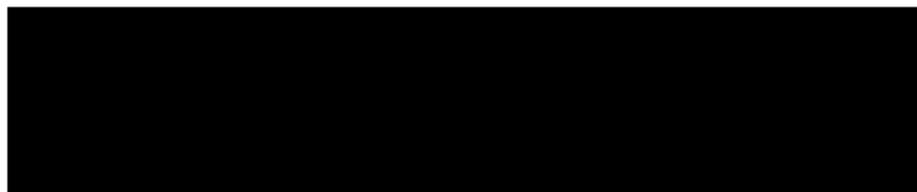


identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy  
**PUBLIC COPY**

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



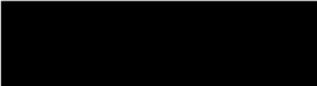
U.S. Citizenship  
and Immigration  
Services



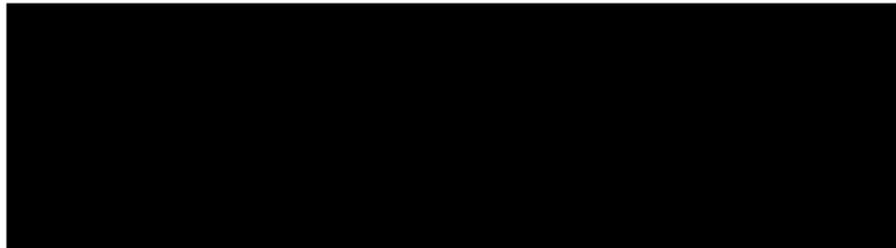
D2

Date: **SEP 04 2012**

Office: VERMONT SERVICE CENTER

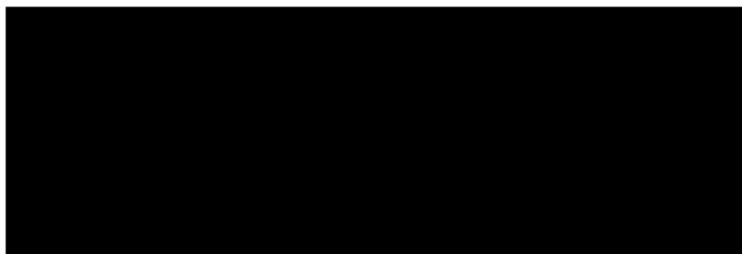
FILE: 

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

**DISCUSSION:** The service center director initially approved the nonimmigrant visa petition. Upon receiving additional information and reviewing the record, the director issued a notice of intent to revoke (NOIR) and ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. Approval of the petition will remain revoked.

The petition was filed at the Vermont Service Center on April 1, 2009, seeking to classify the beneficiary as an H-1B temporary 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 petition was approved on August 21, 2009. However, the service center director revoked that approval, by a decision issued to the petitioner on August 25, 2010. The revocation decision followed an NOIR, dated March 9, 2010, and the petitioner's response to that notice, which was received by the service center on April 12, 2010. After the decision of revocation was issued, the petitioner filed a timely appeal.

On the Form I-129 (Petition for a Nonimmigrant Worker), the petitioner stated that it is a restaurant/catering establishment with six employees. On both the Form I-129 and the Labor Condition Application (LCA) filed with it, the petitioner specified the job title of the proffered position as "Financial Manager." The wage proffered in this matter was \$87,360 annually.

On October 27, 2009, a date subsequent to the approval of the visa petition, a site visit was conducted at the petitioner's restaurant. The officer who conducted the interview indicated that the petitioner's owner, [REDACTED] stated that the beneficiary worked in the petitioner's office, but was otherwise vague when questioned about the beneficiary's duties. Another of the petitioner's employees stated that he knew the beneficiary, and that she worked in the petitioner's restaurant as a waitress. The petitioner's owner also stated that she had no documentation at the restaurant pertinent to the wages paid to the beneficiary. That information was included in the March 9, 2010 NOIR issued in this matter.

In response to the NOIR, counsel submitted: (1) a 2009 Form W-2 Wage and Tax Statement, (2) pay stubs, (3) two affidavits, and (4) two I-94 Departure Records,

The 2009 W-2 form submitted showed that the petitioner paid \$4,400 to the beneficiary during that year.

The pay stubs submitted purport to show that the petitioner paid the beneficiary \$876 on January 10, 2010, January 24, 2010, February 7, 2010, February 7, 2010, and February 21, 2010. Other pay stubs purport to show that the petitioner paid the beneficiary \$3,976.49 on January 31, and February 28 of an unspecified year.

