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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

D2

[redacted]

DATE: OCT 03 2011 Office: CALIFORNIA SERVICE CENTER File: [redacted]

IN RE: Petitioner: [redacted]
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:

[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 revoked approval of the instant nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. Approval of the visa petition will remain revoked.

The petitioner, self-described as an IT consulting and software development firm, filed this visa petition to classify the beneficiary as an H-1B temporary nonimmigrant worker in a programmer analyst position.

The service center director approved the petition on July16, 2008.

On September 8, 2009, the service center director revoked approval of the petition, finding that the petitioner failed to establish that the petitioner intends to comply with the labor condition application (LCA) as certified.

On appeal, counsel submits a letter from the petitioner's human resources manager with two attachments. .

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for evidence (RFE) issued on May 30, 2008, (3) the response to the RFE, (4) the service center's notice of intent to revoke (NOIR); (5) the response to the NOIR; (6) the director's revocation letter; and (7) the Form I-290B and the exhibits attached in support of the appeal.

The regulation at 8 C.F.R. § 214.2(h)(11)(i)(B) states that the director may revoke approval of a visa petition at any time.

The regulation at 8 C.F.R. § 214.2(h)(10)(iii)(A), which specifies grounds for revocation that must be preceded by an NOIR, identifies the following grounds for revocation after notice and an opportunity to respond:

> (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:
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> *(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
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> *(2)* The statement of facts contained in the petition . . . was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
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> *(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.

As will be discussed below, based upon its review of the entire record of proceeding, including, but not limited to, the submissions on appeal and in the petitioner's response to the NOIR, the AAO concludes that the director's revocation of the petition approval was correct. The AAO bases this conclusion upon its finding that the revocation was separately and independently justified under each of two sections of the regulation at 8 C.F.R. § 214.2(h)(10)(iii)(A), namely, subparagraph 2 (the statement of facts contained in the petition . . . was not true and correct, inaccurate, fraudulent, or misrepresented a material fact) and subparagraph 5 (the approval of the petition violated paragraph (h) of this section or involved gross error).

The petitioner's response to the RFE issued prior to approval of the petition included a document identified by the petitioner as a "Notarized list of all employees, showing each employee name, specific job title, start date, end date, salary and immigration status" (hereinafter referred to as the notarized list). Months after approval of the petition, the service center director issued a NOIR, on July 14, 2009, based upon information from the United States Consulate in Chennai which indicated that five of the employees identified in the notarized list that was included in response to the RFE were not being paid in accordance with the wage obligations reflected in the annual-salary section of the notarized list.

The record of proceeding contains a list of the petitioner's employees and copies of its Form UIA 1020 Employer's Quarterly Tax Reports that it submitted to the Michigan Department of Labor & Economic Growth Unemployment Insurance Agency for the [redacted] (Quarterly Reports)

In the NOIR, issued July 14, 2009, the service center noted discrepancies between the wages the petitioner stated on notarized list that it paid to its H-1B workers, and the amounts the Quarterly Reports show that it actually paid to them.

In the notarized list, the petitioner indicated that [redacted] were current employees of the petitioner. [redacted]e petitioner's owner, signed that employee list and dated it

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[1] That name is variously spelled [redacted] in the record. Which spelling is correct is immaterial, but the AAO finds that both spellings refer to the same person, whom it will refer to in this decision as [redacted]

[2] That name is shown on the employee list as [redacted] on a W-2 form as [redacted] but elsewhere as [redacted] Which spelling is correct is immaterial, but the AAO find that all three spellings refer to the same person, whom it will refer to in this decision as [redacted]

10/8/08.[3] Whether that date indicates October 8 or August 10, is unclear, but it is clearly one or the other.

