales Managers" at a Level 4 wage. The petitioner stated that it intends to employ the beneficiary on a full-time basis. On the LCA, the petitioner reported that the beneficiary will be employed at two worksites. The first place of employment is listed as Alpharetta, Georgia and the prevailing wage is stated as $136,667 per year. The

[1] Counsel stated that the 2007 draft financial documents rather than the completed financials were sent to the AAO because of a November 7, 2008 deadline (apparently in connection with a Form I-140, although the record is unclear). The petitioner and counsel failed to provide any explanation as to why finalized, *recent* financial documents were not provided to USCIS in connection with this Form I-129 petition, which was submitted on December 18, 2009 (over a year later).

additional worksite is listed as Fargo, North Dakota, where the prevailing wage for the occupation is $106,600 per year. The wage source is stated as the "Online Wage Library."[2] The LCA was certified on November 3, 2009 and signed by the petitioner's president on November 30, 2009. On the Form I-129 petition (pages 3 and 13), the petitioner stated that the salary for the proffered position would be $136,677 per year. The instructions to Form I-129 state that "[t]he rate of pay is the salary or wages paid to the beneficiary. Salary or wages must be expressed in annual full-time amount and do not include non-cash compensation or benefits."

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. *See* section 212(n) of the Act, 8 U.S.C. 1182(n). The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment. In the instant case, by signing the LCA, the petitioner's president obliged the petitioner to comply with the wage requirements.

In reviewing the documentation provided for the year immediately preceding the filing of the petition, the director noted that there were discrepancies in the stated wages and the actual annual wages paid to the beneficiary. More specifically, the petitioner stated in the prior H-1B petition (EAC 09 073 51921) that it would compensate the beneficiary at an annual rate of $145,600.[3] However, the Form W-2 (Wage and Tax Statement) for 2009 for the beneficiary indicated that he was paid $78,000 by the petitioner. The W-2 wage data, therefore, does not support a finding that the petitioner paid the beneficiary the required wage.

With the Form I-129 petition, counsel submitted a brief stating the following:

> [The beneficiary] has never been paid the prevailing wage in terms of the standard wages and salaries reflected on his W-2 . . . . However, [the beneficiary] has chosen vested deferred compensation and so the Petitioner believes it has met the prevailing wage requirements. However, assuming the present prevailing wage has not been met, the Petitioner must carry the burden of showing that it has the ability to pay the prevailing wage. . . . Draft financials and taxes for 2007 are also included with this filing. . . . The tax return reflects a net income of $0. . . . Thus, net income cannot satisfy the ability to pay from perspective that looks specifically at the tax return. Generally, net current assets are found in the tax return at Schedule L . . . . Using this general approach, the 2007 net current assets

[2] The U.S. Department of Labor's Foreign Labor Certification Data Center is the location of the Online Wage Library for prevailing wage determinations, and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at *http://www.flcdatacenter.com/.*

[3] On the petition filed on January 12, 2009, the petitioner stated the beneficiary's wages as $145,600 annually. On the petition filed on December 18, 2009, the petitioner stated that the beneficiary's wages as $136,677 annually.

> of [the petitioner] as reflected on Schedule L of the tax return are calculated as -$35,376.

Counsel further stated that a portion of the beneficiary's income was "earned and vested" but "held by the employer to be issued as shares." In response to the RFE, counsel asserted that the beneficiary chose to receive vested deferred compensation in the form of stock to be issued at a future date and that the "if [the beneficiary] left [the petitioner] today, he would be paid the full amount owing as deferred compensation."

Counsel acknowledges that the financial documents submitted to USCIS do not establish that the petitioner has the ability to pay the beneficiary the offered salary. However, counsel claims that USCIS should consider other factors in determining the petitioner's ability to pay, including that the petitioner "is a young and growing company" and "has had some major realignments of business."[4] Counsel asserts that "[t]he shift values on the tax returns and financials for [the petitioner] over the last couple of years reflect . . . growing pains so to speak." USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 ('Reg. Comm'r 1978). Furthermore, the AAO notes that the petition was submitted in December 2009. Yet, the record of proceeding, as well as counsel's brief, are devoid of any information regarding the petitioner's most recent finances, specifically for 2008 and 2009 (and the 2007 documents that were submitted to USCIS are simply drafts). Without documentary evidence to support the claim that the petitioner has the ability to pay the beneficiary the offered salary, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The record contains two declarations by the beneficiary (that are almost identical) signed on August 7, 2008 and on January 7, 2010. Both declarations state that the beneficiary's "W-2 does not reflect the status of payment of my wages because some of my income is being deferred as shares in the parent company [the petitioner]." He further states that he "requested that the [petitioner] defer payment of parts of my salary and instead provide me shares in the company upon my attaining permanent residence." The beneficiary claims that he is "hesitant to have [the petitioner] provide the shares" until he is granted U.S. permanent residence. He further asserts the following:

> In the event I do not gain my permanent residence, I would then have to divest myself of the shares and convert them to cash . . . . At least with the cash remaining deferred and liquid, I can take the cash if I need to leave the US and do not need Board approval to convert the less liquid asset of shares.

