

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D2



FILE: WAC 03 024 50339 Office: CALIFORNIA SERVICE CENTER Date: **JUL 06 2009**

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)

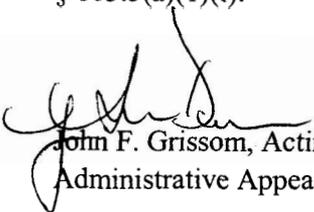
ON BEHALF OF PETITIONER:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The director of the California Service Center revoked the previously approved nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition's approval will be revoked.

The petitioner is a "Filipino newspaper/entertainment promoter" that employs the beneficiary as a public relations specialist/journalist 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 petition in accordance with the provisions of 8 C.F.R. § 214.2(h)(11)(iii)(A). The director noted that the beneficiary's wife and children applied for derivative H-4 visas at the Embassy of Manila and presented documentation of the wages paid to the beneficiary which indicated the beneficiary was not paid the prevailing wage as indicated on the Labor Condition Application ("LCA").

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation dated October 30, 2002; (2) the director's notice of intent to revoke (NOIR), dated September 7, 2007; (3) the director's November 28, 2007 notice of revocation; and (4) the form I-1290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

On October 30, 2002, the petitioner filed the Form I-129 (Petition for Nonimmigrant Worker) to employ the beneficiary in H-1B classification for the period of November 1, 2002 to November 1 2005. The director approved the petition. On September 7, 2007, the director notified the petitioner of her intent to revoke approval of the H-1B petition based on evidence concluding that the beneficiary did not get paid the prevailing wage as indicated on the LCA. The director subsequently revoked approval of the petition on November 28, 2007. The only issue before the AAO is whether the director appropriately revoked the approval.

The AAO now turns to the basis for the director's denial, and whether this action provided the director with grounds for revoking the H-1B petition under the language at 8 C.F.R. § 214.2(h)(11)(iii)(A), the regulation outlining the circumstances under which a Form I-129 petition's validity will be rescinded.

The regulation at 8 C.F.R. § 214.2(h)(10)(iii), which governs revocations that must be preceded by notice, states:

(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 if the beneficiary is no longer receiving training as specified in the petition; or
- (2) The statement of facts contained in the petition was not true and correct; 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. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

The director's revocation attempts have complied with the notice and decision requirements of the U.S. Citizenship and Immigration Services (USCIS) regulations on revocation.

On September 7, 2007, the director sent a decision to revoke approval of the petition. The director asserted the following reason for revocation:

The beneficiary's wife and sons, [REDACTED] and [REDACTED], applied for derivative H4 visas at the Embassy in Manila. A review of the documentation provided in support of their application revealed that the beneficiary was not being paid the wage specified on the petition and the LCA.

According to the beneficiary's wife, the beneficiary had been working for the petitioner since March 2003. His pay records for the period October 26, 2003, to November 30, 2003, showed that his year-to-date salary was \$10,556.32. If he had been working an average of 20 hours per week at \$20.41 an hour during the 39 weeks between March 2003 and November 2003, his year-to-date salary would have been \$15,919.80. If he had been working an average of 30 hours per week at \$20.41 per hour during that same period, his year-to-date salary would have been \$23,870.70. It was apparent that he was not being paid the prevailing wage for a Public Relations Specialist/Journalist in Los Angeles, California. Therefore, the beneficiary had been out of status since March 2003.

This information provided the director with a basis for revoking approval of the petition under the grounds at 8 C.F.R. § 214.2(h)(11)(iii)(A).

On November 28, 2007, the director revoked the petition concluding that the petitioner violated the terms and conditions of the approved petition through its failure to pay the proffered wage listed on the petition and the LCA.

The issue to be discussed is whether the petitioner's statement on the LCA was true and correct. 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 director noted that USCIS received evidence showing the wages paid to the beneficiary from 2003 through 2007; however, the beneficiary's salary was below the prevailing wage listed on the Form I-129 and the LCA.

On appeal, counsel for the petitioner submitted the beneficiary's Form W-2 Earnings Statements for 2003, 2004, 2005, and 2006. In addition, counsel submits the beneficiary's earning statement for the pay period of December 14, 2007 through December 28, 2007, which shows the gross pay year to date as \$25,505.77. In addition, the petitioner explained that the beneficiary received free housing for ten months in 2003 and 2004, valued at \$9,500.00 for each year. Counsel explains that as part of the beneficiary's wages in 2003 and 2004, the petitioner paid rent on behalf of the beneficiary. The beneficiary occupied only the master bedroom of a two bedroom which was viewed as compensation in the amount of \$9,500.00 for each year. Counsel further explained that "starting in November 2004, beneficiary began paying his own housing." Thus, counsel for the petitioner contends that the beneficiary's salary, plus the residential expenses, which is \$9,500.00 per year, was above the prevailing wage, and thus the petitioner did not violate the H-1B requirements.

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).

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)(iii)(B), housing and food allowances may be a permissible deduction if it meets the "benefit of employee" standard. The employee's housing must be principally for the benefit of the employee. The regulations note that the employee's housing may not principally benefit the employee, such as requiring the employee to be "on-call." As a journalist, the petitioner may require that the beneficiary be "on-call" at all times to report on any news-breaking stories. The petitioner did not provide sufficient documentation to establish that the housing provided to the beneficiary meets the standards under 20 C.F.R. § 655.731(c)(9)(iii)(B), and is a permissible deduction of the beneficiary's wages.

Although the petitioner stated that the total rental for 2003 and 2004 was \$9,500.00, the petitioner did not submit any corroborating evidence to support this claim such as a lease agreement, or an employment agreement letter establishing that the petitioner will pay part of the beneficiary's housing. The petitioner did not provide copies of the beneficiary's Form 1040, Individual Income Tax Return, indicating payment of his housing by the petitioner. Further, the petitioner did not provide documentation of payment of the monthly rent, such as copies of checks made by the petitioner to pay the beneficiary's monthly rent. 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)). Without documentary evidence to support the claim, 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). Therefore, the petitioner has not overcome the director's concerns on this issue.

The petitioner has failed to establish that the petitioner followed the terms and conditions of the approved petition and paid the proffered wage listed on the petition and the LCA.

Contrary to the claims of counsel, 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.

ORDER: The appeal is dismissed. The petition's approval is revoked.