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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**

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[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **FEB 03 2011**

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:

[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 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 dental clinic that employed the beneficiary as a medical research assistant 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 a consular officer at the Embassy of Manila did not find that it was believable or satisfactory that the beneficiary would work in the position offered, noting that 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; (2) the director's notice of intent to revoke (NOIR), dated January 3, 2008; (3) the petitioner's response to the NOIR dated February 4, 2008; (4) the director's March 18, 2008 notice of revocation; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

On August 29, 2005, the petitioner filed the Form I-129 (Petition for a Nonimmigrant Worker) to employ the beneficiary in H-1B classification for the period of September 1, 2005 to August 31, 2008. The director initially approved the petition. On January 3, 2008, the director notified the petitioner of her intent to revoke approval of the H-1B petition based on evidence concluding that the beneficiary was not paid the prevailing wage as indicated on the LCA. The director subsequently revoked approval of the petition on March 18, 2008. The issue before the AAO therefore is whether the director appropriately revoked the approval of this H-1B petition.

The AAO turns first to the basis for the director's revocation, and whether this basis provided the director with sufficient 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 an H-1B Form I-129 petition's validity will be rescinded.

The regulation at 8 C.F.R. § 214.2(h)(11)(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.

It is first noted that the director has complied with the notice requirements of 8 C.F.R. § 214.2(h)(11)(iii)(B).

The next issue to be addressed is whether the petitioner's statement on the LCA was true and correct, and whether the petitioner paid the beneficiary the proffered wage. 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 consular officer in Manila noted that the petitioner's LCA and employment contract both indicated that the beneficiary would receive \$15 per hour in compensation for her employment. Her Form W-2, Wage and Tax Statement, for 2003 indicated that she received only \$4460 in wages that year. The consular officer noted that the beneficiary's pay stubs for 2004, which were presented for review and showed that the beneficiary was working 80 hours per week at a rate of \$10 per hour, appeared fake. The officer further noted that the beneficiary's pay stub for the pay period dated January 6, 2004 moved the decimal point in the rate column, demonstrating a total of \$8.00 earned as the year to date total. Finally, the officer noted that the prevailing wage rate for a medical research assistant in Cypress, California, according to section D of the LCA, was \$15.75 per hour, a rate higher than that which the beneficiary was allegedly being paid.

In response to the NOID, counsel submitted the beneficiary's W-2 forms for 2003, 2004, and 2005, which showed annual earnings in the amounts of \$4,460, \$20,415, and \$22,560, respectively. Counsel also submitted copies of pay records generated by the petitioner for other employees, claiming that they represented documents similar to those presented to the consular officer. Finally, a letter written by the petitioner, dated February 1, 2008, was submitted, which asserted that under regulations in effect at the time, the petitioner was required to pay only 95% of the prevailing wage rate, and therefore its proffered wage rate of \$15 per hour was appropriate. In addition, the petitioner claimed that the beneficiary's position was a part-time position and the beneficiary was compensated in accordance with this claim. Finally, the petitioner

indicated that the pay stubs found by the consular officer to be fake were in fact accounting software wage reports, formatted in accordance with the print style offered.<sup>1</sup>

On March 18, 2008, the director sent a decision, revoking approval of the petition and concluding that the petitioner had failed to establish that it had been paying the beneficiary at the prevailing wage and was abiding by the terms and conditions of employment. Specifically, the director asserted the following reasons for revocation:

1. The wages, tips and other compensation shown on the beneficiary's Form W-2, Wage and Tax Statement, from 2003-2005 did not conform with the petitioner's claims;
2. The prevailing wage in Cypress, California, the location of the beneficiary's employment, was more than the petitioner claimed it would pay the beneficiary on the LCA.

The director noted that U.S. Citizenship and immigration Services (USCIS) received evidence showing the wages paid to the beneficiary from 2003 through 2005; however, the beneficiary's salary was below the prevailing wage listed on the Form I-129 and the LCA.

The petitioner claimed in response to the NOID and again on appeal that the beneficiary was employed in a part-time capacity, working only 20 hours per week at \$15 per hour. The petitioner noted that the beneficiary's hours eventually increased to "more than" 20 hours per week, but not equal to 40 hours per week.<sup>2</sup>

In support of this contention, charts demonstrating her rate of pay were issued. The director noted that the charts submitted by the petitioner did not include correct information, and therefore the director based his decision on the following information:

<b>Year</b>	<b>Wage Required based on \$15/hr, 20 hr/wk</b>	<b>Wage Received as reflected in W-2 forms</b>
2003 (8/29/03–12/31/03, 17.71 weeks)	\$5,313	\$4,460

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<sup>1</sup> It is noted that copies of the documents deemed to be fake by the consular officer are not included in this record of proceeding.