One of the affidavits submitted was attested to by the beneficiary. It states that the beneficiary commenced working for the petitioner as its financial manager on November 9, 2009, but took voluntary leave from November 16, 2009 through November 30, 2009, and from December 21, 2009 through January 2, 2010. The other affidavit, from the beneficiary's husband, attests to substantially the same facts, and also that he and the beneficiary entered the United States on October 9, 2009.

The I-94 Departure Records confirm that the beneficiary and her husband entered the United States on October 9, 2009.

After reviewing the petitioner's response to the NOIR and finding the evidence submitted insufficient to refute the findings in the NOIR, the director revoked the approval of the petition on August 15, 2010.

On appeal, counsel submitted a letter from one of the petitioner's employees and a brief. The employee, who identified himself as [REDACTED] stated that he was employed as a shift manager at the petitioner's restaurant on October 27, 2009. He further stated that he responded to an unidentified individual inquiring about the beneficiary, stating that she worked in the restaurant as a waitress. He also asserted that he misstated her position because he misunderstood that the individual was asking about her previous position, rather than her present position.

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 service center's NOIR; (5) the response to the NOIR; (6) the director's revocation letter; and (7) the Form I-290B and counsel's submissions on appeal.

USCIS may revoke the approval of an H-1B petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii), which states the following:

- (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, inaccurate, fraudulent, or misrepresented a material fact; 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.

As was noted above, the director sent an NOIR to the petitioner, who was offered an opportunity to submit additional evidence or arguments for consideration. Upon review of the record, the AAO finds that the NOIR placed the petitioner on notice that revocation of the approval of the petition was contemplated within the scope of the revocation-on-notice provisions, specifically, 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), (3), and (4).

The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner's response to the NOIR failed to overcome the grounds specified in the NOIR for revoking the petition.

The letter on appeal was provided by [REDACTED]. The AAO observes that the officer who conducted the site visit at the petitioner's restaurant identified, by first name, the petitioner's employee who stated that the beneficiary worked for the petitioner as a waitress. That first name was not [REDACTED] nor was it any nickname associated with the name [REDACTED]. An employee in the petitioner's restaurant would be in a position to know whether the beneficiary was working as a waitress, rather than in some capacity in the petitioner's office, and the letter from [REDACTED] does not overcome that evidence.

Further, the evidence in the record shows that the beneficiary entered the United States on October 9, 2009 pursuant to her H-1B visa. Thus, the beneficiary was thus in the United States in H-1B status for 11 weeks of 2009. The wage proffered in the visa petition is \$87,360. At that rate, one would expect the beneficiary to have earned approximately \$18,480.<sup>1</sup> Further, as [REDACTED] asserted in his October 20, 2010 letter, the beneficiary worked for the petitioner as a waitress through July 30, 2009, then one would have expected her to earn considerably more than that. The W-2 form provided, however, shows that the petitioner paid her only \$4,400 during 2009. This strongly suggests that the beneficiary is not working in the proffered position at the proffered wage, but in some other position at some lesser wage.

Further still, the 2010 pay stubs provided show that, during that year, the petitioner paid the beneficiary \$876 every two weeks, which amount equates to \$45,084 annually. The other pay stubs show that during some other year the petitioner paid the beneficiary \$3,976.49 per month, which equates to \$47,717.88 per year. Those amounts, again, strongly suggest that the beneficiary was not working as a financial manager and, in any event, was not employed pursuant to the terms and conditions of the approved visa petition.

---

<sup>1</sup> \$87,360 per year divided by the 52 weeks in a year equals \$1,680, which, when multiplied by 11 weeks, equals an expected wage during those 11 weeks of 18,480.

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 response, counsel provided affidavits from the beneficiary and her husband. Those affidavits aver that the beneficiary took considerable leave during the last months of 2009, shortly after coming to work for the petitioner.

The AAO notes, first, that those affidavits, while they may be a plausible explanation of the amount shown on the 2009 W-2 form, do not constitute the independent, objective evidence required by *Matter of Ho, supra*, to overcome conflicting evidence. Further, they do not overcome the evidence shown on the pay stubs, which show that the petitioner paid the beneficiary \$876 every two weeks (\$45,084 annually) during 2010 and suggest that it paid her \$3,976.49 per month (\$47,717.88 annually, during another year.

Even if the evidence submitted on appeal were taken at face value, it would not overcome the evidence in the record that suggests that the petitioner is not employing the beneficiary as a financial manager and is not paying her the wage proffered in the visa petition. Thus, the approval of the petition is subject to revocation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), (3), and (4). The appeal will be dismissed and approval of the visa petition will remain revoked on that basis.

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. The petition will remain revoked.