

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

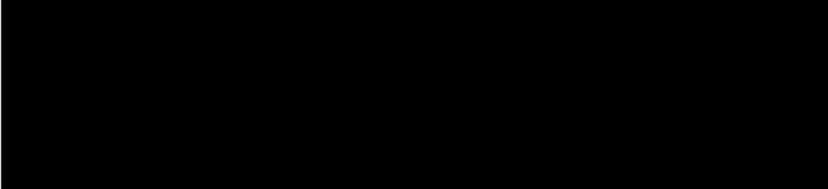
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

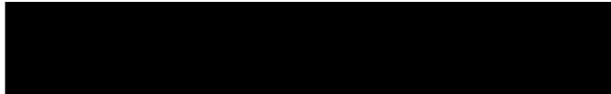
D2



FILE: WAC 04 254 50325 Office: CALIFORNIA SERVICE CENTER Date:

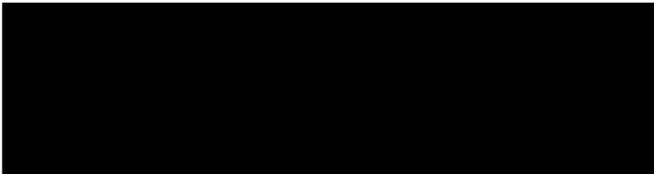
APR 29 2010

IN RE: Petitioner:  
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:



**INSTRUCTIONS:** This is the decision 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).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director initially approved the nonimmigrant visa petition. The director subsequently revoked the petition on September 19, 2008. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be revoked.

The petitioner states that it is a human capital solutions company. It seeks to employ the beneficiary as a Sr. Ericsson RBS Engineer and 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).

This H-1B petition was initially approved on September 27, 2004 with validity dates of October 1, 2004 to October 1, 2007. However, on April 4, 2008, the director issued a Notice of Intent to Revoke (NOIR), because the U.S. Citizenship and Immigration Services (USCIS) received information that the petitioner failed to pay the beneficiary the proffered wages as stated in the instant petition.

The petitioner responded to the NOIR on April 29, 2008. However, the petitioner did not adequately respond to the director's basis for denial.

The director therefore revoked the petition on September 19, 2008, because the petitioner did not overcome the grounds for revocation.

The petitioner filed an appeal on October 22, 2008. The petitioner believed the NOIR to be issued in error because the director did not provide the underlying information forming the basis for the issuance of the NOIR, even though the director provided a sufficient reason for issuing the NOIR. To ensure full compliance with 8 C.F.R. § 103.2(b)(16)(i), the AAO thereby exercised its discretion and informed the petitioner that the reason the director issued the NOIR was because USCIS learned the beneficiary presented evidence to the U.S. Department of State that he only earned \$19,755 in 2005, which is substantially less than the \$78,000 annual wage listed in the forms signed by the petitioner.

Although the petitioner had submitted copies of the beneficiary's earning statements in response to the NOIR, the AAO determined that additional evidence would be required to determine whether the petitioner paid the beneficiary the proffered wage throughout the employment period listed in the petition. The AAO therefore issued a Request for Additional Evidence (RFE) and instructed the petitioner to provide the following material documentation:

1. The petitioner's state and federal quarterly returns for the beneficiary covering all quarters from October 2004 to October 2007;
2. Copies of all of the beneficiary's Forms 1099 and/or Forms W-2 issued by the petitioner for 2004, 2005, 2006, and 2007; and
3. Original U.S. federal tax return transcripts or tax account transcripts for the beneficiary's federal income tax returns (Form 1040) for 2005 and 2006 (these transcripts MUST be originals issued by the Internal Revenue Service).

In response to the AAO's RFE, the petitioner provided the following documents:

- Earnings statements for the beneficiary for the periods ending August 28, 2005 through December 18,

2005 and for the periods ending September 21, 2008 through November 23, 2008. The 2005 statement indicates the beneficiary received a cumulative gross salary of \$19,755 for 2005. The 2008 earnings statement indicates the beneficiary has received a cumulative gross salary of \$359,107 since his initial employment with the petitioner, but does not indicate how this cumulative amount is broken down in each year of employment.<sup>1</sup>

- Forms W-2 for the beneficiary for 2006, 2007, 2008, and 2009. These records indicate that the beneficiary was paid \$51,569 in 2006, either \$12,540 or \$56,381 in 2007,<sup>2</sup> \$126,280 for 2008, and \$64,988 in 2009.

