



U.S. Citizenship  
and Immigration  
Services

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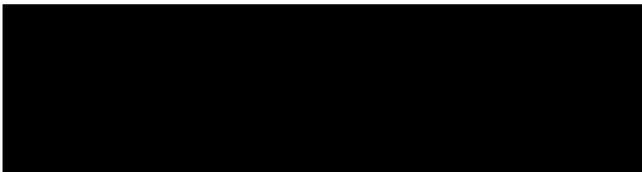
Date: NOV 03 2012 Office: VERMONT SERVICE CENTER

FILE: [REDACTED]

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:

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

**DISCUSSION:** The service center director revoked the approval of the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The approval of the petition will remain revoked.

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a privately held investment banking firm with 14 employees. It seeks to employ the beneficiary as an investment analyst 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). The director revoked the approval of the petition on the grounds that the petitioner violated the terms and conditions of the approved petition.

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); (3) the petitioner's response to the NOIR; (4) the notice of decision; and (5) the Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

On July 17, 2009, the petitioner filed an H-1B petition with the U.S. Citizenship and Immigration Services (USCIS), and it was initially approved on November 3, 2009, with a validity period of November 3, 2009 to July 14, 2012.

After an Administrative Site Visit conducted on December 30, 2009, the director issued an NOIR informing the petitioner that the site inspector discovered that the beneficiary was being paid below what was required by the petition and the [REDACTED]. Specifically, during a discussion with the president of the petitioner, the site inspector learned that the petitioner was paying the beneficiary \$50,000 per year instead of what the petitioner stated it would pay the beneficiary on the Form I-129 and [REDACTED], \$75,000 per year, and below the prevailing wage, i.e., \$58,136.

On July 5, 2011, in response to the director's NOIR, the petitioner stated that the beneficiary's "salary was lowered on a temporary basis as part of firm wide cost cutting measures . . . ." The petitioner further stated that the beneficiary was "compensated for the deficit since the beginning of 2011" and provided the following table showing the petitioner's compensation to the beneficiary:

<b>Year</b>	<b>Total Salary</b>
2009	\$31,771
2010	\$41,000
YTD June 30, 2011	\$37,276
<b>Total</b>	<b>\$110,047</b>
<b>Monthly</b>	<b>\$4,785</b>
<b>Annualized basis (Actual)</b>	<b>\$57,416</b>
Target for 2011	\$75,000
<b>Annualized basis (Based on</b>	<b>\$61,147</b>

target for 2011)	
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The petitioner also submitted the beneficiary's Form W-2s for 2009 and 2010 as well as pay stubs for the first half of 2011.

The director revoked the approval of the petition on September 1, 2011.

On appeal, counsel for the petitioner states that "the adjudicator apparently revoked the petition on the ground that the wage shown in the petition and the [LCA] was not being paid." Counsel further claims that "[t]his situation has been corrected and a wage slightly above the salary approved and well above the prevailing wage is being paid."

Upon review, the AAO agrees with the director and finds that by not paying the beneficiary the wage required by the petition and the corresponding LCA, the petitioner violated the terms and conditions of the approved petition.

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. 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.

Based on the petitioner's admissions and the evidence submitted, the AAO finds that the petitioner failed to pay the beneficiary the proffered wage and wage rate as attested in the petition and LCA for at least part of the approved validity period. The approval of an H-1B petition must be revoked on notice if it is found that the petitioner violated the terms and conditions of the approved petition. *See* 8 C.F.R. § 214.2(h)(11)(iii)(A)(3). If the petitioner must make material changes to the terms and conditions of an approved petition, due to such factors as the economy, it must first seek approval of such changes through the filing of an amended or new petition with U.S. Citizenship and Immigration Services (USCIS). *See* 8 C.F.R. § 214.2(h)(2)(i)(E). In addition, in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E), an amended or new H-1B petition must be accompanied by a new LCA. The regulations do not permit a petitioner to make post hoc changes in response to an NOIR once a violation of the terms and conditions of the approved petition have been discovered. For this reason, the AAO will not

disturb the director's decision to revoke the approval of the petition on notice.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed. The approval of the petition remains revoked.