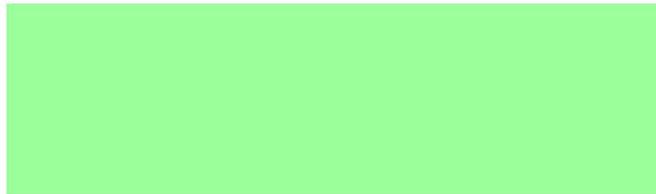
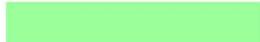


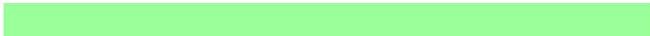


U.S. Citizenship  
and Immigration  
Services

(b)(6)



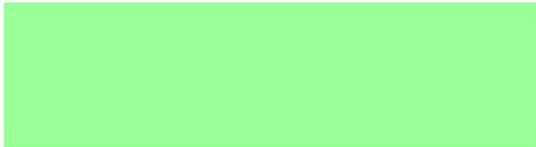
DATE: **JUL 26 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was revoked by the service center director and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the matter is now moot.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on August 2, 2011. In the Form I-129 visa petition, the petitioner describes itself as a healthcare services company established in 2002. In order to employ the beneficiary in what it designates as a management accountant position, the petitioner seeks 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, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petition was initially approved; however, on December 15, 2012, the director revoked the approval on the basis that the petitioner violated the terms and conditions of employment as described in the petition. Specifically, the director noted that the beneficiary appears to be working far more hours than listed on the petition at a lesser pay rate. On appeal, counsel asserts that the director's basis for revocation of the approval of the petition was erroneous.

A review of U.S. Citizenship and Immigration Services (USCIS) records indicates that this beneficiary is also the beneficiary of an approved immigrant petition and has adjusted status to that of a U.S. permanent resident as of October 2, 2012. It would appear that the beneficiary is presently a permanent resident and the issues in this proceeding are moot. However, counsel filed this appeal while acknowledging that the beneficiary already obtained permanent residence; therefore, the AAO will briefly address the director's basis for revoking the approval of the H-1B petition.

The petitioner submitted the Form I-129 petition and supporting documents to USCIS on August 2, 2011 to employ the beneficiary as a management accountant to work on a part-time basis (20-35 hours) at an hourly wage of \$20.87. The petitioner indicated in Part 2 of the Form I-129 that the basis for H-1B classification was continuation of previously approved employment without change with the same employer. Further, in the supplement to the Form I-129, the petitioner indicated that the beneficiary was in H-1B status from December 21, 2008, to August 27, 2009, and from September 5, 2010, to the date of filing the instant petition.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational category "Accountants" – SOC (ONET/OES Code) 13-2011.01, at a Level I (entry-level) position.<sup>1</sup>

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<sup>1</sup> The AAO observes that the beneficiary had been working for the petitioner for a number of years in H-1B status when the instant petition was filed. Notably, in the LCA, the petitioner designated the proffered position as a Level I (entry-level) position, which is the lowest of four assignable wage levels. The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only

In the LCA, the petitioner listed the prevailing wage as \$20.87 per hour. The petitioner stated the wage source as the 2011 OFLC Online Data Center.<sup>2</sup> The AAO reviewed the OFLC Online Data and notes that a Level I wage was \$20.87, for this occupational category at the time the LCA was filed.<sup>3</sup>

The petition was approved on October 5, 2011. Thereafter, on February 8, 2012, USCIS conducted an administrative site visit. During the course of the site visit, the petitioner provided copies of two pay stubs to establish the beneficiary's employment. The pay stubs indicated that the beneficiary was working full-time, approximately 86 hours per pay period, and that the hourly wage of the beneficiary is approximately \$18.00 per hour.

After the site visit, the H-1B petition was returned to the director for review. The director reviewed the record of proceeding and the information provided in the site visit report and issued a notice of intent to revoke (NOIR) the approval of the petition. The director noted that based on the pay stubs provided, it appears that the hourly wage for the beneficiary is below the prevailing wage of \$20.87 per hour as listed on the LCA. The petitioner was given an opportunity to provide evidence or arguments for consideration by the director.

The petitioner's counsel responded to the NOIR by noting that the beneficiary is "also applying for his green card" and has pending I-140 and I-485 applications. Counsel stated that the beneficiary's position under the I-140 petition is market research analyst and that the prevailing wage rate is \$18.30 per hour. Counsel further noted that the beneficiary received an employment authorization document issued from October 17, 2011 to October 16, 2012.

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a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>2</sup> For more information regarding the wage source, see Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatacenter.com> (last visited July 24, 2013).

<sup>3</sup> For more information regarding the prevailing wage for Accountants, see the All Industries Database for 7/2010 - 6/2011 for "Accountants" - SOC (ONET/OES Code) 13-2011 at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatacenter.com/OesQuickResults.aspx?code=13-2011&area=31084&year=11&source=1> (last visited July 24, 2013).

Counsel asserted that while the beneficiary works as a management accountant part-time pursuant to the H-1B petition, the beneficiary also works as a market research analyst pursuant to pending I-485 and I-140. Counsel further claimed that "86.67" as indicated on the pay stub is "not the actual working hours of the herein beneficiary," but "the payroll of the petitioner is set up with a 86.67 hours pay period for all office employees." Counsel provided the following table to support her contention:

Number of hours per week:	40 hours
Number of week in a year:	52 weeks
Total Number of hours in a year:	40 hours x 52 weeks = 2080 hours
Number of Hours per month:	2080 hours/12 months=173.33 hours per month
Number of hours per pay day:	173.33 hours/2= 86.67 hours

Counsel further claimed the following regarding the beneficiary's hours:

Due to *part time nature of beneficiary's duties as Management Accountant*, his working hours vary from the salaried employees of the Petitioner. [The beneficiary's] H1B hours are only 20-35 hours per week. But due to his work permit, the beneficiary is able to work for more than 20-35 hours per week as Market Research Analyst. He currently works from 35 to 40 hours per week. His working hours are definitely less than 86.67 hours bimonthly.

Counsel also submitted the following documents as additional evidence to support her contentions:

- Copies of pay stubs for two other employees, [redacted] and [redacted] for the period August 1, 2012, to August 15, 2012, to establish that hours for the petitioner's payroll is set up at 86.67 hours per pay period for all of the petitioner's employees.
- Copies of the following pay stubs for the beneficiary

Period	Hours	Pay
December 16, 2011 to December 31, 2011	86.67	\$1,560.06
January 1, 2012 to January 15, 2012	86.67	\$1,560.06
January 16, 2012 to January 31, 2012	86.67	\$1,560.06
February 1, 2012 to February 15, 2012	86.67	\$1,808.80
February 16, 2012 to February 29, 2012	86.67	\$1,808.80
March 1, 2012 to March 15, 2012	86.67	\$1,808.80
March 16, 2012 to March 31, 2012	86.67	\$1,808.80
April 1, 2012 to April 15, 2012	86.67	\$1,808.80
June 1, 2012 to June 15, 2012	86.67	\$1,586.06

June 16, 2012 to June 30, 2012	86.67	\$1,586.06
July 1, 2012 to July 15, 2012	86.67	\$1,586.06
July 16, 2012 to July 31, 2012	86.67	\$1,586.06
August 1, 2012 to August 15, 2012	86.67	\$1,586.06

Counsel attributed the fluctuating pay to differing hours of the beneficiary's employment as a management accountant and also a market research analyst. For example, counsel stated that for the pay period from December 16, 2011 to January 31, 2012, the beneficiary's pay was calculated as follows:

Position	Hours	Wage rate	Amount
Management Accountant	40	\$20.87	\$834.80
Market research analyst	30-40	\$18.30	\$725.26
<b>Total</b>			\$1,560.06

From February 1, 2012 to April 15, 2012, the beneficiary's pay was calculated as follows:

Position	Hours	Wage rate	Amount
Management Accountant	60 to 70	\$20.87	\$1,460.90
Market research analyst	16-20	\$18.30	\$347.90
<b>Total</b>			\$1,808.80

From June 1, 2012 to July 15, 2012, the beneficiary's pay was calculated as follows:

Position	Hours	Wage rate	Amount
Management Accountant	60	\$20.87	\$1,252.20
Market research analyst	18-20	\$18.30	\$333.86
<b>Total</b>			\$1,586.06

The director reviewed the evidence submitted and determined that it did not overcome the grounds for revocation. Subsequently, the director revoked the approval of the petition, finding that the petitioner violated the terms and conditions of the approved petition. Thereafter, counsel for the petitioner submitted an appeal of the decision. In the appeal, counsel reiterated her prior assertion that the beneficiary works part-time as a management analyst and also a market research analyst at a different wage rate.

The AAO reviewed the appeal but is not persuaded by counsel's assertion. The AAO finds that counsel's claims that "the payroll of the petitioner is set up with a 86.67 hours pay period for all office employees" is not supported in the record. Specifically, the AAO notes that with the Form I-129, the petitioner had submitted copies of pay stubs for the beneficiary from March 16, 2011 to

April 30, 2011. The pay stubs indicate the hours as 75.83, not 86.67. No explanation was provided for the discrepancies. This contradicts counsel's claim that the payroll is set up with a 86.67 hours per pay period for all employee pay stubs. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, the AAO finds that counsel's claim that the pay stubs do not accurately reflect the hours violates the documentation of wage requirement.

The pertinent part of 20 C.F.R. § 655.731(b) states the following regarding documentation of the wage statement:

(b) Documentation of the wage statement.

(1) The employer shall develop and maintain documentation sufficient to meet its burden of proving the validity of the wage statement required in paragraph (a) of this section and attested to on Form ETA 9035 or 9035E. The documentation shall be made available to DOL upon request. Documentation shall also be made available for public examination to the extent required by § 655.760. The employer shall also document that the wage rate(s) paid to H-1B nonimmigrant(s) is(are) no less than the required wage rate(s). The documentation shall include information about the employer's wage rate(s) for all other employees for the specific employment in question at the place of employment, beginning with the date the labor condition application was submitted and continuing throughout the period of employment. The records shall be retained for the period of time specified in § 655.760. The payroll records for each such employee shall include:

- (i) Employee's full name;
- (ii) Employee's home address;
- (iii) Employee's occupation;
- (iv) Employee's rate of pay;
- (v) Hours worked each day and each week by the employee if:
  - (A) The employee is paid on other than a salary basis (e.g., hourly, piece-rate; commission); or
  - (B) With respect only to H-1B nonimmigrants, the worker is a part-time employee (whether paid a salary or an hourly rate).

- (vi) Total additions to or deductions from pay each pay period, by employee; and
- (vii) Total wages paid each pay period, date of pay and pay period covered by the payment, by employee.
- (viii) Documentation of offer of benefits and eligibility for benefits provided as compensation for services on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers (see paragraph (c)(3) of this section):
  - (A) A copy of any document(s) provided to employees describing the benefits that are offered to employees, the eligibility and participation rules, how costs are shared, etc. (e.g., summary plan descriptions, employee handbooks, any special or employee-specific notices that might be sent);
  - (B) A copy of all benefit plans or other documentation describing benefit plans and any rules the employer may have for differentiating benefits among groups of workers;
  - (C) Evidence as to what benefits are actually provided to U.S. workers and H-1B nonimmigrants, including evidence of the benefits selected or declined by employees where employees are given a choice of benefits;
  - (D) For multinational employers who choose to provide H-1B nonimmigrants with "home country" benefits, evidence of the benefits provided to the nonimmigrant before and after he/she went to the United States. See paragraph (c)(3)(iii)(C) of this section.

(2) Actual wage. In addition to payroll data required by paragraph (b)(1) of this section (and also by the Fair Labor Standards Act), the employer shall retain documentation specifying the basis it used to establish the actual wage. The employer shall show how the wage set for the H-1B nonimmigrant relates to the wages paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question at the place of employment. Where adjustments are made in the employer's pay system or scale during the validity period of the LCA, the employer shall retain documentation explaining the change and clearly showing that, after such adjustments, the wages paid to the H-1B nonimmigrant are at least the greater of the adjusted actual wage or the prevailing wage for the occupation and area of intended employment.

In this case, the pay stubs do not indicate the rate of pay and also do not accurately reflect the hours worked. The AAO notes that counsel's assertion that the beneficiary works partly as a management accountant and also as a market research is not supported by documentary evidence. The AAO further notes that the petitioner claimed that the beneficiary has been working for the petitioner since December 21, 2008 to August 27, 2009, and from September 5, 2010 to date of filing the petition on August 2, 2011. However, the petitioner failed to provide further evidence that the petitioner has complied with the LCA prevailing wage requirement. 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 Obaiqbena*, 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).

As such, the petitioner has failed to establish that it paid the beneficiary an adequate salary for his work, as required under the Act. The AAO therefore agrees with the director that the petitioner failed to establish that it complied with the terms and conditions of the approved petition.

However, because the beneficiary's status has been adjusted to permanent resident, further pursuit of the matter at hand is moot.

**ORDER:** The appeal is dismissed. The petition is denied.