Although the AAO specifically requested the Form W-2 for 2005, the petitioner's federal and state quarterly returns from October 2004 to October 2007, and the beneficiary's original federal tax return transcripts or tax account transcripts for 2005 and 2006, the petitioner did not submit these documents. On appeal, the petitioner states that it has been unable to locate the 2005 Form W-2 for the beneficiary. The petitioner does not provide any explanation for the omission of the other documents. 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)). Moreover, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's NOIR; (3) the petitioner's response to the NOIR; (4) the notice of decision; (5) Form I-290B and supporting materials; (6) the AAO's RFE; and (7) the petitioner's response to the AAO's RFE. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons discussed below, the AAO finds that the evidence submitted on appeal is not sufficient to favorably resolve the issue of the petitioner's intention to comply with its H-1B wage obligations.

---

<sup>1</sup> It is noted that, as the 2008 earnings statement indicating a cumulative gross salary of \$359,107 includes part of the beneficiary's wages for 2007 and all of the beneficiary's wages for 2008, which are not periods of time covered by the present petition, and as this cumulative amount is not broken down on a quarterly or annual basis, the 2008 earnings statement is not probative for determining what the petitioner paid the beneficiary in 2005, 2006, and 2007.

<sup>2</sup> Two Forms W-2 were issued by the petitioner for the beneficiary for 2005 indicating the beneficiary was paid substantially differing amounts for that year and the petitioner did not explain the discrepancy. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In addition, as the present petition's validity expires October 1, 2007, the Forms W-2 for 2008 and 2009 are not probative for these proceedings. As such, the AAO will only examine the Forms W-2 for 2006 and 2007.

Accordingly, the decision of the director will not be disturbed. The appeal will be dismissed, and the petition will be revoked.

In the instant H-1B petition, which was submitted on September 21, 2004, the petitioner listed over 550 consultants as employees in the Form I-129. The petitioner indicated that it wished to employ the beneficiary as [REDACTED] at a client site from October 1, 2004 through October 1, 2007 at an annual salary of \$78,000.

Based upon its review of the entire record of proceedings, including the documents submitted on appeal, the AAO finds that the documentation submitted into the record indicates that the petitioner has not complied with its H-1B wage obligations with regard to the beneficiary.

As discussed above, the salary specified in the Form I-129 is \$78,000 per year. Although the petitioner did not submit either the beneficiary's Form W-2 or the beneficiary's original tax transcript for 2005, the petitioner submitted an earnings statement for 2005, which indicates the beneficiary was paid only \$19,755 for that year, thereby confirming the information obtained by the U.S. Department of State. This means that the beneficiary earned nearly \$60,000 less than the proffered wage in 2005. The petitioner did not submit any information to contradict this finding. Moreover, the petitioner did not submit documentation evidencing that the beneficiary was paid the proffered wage in 2006 or 2007. Therefore, the record indicates that the petitioner has not recognized its obligation to pay its salaried H-1B beneficiary the wage rate specified on the LCA on a regular basis and without reduction, suspension, or delay except in certain limited circumstances that do not appear in this record of proceeding. *See* 20 C.F.R. § 655.731(c) (Satisfaction of required wage obligation). For this reason, the AAO will not disturb the director's decision to revoke the petition.

Beyond the decision of the director, the AAO also finds that the petitioner failed to submit requested evidence that precludes a material line of inquiry. The petitioner did not provide additional documentation that was specifically requested by the AAO to provide further information that clarifies whether the petitioner paid the proffered wage. As stated earlier, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Therefore, the petition will be denied/revoked for this additional reason, noting that this failure to provide the requested evidence prevents the petitioner from establishing that it did not violate the terms and conditions of the approved petition. *See* 8 C.F.R. § 214.2(h)(11)(iii)(A)(3).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The appeal will be dismissed and the petition revoked for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

WAC 04 254 50325

Page 5

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