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[4] On the Form I-129, the petitioner stated that it was established in 2001. In the letter of support, the petitioner stated that it "began its operations in 1998."

The petitioner's president submitted a declaration dated January 7, 2009, stating the following on the issue of the beneficiary's deferred compensation, through purchasing shares in the corporation:

> Initially . . . the purchase was not possible because the corporation was at that time a subchapter S corporation and foreign nationals cannot own any portion of a subchapter S. Thus, the corporation agreed to merely defer compensation until two factors were met: (1) reconfiguration of the corporation to that of a C corporation; and (2) [the beneficiary's] long term presence in the corporate family was secured with the grant of his permanent residence. The corporation is now a C corporation and the legal bars to his ownership are removed, but the practical bar has not yet been removed, namely the assured long term ability of [the beneficiary] to remain as part of our corporate family in the United States.

The petitioner also submitted a document entitled "Action by Written Consent of the Board" stating that the petitioner would "pay a portion of [the beneficiary's] salary in [the] form of future stock in [the petitioner]." The document is dated January 9, 2003.

The petitioner claims that it did not immediately issue shares to the beneficiary due to its Subchapter S Corporation status, explaining that a nonresident alien cannot be a shareholder in such a corporation. Although this is technically correct, the definition for a nonresident alien under the Internal Revenue Code (IRC) is different than that under the Act. According to sections 7701(b)(1)(A)(iii) and (b)(4) of the IRC, 26 U.S.C. §§ 7701(b)(1)(A)(iii) and (b)(4), if certain conditions are met, an alien may elect to be considered a "resident alien" for tax code purposes after thirty-one (31) days residence in the United States. As such, the explanation provided for the non-issuance of shares to the beneficiary is without merit given that it appears that the beneficiary could have simply elected to be a resident alien for tax purposes / Subchapter S Corporate status purposes instead of waiting until lawful permanent resident status in the United States has been obtained.

The primary rules governing an H-1B petitioner's wage obligations appear in DOL regulations at 20 C.F.R. § 655.731. Based upon the excerpts below, the AAO finds that this regulation generally requires that the H-1B employer fully pay the LCA-specified H-1B annual salary (1) in prorated installments to be disbursed no less than once a month, (2) in 26 bi-weekly pay periods, if the employer pays bi-weekly, and (3) within the work year to which the salary applies.

The pertinent part of 20 C.F.R. § 655.731(c) states the following:

> *Satisfaction of required wage obligation.*
>
> (1) The required wage must be paid to the employee, cash in hand, free and clear, when due. . . .

(2) "Cash wages paid," for purposes of satisfying the H-1B required wage, shall consist only of those payments that meet all the following criteria:

(i) Payments shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due, except for deductions authorized by paragraph (c)(9) of this section;
(ii) Payments reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS (in accordance with the Internal Revenue Code of 1986, 26 U.S.C. 1, et seq.);
(iii) Payments of the tax reported and paid to the IRS as required by the Federal Insurance Contributions Act, 26 U.S.C. 3101, et seq. (FICA). The employer must be able to document that the payments have been so reported to the IRS and that both the employer's and employee's taxes have been paid except that when the H-1B nonimmigrant is a citizen of a foreign country with which the President of the United States has entered into an agreement as authorized by section 233 of the Social Security Act, 42 U.S.C. 433 (i.e., an agreement establishing a totalization arrangement between the social security system of the United States and that of the foreign country), the employer's documentation shall show that all appropriate reports have been filed and taxes have been paid in the employee's home country.
(iv) Payments reported, and so documented by the employer, as the employee's earnings, with appropriate employer and employee taxes paid to all other appropriate Federal, State, and local governments in accordance with any other applicable law.
(v) Future bonuses and similar compensation (i.e., unpaid but to-be-paid) may be credited toward satisfaction of the required wage obligation if their payment is assured (i.e., they are not conditional or contingent on some event such as the employer's annual profits). Once the bonuses or similar compensation are paid to the employee, they must meet the requirements of paragraphs (c)(2)(i) through (iv) of this section (i.e., recorded and reported as "earnings" with appropriate taxes and FICA contributions withheld and paid).

(3) *Benefits and eligibility for benefits* provided as compensation for services (*e.g.*, cash bonuses; stock options; paid vacations and holidays; health, life, disability and other insurance plans; retirement and savings plans) shall be offered to the H-1B nonimmigrant(s) on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.

