

(b)(6)



U.S. Citizenship
and Immigration
Services

[Redacted]

DATE: FEB 01 2013

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director revoked the approval of the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. Approval of the petition is revoked.

On the Form I-129 visa petition, the petitioner describes itself as a medical research foundation established in 2004. The approved petition that is the subject of the revocation action had been filed so that the petitioner could continue its employment of the beneficiary in what it designates as a Director of Events position, by extending her classification 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 revoked the approval of the petition on the bases of her determinations that the petitioner had failed to demonstrate: (1) that it still employs the beneficiary in the capacity specified in the petition; and (2) that it has complied with the terms and conditions of the approved petition.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) counsel's response to the RFE; (3) the director's notice of intent to revoke approval of the petition (NOIR); (4) counsel's response to the NOIR; (5) the director's letter revoking approval of the petition; and (6) the Form I-290B and supporting documentation.

Upon review of the entire record, the AAO finds that the petitioner has failed to overcome the director's grounds for revoking the approval of this petition. Accordingly, the appeal will be dismissed, and approval of the petition will be revoked.

When it filed the petition, the petitioner proposed employing the beneficiary as its Director of Events from March 1, 2011 through March 1, 2014. The petitioner stated on both the Form I-129 and the certified Labor Condition Application (LCA) that it submitted in support of the petition that this is a full-time position, and that the beneficiary would earn a wage of \$19.46 per hour. The director approved the petition on May 10, 2011.

U.S. Citizenship and Immigration Services (USCIS) attempted to conduct an administrative site visit to the petitioner's business premises on June 16, 2011. However, the beneficiary was not present, and the site investigator was informed that the beneficiary only worked on Fridays and Saturdays, rather than on a full-time basis as stated on the Form I-129 and the LCA.

Accordingly, the director issued the NOIR on February 15, 2012. Although counsel submitted a timely response, the director found it insufficient, and she revoked the approval of the petition on March 27, 2012. Counsel submitted a timely appeal.

In general, the authority to revoke approval of an H-1B petition is found at 8 C.F.R. § 214.2(h)(11), which states, in pertinent part, the following:

Revocation of approval of petition.

(b)(6)

(i) *General.*

- (A) The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(H) of the Act and paragraph (h) of this section. An amended petition on Form I-129 should be filed when the petitioner continues to employ the beneficiary. . . .
- (B) The director may revoke a petition at any time, even after expiration of the petition.

* * *

(iii) *Revocation on notice—*

- (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 petitioner 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.
- (B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. . . .

As noted, the director revoked approval of the petition on the bases of her determinations that the petitioner had failed to demonstrate that it still employs the beneficiary in the capacity specified in the petition and that it has complied with the terms and conditions of the approved petition. Specifically, the director found that the petitioner failed to pay the beneficiary the wage specified on the Form I-129 and Labor Condition Application (LCA).

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 the filing of 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. By signing the Form I-129 and LCA, the petitioner attests that it will comply with the wage requirements.

The primary rules governing an H-1B petitioner's wage obligations appear in the 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 regulation at 20 C.F.R. § 655.731(c) states, in pertinent part, 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, 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. Benefits and eligibility for benefits provided as compensation for services must be offered in accordance with paragraph (c)(3) of this section.
- (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.

(b)(6)

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).

* * *

- (iv) Benefits provided as compensation for services may be credited toward the satisfaction of the employer's required wage obligation only if the requirements of paragraph (c)(2) of this section are met (e.g., recorded and reported as "earnings" with appropriate taxes and FICA contributions withheld and paid).

At pages 3 and 13 of the Form I-129 and on the LCA, the petitioner reported that the salary for the proffered position would be \$19.46 per hour for full-time work, or approximately \$40,613.02 per year. However, the beneficiary's pay stubs indicate that she was paid only \$14,598.08 in 2011, and only \$2,681.28 between January 1, 2012 and February 25, 2012.¹ This significant underpayment does not support a finding that the petitioner paid the beneficiary the required wage under the relevant statutory and regulatory provisions.

When a petitioner signs the Form I-129, it confirms "under penalty of perjury under the laws of the United States of America that this petition and the evidence submitted with it are all true and correct" and that it "agrees to the terms of the labor condition application for the duration of the alien's authorized period of stay for H-1B employment." The petitioner attests that it has read and agreed to the labor condition statements at Section H, which include confirming that it will "[p]ay nonimmigrants at least the local prevailing wage or the employer's actual wage, whichever is higher, and pay for nonproductive time." The required wage must be paid to the employee, cash in hand, free and clear, when due. *See* 20 C.F.R. § 655.731(c)(1). As discussed above, the petitioner has not complied with this requirement.

Counsel concedes that the petitioner underpaid the beneficiary. He argues, however, that the beneficiary has only been working for the petitioner on a part-time basis since 2011. Counsel claims that although the petitioner intended to employ the beneficiary on a full-time basis as specified in the petition, it was unable to do so due to a change in its financial situation. Counsel contends that although the petitioner failed to file an amended H-1B petition and LCA reflecting the beneficiary's change in status from a full-time to a part-time employee, the petitioner made no willful misrepresentations and did not intend to violate the terms and conditions of the LCA.

¹ These pay stubs and the beneficiary's 2010 Form W-2 indicate that the petitioner may have also violated the terms and conditions of its prior approved petition on behalf of the beneficiary. The director should therefore consider initiating revocation-on-notice proceedings with regard to that petition in order to explore this issue further.

However, the regulations contain no provision for waiver of the LCA requirements due to financial hardship. The regulation at 8 C.F.R. § 214.2(h)(11)(i)(A) requires a petitioner to immediately notify USCIS of any changes in the terms and conditions of employment of a beneficiary by filing an amended H-1B petition if it continues to employ the beneficiary. The petitioner, however, did not comply with this requirement by filing an amended H-1B petition and it is therefore bound by the terms and conditions of the original petition and its supporting LCA.

Based upon a complete review of the record, the AAO finds that the director properly revoked the approval of this petition. First, the petitioner has failed to establish that the beneficiary is still employed by the petitioner on a full-time basis as specified in the petition. The record therefore establishes that the beneficiary is no longer employed by the petitioner in the capacity specified in the petition, and the director properly revoked approval of the petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(1). Second, petitioner has failed to establish that it paid the beneficiary the appropriate salary for her work, as required under the Act. The record therefore establishes that the petitioner violated the terms and conditions of the approved petition, and the director also properly revoked approval of the petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(3). Accordingly, the appeal will be dismissed and approval of the petition will be revoked.

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 not sustained that burden.

ORDER: The appeal is dismissed. Approval of the petition is revoked.