The notarized list indicates that began working for the petitioner on , that gan working for the petitioner on hat began working for the petitioner on hat began working for the petitioner on nd that gan working for the petitioner on All of those employees, therefore, began working for the petitioner prior to The list further states that as of the date of that list, whether during ll five were still employees of the petitioner in H-1B status. The AAO notes that, according to the information on the petitioner's employee list, each of those five people worked for the petitioner throughout the

The Quarterly Reports provided show that, during the first, second, and third quarters of 2008, the petitioner paid 9,424, $15,624, and $4,712, respectively, although the amount of the proffered wage due to him during each of those quarters was approximately $15,000; paid $6,450, $15,364, and $16,625, although the amount of the proffered wage due was $17,500 during each quarter; paid 3,000, $13,410, and $17,920, although the amount due during each quarter was $17,500; paid $9,600, $14,400, and $14,400, although the amount due each quarter was $15,000; and paid $12,332.80, $17,379.20, and $5,606.40, although the amount due was $18,000 per quarter. The AAO notes that, according to the Quarterly Reports, each of those five people worked for the petitioner during all of the

The NOIR stated that the wages listed on the petitioner's notarized list and those shown in its Quarterly Reports conflict. In a letter submitted in response to the NOIR, the petitioner's owner stated that the salaries specified in the notarized list did not represent actual wages paid, but either expected salaries or estimates of past salaries. The petitioner's owner apologized for providing false information on that notarized document.

The owner further stated that ceased working for petitioner during June of 2008, and that the amount paid to Deepthi Chigurapati during 2008 was for only half of a year. The AAO notes that the Quarterly Report for the third quarter of 2008 contradicts the assertion that ceased to work for the petitioner during June 2008, as does the petitioner's owner's statement on the employee list that continued to work for the petitioner through the date of that list.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is

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[3] On various submissions presented himself or herself to be the petitioner's Business and Development Manager and its Human Resources Manager. The petitioner's 2006 and 2007 Form 1120 U.S. Corporation Income Tax Returns indicate that he or she also owns 100% of the petitioner.

incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner's owner stated that was paid wages of $51,320 during 2008, and noted that this is close to the amount stated on the employee list. The record does not contain that W-2 form. The petitioner's owner further stated that the wage proffered in that case was $50,000 annually, but provided no evidence to support that assertion.

The petitioner's owner stated that was paid wages of $46,650 during 2008, but was absent from the United States for one month. He stated that a W-2 form was being provided to support his statement of the amount paid during 2008. The record does not contain a W-2 form issued to Further, the record contains no evidence to support the petitioner's owner's assertion that was absent from the United States for one month during 2008.

The petitioner's owner stated he was providing a W-2 form showing that was paid $51,000 during 2008. He also stated that was out of the United States for approximately two and a half months during that year. The W-2 form to which the petitioner's owner alluded is not in the record, nor is evidence that was absent from the United States during 2008 as the petitioner's owner claimed.

The petitioner's owner provided a W-2 form showing that the petitioner paid $35,318.40 during The petitioner's owner also stated that ceased to work for the petitioner during June 2008, and that the amount paid to during was for only half of a year. The AAO notes that the Quarterly Report for the contradicts the assertion that ceased to work for the petitioner during as does the petitioner's owner's statement on the employee list that continued to work for the petitioner through the date of that list.

Again, the assertion that ceased to work for the petitioner during is contradicted both by the petitioner's employee list and by the Quarterly Report for the third quarter of 2008. Further, even if the petitioner's owner's assertion were otherwise credible, it would not qualify as the "independent objective evidence" required by *Matter of Ho, Supra.*

It is important to note that the AAO accords no evidentiary weight to statements of the petitioner and/or the petitioner's counsel regarding the revocation action that are not supported by corroborating documentary evidence. 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).

The primary rules governing an H-1B petitioner's wage obligations appear in the Department of Labor (DOL) regulations at 20 C.F.R. § 655.731 (What is the first LCA requirement, regarding wages?). 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) reads:

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

* * *

> (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 also note that an H-1B employer is obligated to pay the required wage even if the H-1B nonimmigrant is in "nonproductive status" (i.e., not performing work) "due to a decision by the employer" (e.g., because of the lack of work to assign). *See* 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. §§ 655.731(c)(7)(i).

