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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



82

Date: **JUL 05 2012**

Office: CALIFORNIA SERVICE CENTER

FILE: 

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:

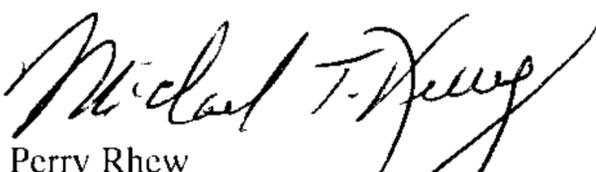


INSTRUCTIONS:

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,


Perry Rhew
Chief, Administrative Appeals Office

for

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

On the Form I-129 visa petition the petitioner stated that it is a software consulting, training, and development firm with 28 employees. It stated its gross annual income as \$5 million and its net annual income as \$500,000. To employ the beneficiary in what it designates as a programmer analyst position, the petitioner endeavors 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).

The director denied the petition, finding that the credibility of the evidence submitted is in question, that the evidence suggests that the petitioner would not abide by the terms and conditions of H-1B employment in that it appears that the petitioner does not intend to pay the beneficiary the proffered wage, and that the petitioner has not demonstrated that it would employ the beneficiary in a location for which the approved Labor Condition Application (LCA) is valid. On appeal, counsel asserted that the director's bases for denial were erroneous, and contended that the petitioner satisfied all evidentiary requirements.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

The director cited discrepancies to call into question the accuracy of the evidence submitted. Some of that evidence pertains to other employees for whom the petitioner filed H-1B visa petitions.

The director observed that, although a chart provided by the petitioner stated that [REDACTED] began work for the petitioner on May 21, 2007, USCIS records show that [REDACTED] entered the United States on H-1B status with the petitioner on April 10, 2007.

The same chart shows that [REDACTED] started employment with the petitioner on April 1, 2007, although USCIS records show that his H-1B employment was approved on October 1, 2006.

That chart states that [REDACTED] started employment with the petitioner on May 7, 2007, although the director stated that USCIS records show that this person entered the United States in H-1B status on January 22, 2007.

Although that list shows that [REDACTED] began employment with the petitioner on June 1, 2007, USCIS records show she was approved for change of status with a start date of October 1, 2006.

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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record with 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. *Id.* At 591-592.

In the brief on appeal, the petitioner's director stated, "Mr. [REDACTED] was not able to obtain SSN until May of 2007, right after which he immediately commenced his employment with us." He further stated, as to an employee named [REDACTED]

Mr. [REDACTED] requested extended personal leave to look after his wife during a problematic pregnancy. After delivery, Mr. [REDACTED] wife had paralysis stroke and fell into a coma for 3 weeks. Hence he reported to work on April 1, 2007. His employment with us has been characterized with frequent needs to request personal leaves due to family issues, which leaves we have felt complied [sic] to grant.

The petitioner's director apparently meant to refer to [REDACTED]. The significance of the name discrepancy is unknown to the AAO. However, the AAO will consider that assertion to refer to [REDACTED]

As to the person listed on the employee list as [REDACTED] the petitioner's director stated:

Ms. [REDACTED] was on prolonged maternity leave before she delivered her baby. Furthermore, pursuant to her doctor's advice she was bed rested and took care of her baby until the baby was 3 months old. Thus, even though Mr. [REDACTED] change of status was approved as for October 1, 2006, she reported to work June 1, 2007.

Pursuant to *Matter of Ho, supra*, the petitioner is obliged to reconcile discrepancies in the evidence with independent objective evidence, rather than just an uncorroborated explanation. The mere assertions that (1) Mr. [REDACTED] was unable, for a reason that is unexplained, to timely obtain a social security card; (2) Mr. [REDACTED] stayed home to care for his wife; and (3) Ms. [REDACTED] had a problem pregnancy that necessitated bed rest, are insufficient to satisfy the requirement of independent objective evidence. Further, the petitioner's director did not explain the petitioner's failure to employ [REDACTED] for more than three months after his entry in H-1B status.

The discrepancies cited by the director remain unreconciled and, as per *Matter of Ho*, the reliability of the petitioner's remaining evidence remains in doubt.

The AAO will next discuss the director's finding that the evidence in the record indicates that the petitioner would not pay the beneficiary the full amount of the wage proffered.

The primary rules governing an H-1B petitioner's wage obligations appear in the U.S. Department of Labor (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 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. . . .

(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).

* * *

(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 provided 2007 Form W-2 Wage and Tax Statements for its employees during that year. As was stated above, the petitioner also provided a list of its H-1B employees.¹ Of those, the following beneficiaries were in H-1B status throughout 2007, pursuant to the visa petitions listed, which proffered the following annual amounts. Further, the 2007 W-2 forms show that those beneficiaries were paid the following amounts during that year: [REDACTED] amount proffered: \$50,000, amount paid: \$50,062.27; [REDACTED] amount proffered: \$48,000, amount paid: \$38,240.72; [REDACTED] amount proffered: \$46,600, amount paid:

¹ In some cases, the W-2 forms differed from the petitioner's H-1B list as to the spelling of the names or which was represented to be a beneficiary's family name. However, the social security numbers included on both confirmed that the names on the H-1B list are correctly matched with the receipt numbers as listed above.