(i) For purposes of this section, the offer of benefits "on the same basis, and in accordance with the same criteria" means that the employer shall offer H-1B nonimmigrants the same benefit package as it offers to U.S. workers, and may not provide more strict eligibility or participation requirements for the H-1B nonimmigrant(s) than for similarly employed U.S. workers(s) (*e.g.*, full-time workers compared to full-time workers; professional staff compared to

professional staff). H-1B nonimmigrants are not to be denied benefits on the basis that they are "temporary employees" by virtue of their nonimmigrant status. An employer may offer greater or additional benefits to the H-1B nonimmigrant(s) than are offered to similarly employed U.S. worker(s), *provided* that such differing treatment is consistent with the requirements of all applicable nondiscrimination laws (*e.g.*, Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e-2000e17). Offers of benefits by employers shall be made in good faith and shall result in the H-1B nonimmigrant(s)'s actual receipt of the benefits that are offered by the employer and elected by the H-1B nonimmigrant(s).

* * *

(4) For salaried employees, wages will be due in prorated installments (e.g., annual salary divided into 26 bi-weekly pay periods, where employer pays bi-weekly) paid no less often than monthly except that, in the event that the employer intends to use some other form of nondiscretionary payment to supplement the employee's regular/pro-rata pay in order to meet the required wage obligation (e.g., a quarterly production bonus), the employer's documentation of wage payments (including such supplemental payments) must show the employer's commitment to make such payment and the method of determining the amount thereof, and must show unequivocally that the required wage obligation was met for prior pay periods and, upon payment and distribution of such other payments that are pending, will be met for each current or future pay period. . . .

(5) For hourly-wage employees, the required wages will be due for all hours worked and/or for any nonproductive time (as specified in paragraph (c)(7) of this section) at the end of the employee's ordinary pay period (e.g., weekly) but in no event less frequently than monthly.

The petitioner should note that the persuasive evidentiary weight of its president's written statements and the beneficiary's declarations are limited. They represent claims by the petitioner and the beneficiary, rather than evidence to support those claims. Moreover, these documents lack essential information regarding the beneficiary's deferred income. As such, the evidentiary weight does not exceed the cumulative corroborative information other documents of record provide, as well as the lack of documentation submitted, regarding the petitioner's ability to pay the beneficiary's full salary and the agreement to defer the beneficiary's income. The record of proceeding lacks documentary evidence that establishes or corroborates the petitioner's statements and the beneficiary's declaration. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

As previously mentioned, counsel claims that the beneficiary's income was "earned and vested" but "held by the employer to be issued as shares" and "if [the beneficiary] left [the petitioner]

today, he would be paid the full amount owing as deferred compensation." However, the petitioner and counsel have failed to provide sufficient evidence to establish that the petitioner has accounted for "the full amount owing as deferred compensation." The petitioner has not demonstrated that the compensation due to the beneficiary is tracked and that the funds to be paid to the beneficiary, if he "left [the petitioner] today" (or stock shares to be issued to the beneficiary if he is granted U.S. permanent residency) are designated for the beneficiary and/or maintained separately from the petitioner's resources in a marked account, escrow or trust fund or by any other method. The documentation submitted by the petitioner, including the draft 2007 financial documents, do not account for the petitioner's liability to the beneficiary. The petitioner does not appear to have a positive net income and it has not demonstrated that it can assure payment of its debt to the beneficiary for his past deferred wages, let alone for the beneficiary's future salary. Moreover, the petitioner has provided no price or price formula for the shares of the petitioner's stock that are to be awarded to the beneficiary to pay his deferred salary. The record of proceeding fails to establish that the value of the benefit has been tabulated and recorded by the petitioner. Instead, the petitioner claims that some unspecified amount of stock will allegedly be given to the beneficiary "if he receives his permanent resident status."

Not only is the petitioner's arrangement contrary to the regulatory requirement that such future compensation be assured and not be contingent on some event, it also violates the prevision that such a benefit not be denied on the basis of the beneficiary's temporary nonimmigrant status. 20 C.F.R. §§ 655.731(c)(2)(v) and (c)(3)(i). Moreover, this arrangement would appear to violate the very intent of section 212(n)(1)(A) of the Act, 5 U.S.C. § 1182(n)(1)(A), by delaying required compensation until such time as the beneficiary is no longer protected by this provision, *i.e.*, when he becomes a lawful permanent resident.

The petitioner has not demonstrated that the beneficiary's future compensation (i.e., unpaid but to-be-paid) is assured. Based upon a complete review of the record, the petitioner has failed to establish that it would pay the beneficiary an adequate salary for his work, as required under the Act, if the petition were granted. The AAO finds that the director was correct in the determination that the petitioner failed to credibly establish that it would comply with the terms and conditions of employment. Accordingly, the director's decision to deny the petition will not be disturbed.[5]

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed, and the petition will be denied.

**ORDER:** The appeal is dismissed. The petition is denied.

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[5] The director indicated that the petition was denied because the petitioner failed to credibly establish that it would comply with the terms and conditions of employment. No other reasons were provided by the director for the denial. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). However, in this case the AAO will not discuss additional issues or deficiencies in the record for this proceeding.