The AAO was unable to locate USCIS computer records pertinent to the petitioner's H-1B visa petitions for [redacted] with on the information provided. However, the AAO located the computer records of the other four employees in question.

USCIS computer records show that [redacted] was the beneficiary of an H-1B visa petition, receipt number [redacted] filed by the petitioner and approved for the period from [redacted] The annual wage proffered in that case was $50,000 per annum. Although approval of that visa petition was revoked on September 17, 2009, the AAO observes that it was in effect throughout 2008. Payment of less than $12,500 during any [redacted] would indicate that the petitioner did not pay the full amount of the proffered wage during that quarter. The AAO notes that the Quarterly Reports provided show that, of the three quarters pertinent to which evidence was provided, the petitioner failed to pay [redacted] the full amount of the proffered wage during the [redacted]

[redacted] was the beneficiary of an H-1B visa petition, receipt number [redacted] filed by the petitioner and approved for the period from October 1, 2006 through September 30, 2009. The proffered wage was $53,400 per annum. [redacted] as therefore the beneficiary of an H-1B petition throughout 2008, and the payment of less than $13,350 during any of the quarters of 2008 would indicate that the petitioner did not pay the full amount of the proffered wage during that quarter. The Quarterly Reports provided show that, of the three quarters pertinent to which evidence was provided, the petitioner failed to pay [redacted] e full amount of the proffered wage during the [redacted] Further, the petitioner's owner stated

that was absent from the United States for one month of 2008, and was paid $46,650 during that year. The AAO observes that, even if the petitioner's owner's assertion were credible, it would still indicate that the petitioner paid less than the proffered wage during as the annual amount of the proffered wage, $53,400, minus one twelfth of the proffered wage, $4,461.67, is equal to $48,938.33, which is greater than $46,560, the amount the petitioner's owner states the petitioner paid to during Even if, *arguendo*, the petitioner's owner's assertion were taken as fact, it would show that that the petitioner failed to pay the amount due to him during

was the beneficiary of an H-1B visa petition, filed by the petitioner and approved for the period from The proffered wage was $57,000 per annum. was therefore the beneficiary of an H-1B petition throughout and the payment of less than $14,250 during any of the quarters of would indicate that the petitioner did not pay the proffered wage during that quarter. The Quarterly Reports provided show that, of the three quarters pertinent to which evidence was provided, the petitioner failed to pay the full amount of the proffered wage during the

was the beneficiary of an H-1B petition, filed by the petitioner and approved for the period from The proffered wage was $60,000 per annum. was therefore the beneficiary of an H-1B petition throughout 2008, and the payment of less than $15,000 during any of the quarters of 2008 would indicate that the petitioner did not pay the full amount of the proffered wage during that quarter. The Quarterly Reports provided show that, of the three quarters pertinent to which evidence was provided, the petitioner failed to pay the full amount of the proffered wage during the first and

The petitioner's own statement in response to the NOIR, as well as the evidentiary context discussed above, indicates that, prior to its approval, the petition stated facts that were not true and correct, and that were inaccurate, thus establishing a legitimate ground for revocation of approval of the petition, in accordance with the provision at 8 C.F.R. § 214.2(h)(10)(iii)(A)(*2*). Further, in light of the fact that the record of proceeding as presently constituted fatally undermines the credibility of the petitioner's attestations in the petition and the related LCA that it would pay the beneficiary in accordance with the wage requirements of the LCA, the AAO also finds that the service center director's revocation of approval of the petition accords with the provision, at 8 C.F.R. § 214.2(h)(10)(iii)(A)(*5*), for such action when the approval violates the regulations regarding H-1B specialty occupation petitions.
The AAO further finds, first, that the NOIR and the service center director's decision to revoke approval of the petition adequately apprised the petitioner of the grounds for the revocation action; and, second, that neither the petitioner's response to the NOIR nor the appeal overcame the grounds of the decision to revoke approval of the petition.

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.

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