<sup>2</sup> It is noted that, if significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Specifically, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(E) provides:

*Amended or new petition* . The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

2004	\$15,600	\$20,415
2005	\$15,600	\$22,560

Because the petitioner failed to specify the exact number of hours worked by the beneficiary per week (more than 20 but less than 40), the AAO cannot determine the exact hourly rate for 2004 and 2005, but notes that for 2003, if the beneficiary worked only 20 hours per week, she earned \$12.59 per hour, an amount much less than the proffered wage and the prevailing wage. In the event that she worked more than 20 hours per week, as indicated by the petitioner, her hourly rate would drop even farther below the proffered wage and the prevailing wage.

According to 20 C.F.R. § 656.40(a)(2)(i) (2004), the wage offered to the beneficiary will be deemed to meet the prevailing wage standard on the LCA if the wage offered is within 5% of the prevailing wage. In this matter, the prevailing wage in Cypress, California of \$15.75 per hour for a twenty hour work week, multiplied by 17.71 weeks, results in a salary of \$5,578.65. The proffered wage of \$15 per hour for a twenty hour work week, multiplied by 17.71 weeks, results in a proffered salary of \$5,313, a figure within 5% of the prevailing wage. However, as documented in the record, the petitioner paid the beneficiary only \$4,460.00 in 2003, a figure that was approximately 20% less than the prevailing wage.

On appeal, counsel claims that the beneficiary did not begin her employment in the United States until October 1, 2003. Consequently, counsel contends that contrary to the director's findings, the beneficiary only worked in the United States for fourteen weeks. Noting that the beneficiary's Form W-2 for 2003 demonstrates wages paid in the amount of \$4,460, counsel concludes that the proffered wage of \$15 per hour, for 20 hours per week, totaled \$4,200. Therefore, counsel contends that the wages paid to the beneficiary had exceeded the proffered wage. Consequently, counsel contends that the petitioner has met its burden.

The AAO disagrees. The prior petition [REDACTED] was filed as a change of status petition. As such, to properly maintain the beneficiary's status, she was required to begin working for the petitioner and the petitioner was required to begin paying the beneficiary from August 26, 2003, the beginning validity date of the petition. Regardless, neither counsel nor the petitioner submit evidence demonstrating that the beneficiary in fact commenced working in the United States on October 1, 2003, and not August 29, 2003 as set forth in the approval notice. Instead of submitting evidence to support this claim, counsel states that the AAO can "independently verify this" with the Social Security Administration. This attempt by counsel to shift the evidentiary burden in this proceeding to the government is unacceptable. 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). Moreover, 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 Obaighena*, 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).

It is evident, therefore, that in 2003, the petitioner failed to comply with the terms and conditions of employment, since the petitioner paid the beneficiary at most a wage of \$12.59 per hour, \$2.41 per hour less

than the proffered wage on the LCA. Moreover, it is noted that the prevailing wage for such a position in Cypress, California, according to the LCA, was \$15.75 per hour at the time. Even if it had paid the requisite per-hour wage, it would have violated the terms and conditions of employment by not paying the beneficiary's required wages between August 29, 2003 and October 1, 2003. Either way, it is evident that the petitioner violated the requirements of the H-1B provisions of the Act and their implementing regulations, providing sufficient grounds for revoking the petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(4).

Moreover, as stated above, the AAO is unable to calculate the wages paid to the beneficiary in 2004 and 2005, since the petitioner failed to establish how many hours per week the beneficiary worked. Claiming that the beneficiary worked more than 20 hours but less than 40 hours, without providing paystubs or other documentation to demonstrate the actual number of hours worked in a given period, is insufficient for establishing compliance in this matter. 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). Simply claiming that the petitioner met the requirement of paying 95% of the prevailing wage rate at the time, without documentation to demonstrate the actual dates and hours worked by the beneficiary, 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)). Again, 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. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Again, the uncontroverted evidence in the record provides sufficient grounds to revoke the instant petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(4). As such, the director's decision to revoke the instant petition will not be disturbed.

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.