\$16,363.63; [REDACTED] amount proffered: \$46,600, amount paid: \$22,500; [REDACTED] amount proffered: \$48,000, amount paid: \$27,992.38; [REDACTED] amount proffered: \$46,600, amount paid: \$8,132.81; [REDACTED] amount proffered: \$45,000, amount paid: \$49,201.45; [REDACTED] amount proffered: \$55,000, amount paid: \$43,032.35; [REDACTED] amount proffered: \$45,000, amount paid: \$18,000; [REDACTED] amount proffered: \$48,000, amount paid: \$33,615.67; [REDACTED] amount proffered: \$45,000, amount paid: \$30,833.32; [REDACTED] amount proffered: \$48,000, amount paid: \$20,666.64; [REDACTED] amount proffered: \$45,000, amount paid: \$12,000; and [REDACTED] amount proffered: \$45,000, amount paid: \$17,678.56;

Of the 14 H-1B employees who worked for the petitioner throughout 2007, then, it appears that 12 were paid less than the annual amount of the proffered wage. As was stated above, the petitioner provided uncorroborated explanations for the shortages in the amounts paid to [REDACTED]. However, as noted earlier in this decision, explanations will not suffice to overcome such inconsistencies if the explanations are not corroborated by competent objective evidence pointing to where the truth, in fact, lies. *See Matter of Ho, supra.*

Further, on appeal, the petitioner's director stated that [REDACTED] transferred to an unknown employer and quit his job with the petitioner on July 31, 2007. As to Pradeep Sreeram, the petitioner's director stated, "Mr. [REDACTED] requested personal leave to visit his family in India; thus, he was absent from September 11, 2008 until December 24, 2007."² [Verbatim from the original.] As to [REDACTED], the petitioner's president stated, "Mr. [REDACTED] was not able to obtain his SSN in 2nd week of March and he started employment with us on April 2, 2007." As to [REDACTED] the petitioner's president stated, "Ms. [REDACTED] requested extensive personal leave to attend family matters in India. She reported back in November of 2007." As to [REDACTED] the petitioner's director stated, "Due to personal reasons, Ms. [REDACTED] started working for [the petitioner] in June of 2007 and soon after that quit her job in September of 2007."

Again, although the petitioner's director provided explanations of the petitioner's failure to pay the full amount of the proffered wage to those five additional employees, pursuant to *Matter of Ho*, absent independent objective evidence showing their accuracy, mere explanations are insufficient to resolve the discrepancies in the evidence. Further, the petitioner's president offered no explanation for the petitioner's failure to pay the full amount of the proffered wage to [REDACTED].

The evidence available to USCIS suggests that the petitioner has paid the full amount of the proffered wage to less than half of its employees. The record contains no evidence to suggest that this practice of paying its employees less than the full amount proffered has changed. This suggests that, if the instant visa petition were approved, the petitioner would, more likely than not, fail to pay the beneficiary the full amount of the wage proffered. The petitioner has failed to show, by a

² In addition to not being independent objective evidence, that statement does not make clear during what portion of 2007 the petitioner's director claims Mr. [REDACTED] was absent from the United States.

preponderance of the evidence, that, if the instant visa petition were approved, the petitioner would abide by the terms and conditions of H-1B employment, as they are indicated in the related attestations in the LCA and the Form I-129. The appeal will be dismissed and the visa petition will be denied on this basis.

The remaining basis for the director's decision of denial is her finding that the petitioner had not complied with the requirement to file a corresponding LCA to support the visa petition. More specifically, the director found that the petitioner had not demonstrated that the LCA corresponds with this petition, in that the LCA does not appear to be valid for all of the locations where the beneficiary would work.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

While the U.S. Department of Labor (DOL) is the agency that certifies LCAs before they are submitted to USCIS, the DOL regulations note that it is within the discretion of the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification. . . .

[Italics added]

The LCA states that the beneficiary would work in Golden Valley, Minnesota, which is the petitioner's location. Subsequently, counsel submitted an itinerary showing that the beneficiary would work at the petitioner's location in Golden Valley, Minnesota 25% of his time, but would work 75% of his time at the location of Next Generation Technology in Arlington Heights, Illinois.

On appeal, counsel stated that the beneficiary's primary work location would be the petitioner's location in Golden Valley, Minnesota, and that the petitioner would transfer the beneficiary to the location of Next Generation Technology only if they requested it. Counsel's statement, however, is contrary to the itinerary provided, which states that the beneficiary would work at the location of Next Generation Technology, in Arlington Heights, Illinois 75% of the time.

In any event, 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).

Further, as was observed above, pursuant to *Matter of Ho, supra*, inconsistencies in the evidence must be resolved with independent, objective, evidence, rather than mere explanatory assertions.

The AAO observes that the LCA provided to support the visa petition is not valid for employment in Arlington Heights, Illinois. As such, it does not correspond with the instant visa petition³ and cannot be used to support it. The appeal will be dismissed and the visa petition denied for this additional reason.

The director's decision will be affirmed and the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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. The petition is denied.

³ Pursuant to 8 C.F.R. § 103.2(b)(1) the itinerary is part of the visa petition. "Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition."