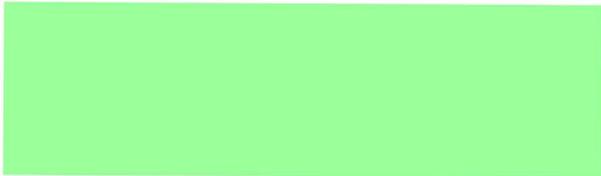




U.S. Citizenship
and Immigration
Services

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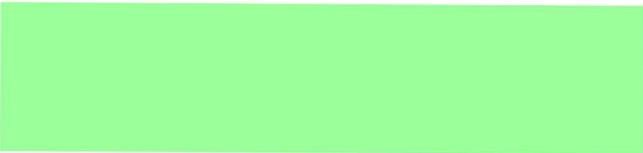


DATE: **JUN 21 2013** OFFICE: VERMONT SERVICE CENTER FILE:

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,

Ron Rosenberg
Acting 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 fine jewelry retail business with four employees. It seeks to continue employ the beneficiary in a position it designates as a credit 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 (1) failed to demonstrate that it is employing the beneficiary in the capacity specified in the petition, and (2) is not paying the beneficiary the prevailing wage in accordance with 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 June 22, 2009, the petitioner filed an H-1B petition with the U.S. Citizenship and Immigration Services (USCIS), and it was initially approved on September 8, 2009, with a validity period of October 1, 2009 to September 30, 2012.

After an Administrative Site Visit conducted on November 17, 2009, the director issued an NOIR informing the petitioner that the site inspector discovered that (1) it appeared that the beneficiary was only working as a credit analyst on a sporadic basis and that he was primarily performing the duties of a sales associate for the petitioner, and (2) that the beneficiary was being paid below what was required by the petition and the Labor Condition Application (LCA). Specifically, during a discussion with the beneficiary, the site inspector learned that the beneficiary's typical day is eight hours long and that he sells jewelry and determines credit liability of clients. The site inspector also learned that the petitioner paid the beneficiary \$26,400 in 2009 instead of the \$36,171 the petitioner was required to pay. In the NOIR, the director also requested that the petitioner submit evidence demonstrating that the offered credit analyst position qualifies for classification as a specialty occupation.

On October 4, 2010, USCIS received the petitioner's response to the director's NOIR. In a letter dated September 30, 2010, the petitioner's counsel provided the following table showing the percentages of time spent by the beneficiary on his job duties:

<u>DESCRIPTION</u>	<u>TIME</u>
Analyze current credit data and financial statements of commercial clients to determine the degree of risk	40%

involved in extending credit or lending money	
Prepare reports with this credit information for use in decision-making	10%
[C]ompare key ratios of liquidity, profitability, credit history, and cash flow	25%
Analyze income growth, market share, industry risk, and collateral appraisal; and summarizes credit analysis and loan approval.	25%

The petitioner also stated that the beneficiary "has always been paid the prevailing wage" and that the beneficiary "took unpaid leave of absence to attend to his pregnant wife."

The petitioner also submitted, *inter alia*, the beneficiary's tax returns and Form W-2s for 2007, 2008, and 2009, and receipts pertaining to the beneficiary's wife's prenatal and postnatal care.

The director revoked the approval of the petition on September 29, 2011.

On appeal, in a brief dated November 22, 2011, counsel for the petitioner contends that "[t]owards the end of 2009 and early 2010, [the beneficiary] took an unpaid leave of absence to care for his pregnant wife" and that the petition should only be revoked "due to fraud."

The AAO turns first to the bases for the director's revocation, and whether these bases provided the director with sufficient grounds for issuing a NOIR under the language at 8 C.F.R. § 214.2(h)(11)(iii)(A), the regulation outlining the circumstances under which an H-1B Form I-129 petition's validity must be rescinded.

The regulation at 8 C.F.R. § 214.2(h)(11)(iii), which governs revocations that must be preceded by notice, states:

(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 or on the application for a temporary labor certification 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.

The AAO finds that the content of the NOIR comported with the regulatory notice requirements, as it provided a detailed statement that conveyed grounds for revocation encompassed by the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(A), and allotted the petitioner the required time for the submission of evidence in rebuttal that is specified in the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(B). Accordingly, the AAO finds no error by the director in issuing the NOIR.

Having found that the revocation on notice was properly issued, the AAO turns next to whether the director erred in ultimately revoking the approval of this petition and whether the petitioner has overcome the stated grounds for revocation. The first basis identified above is whether the petitioner employed the beneficiary as a credit analyst as specified in the approved petition.

Upon review, the AAO agrees with the director and finds insufficient evidence to support a finding that the petitioner employed the beneficiary as a credit analyst. Based on the results of the site visit, the beneficiary indicated that a significant portion of his duties include selling jewelry. Thus, whether the beneficiary performs some duties of a credit analyst or not, as selling jewelry was not included in the approved job duties and responsibilities, it is clear that the beneficiary, based on his own admissions, was not being employed in the capacity specified in the approved petition.

Moreover, with regard to the claimed credit analyst duties, there is no evidence in the record that the petitioner provides credit to clients or even needs to determine credit liability on behalf of and instead of a creditor. In addition, neither the petitioner nor its counsel contested this basis for revocation of the petition's approval. These additional findings provide further support for the director's revocation in this matter. Simply put, the petitioner has failed to establish that it more likely than not employed the beneficiary as a credit analyst. The approval of an H-1B petition must be revoked on notice if it is found that the petitioner (1) no longer employs the beneficiary in the capacity specified in the petition, (2) violated the terms and conditions of the approved petition, or (3) violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of 8 C.F.R. § 214.2. See 8 C.F.R. § 214.2(h)(11)(iii)(A)(1), (3), and (4). Accordingly, the petition must be revoked for employing the beneficiary in a manner inconsistent with that previously

approved by USCIS.

With regard to the second basis for revocation, 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.

According to the 2010 payroll statement submitted, the beneficiary was paid on a bi-monthly basis. A review of the submitted LCA shows that the beneficiary was therefore required to be paid \$1,507.13 twice per month. Comparing this required minimum wage rate to that reflected to have been paid to the beneficiary on the 2010 payroll statement, shows that the beneficiary was not paid the required wage rate at any point in 2010. For the first half of the year, the beneficiary was initially paid \$1,100 and later \$1,150 twice each month. Even when the beneficiary's wage rate apparently increased in the second half of the year to \$1,500, it still remained below that required by the terms and conditions of the approved petition. Further, as counsel on appeal only claims that the lower wage was a result of "an unpaid leave of absence to care for his pregnant wife" taken "[t]owards [the] end of 2009 and early 2010," there remains no explanation for why the beneficiary was not paid at least \$1,507.13 twice per month for the remainder of the year.

Moreover, even if the beneficiary's lower wages in 2009 was the result of the claimed leave of absence due to the beneficiary's wife pregnancy, the evidence submitted does not demonstrate that the beneficiary, in fact, took a leave of absence in 2009. A review of the evidence fails to

demonstrate when the beneficiary took this claimed leave of absence and for how long. Furthermore, the majority of the submitted medical receipts refer to the beneficiary's wife's prenatal and postnatal visits as "routine"; thus, they do not corroborate the petitioner's claim that the beneficiary took an extended leave of absence that resulted in the beneficiary being paid a lower wage than was required.

For the foregoing reasons, 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. Again, the approval of an H-1B petition must be revoked on notice if it is found that the petitioner (1) violated the terms and conditions of the approved petition, or (2) violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of 8 C.F.R. § 214.2. See 8 C.F.R. § 214.2(h)(11)(iii)(A)(3) and (4). For this additional 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.

FURTHER ORDER: The director shall review the approval of the Form I-140 immigrant petition [REDACTED] filed by the petitioner on behalf of the beneficiary for possible revocation on notice pursuant to 8 C.F.R. § 205.2.