



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[REDACTED]

DATE: JUN 25 2013

OFFICE: CALIFORNIA SERVICE CENTER F [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:

[REDACTED]

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,

*Ra Michael T. Kelly*  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**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 describes itself as a travel management company established in 1985. In order to continue its employment of the beneficiary in what it designates as a program coordinator position, the petitioner seeks to extend her classification 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 on the basis of her determination that the petitioner had failed to demonstrate the existence of a reasonable and credible offer of employment in that it had failed to credibly establish that it would comply with the terms and conditions of employment as stated in the petition.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to establish that it will comply with the terms and conditions of employment. Accordingly, the appeal will be dismissed, and the petition will be denied.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n) of the Act, 8 U.S.C. 1182(n). The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment. By signing the Form I-129 and Labor Condition Application (LCA), the petitioner attests that it will comply with the wage requirements.

The primary rules governing an H-1B petitioner's wage obligations appear in the 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 regulation at 20 C.F.R. § 655.731(c) states, in pertinent part, the following:

*Satisfaction of required wage obligation.*

- (1) The required wage must be paid to the employee, cash in hand, free and clear, when due, except that deductions made in accordance with paragraph (c)(9)

of this section may reduce the cash wage below the level of the required wage. Benefits and eligibility for benefits provided as compensation for services must be offered in accordance with paragraph (c)(3) of this section.

- (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).

- (3) *Benefits and eligibility for benefits* provided as compensation for services (e.g., cash bonuses; stock options; paid vacations and holidays; health, life, disability and other insurance plans; retirement and savings plans) shall be offered to the H-1B nonimmigrant(s) on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.
- (i) For purposes of this section, the offer of benefits “on the same basis, and in accordance with the same criteria” means that the employer shall offer H-1B nonimmigrants the same benefit package as it offers to U.S. workers, and may not provide more strict eligibility or participation requirements for the H-1B nonimmigrant(s) than for similarly employed U.S. workers(s) (e.g., full-time workers compared to full-time workers; professional staff compared to professional staff). H-1B nonimmigrants are not to be denied benefits on the basis that they are “temporary employees” by virtue of their nonimmigrant status. An employer may offer greater or additional benefits to the H-1B nonimmigrant(s) than are offered to similarly employed U.S. worker(s), *provided* that such differing treatment is consistent with the requirements of all applicable nondiscrimination laws (e.g., Title VII of the 1964 Civil Rights Act, 42 U.S.C. [§§] 2000e-2000e17). Offers of benefits by employers shall be made in good faith and shall result in the H-1B nonimmigrant(s)’s actual receipt of the benefits that are offered by the employer and elected by the H-1B nonimmigrant(s).
- \* \* \*
- (iv) Benefits provided as compensation for services may be credited toward the satisfaction of the employer’s required wage obligation only if the requirements of paragraph (c)(2) of this section are met (e.g., recorded and reported as “earnings” with appropriate taxes and FICA contributions withheld and paid).

At pages 3 and 13 of the Form I-129 and on the LCA, the petitioner reported that the salary for the proffered position would be \$48,000 per year. The *Instructions* to the Form I-129 state that “[t]he rate of pay is the salary or wages paid to the beneficiary. Salary or wages must be expressed in annual full-time amount and do not include non-cash compensation or benefits.”<sup>1</sup>

The director found the initial evidence submitted by the petitioner insufficient to establish eligibility for the benefit sought, and issued an RFE on April 5, 2010. With the RFE, the director notified the petitioner that additional documentation was required to establish that the present petition meets the criteria for H-1B classification. The notice outlined the documentation to be submitted and included a request that the petitioner submit copies of the beneficiary’s 2008 and 2009 individual income tax returns as well as her 2009 Form W-2.

<sup>1</sup> The *Instructions* to the Form I-129 may be found online at the USCIS website at <http://www.uscis.gov/files/form/i-129instr.pdf> (last accessed October 30, 2012).

The petitioner submitted the requested evidence and, in reviewing the petitioner's response, the director found discrepancies between the wages stated in the prior petitions it had filed on behalf of the beneficiary and evidence of record regarding the actual wages it paid to her.

The evidence submitted by the petitioner in response to the RFE indicates that the petitioner paid the beneficiary \$38,845.98 in 2008 and \$42,804.74 in 2009. However, the petitioner should have paid the beneficiary approximately \$42,863.01 in 2008 and approximately \$45,754.52 in 2009. Accordingly, the evidence of record before the director indicated that the beneficiary was underpaid by approximately \$4,017.03 in 2008 and by approximately \$2,949.78 in 2009, which did not support a finding that the petitioner had paid the beneficiary the required wage under the relevant statutory and regulatory provisions.

In its June 7, 2010 letter submitted on appeal, the petitioner acknowledges that it underpaid the beneficiary in 2008 and 2009, but claims that because the director failed to take into account the beneficiary's contribution toward the petitioner's group medical plan the director's calculation of the actual wages paid to the beneficiary was inaccurate. According to the petitioner, the beneficiary contributed \$1,702.42 of her salary toward the petitioner's group medical plan in 2008 and \$2,195.74 of her salary toward it in 2009. The petitioner contends that, as such, the beneficiary's actual wages were \$40,548.40 in 2008 and \$45,000.48 in 2009. If the petitioner's assertions were accepted, the record would still indicate that the beneficiary was underpaid by approximately \$2,314.61 in 2008 and by approximately \$754.04 in 2009. The petitioner also submits evidence indicating that it has reimbursed the beneficiary \$900 in order to compensate for the 2009 underpayment.<sup>2</sup> The petitioner does not however indicate whether it has reimbursed the beneficiary for its 2008 underpayment.

On appeal counsel argues that "the salary discrepancy was relatively minor and a one-time incident and has already been corrected." The AAO does not agree. Although it appears that the 2009 underpayment has been corrected, the evidence of record does not corroborate that the 2008 underpayment of approximately \$2,314.61 has been corrected.<sup>3</sup> Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. Also, 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).

---

<sup>2</sup> This figure actually exceeds the 2009 underpayment of \$754.04.

<sup>3</sup> Counsel's argument made on appeal that "\$40,548.40 for her actual gross wage, which is above the stated H-1B wage of \$45,000" is not persuasive (emphasis in original). An "actual gross wage" of \$40,548.40 is not "above" \$45,000. Nor is it "above" \$42,833.33, the approximate amount the petitioner was actually required to pay the beneficiary in 2008.

Nor is counsel correct that this was a “one-time incident.” As noted above, the evidence submitted below indicated that the petitioner underpaid the beneficiary in both 2008 and 2009. Furthermore, the evidence submitted on appeal indicates that the petitioner continues underpaying the beneficiary. According to the beneficiary’s paystub dated June 30, 2010 submitted on appeal, the beneficiary had earned \$20,483.07<sup>4</sup> to that point. However, she should have been paid approximately \$23,650 through that date.<sup>5</sup> Accordingly, the record of proceeding indicates that the beneficiary had been underpaid by approximately \$3,166.93 through June 30, 2010.

When a petitioner signs the Form I-129, it confirms “under penalty of perjury under the laws of the United States of America that this petition and the evidence submitted with it are all true and correct” and that it “agrees to the terms of the labor condition application for the duration of the alien’s authorized period of stay for H-1B employment.” The petitioner attests that it has read and agreed to the labor condition statements at Section H, which include confirming that it will “[p]ay nonimmigrants at least the local prevailing wage or the employer’s actual wage, whichever is higher, and pay for nonproductive time.” The required wage must be paid to the employee, cash in hand, free and clear, when due. *See* 20 C.F.R. § 655.731(c)(1). As discussed above, the petitioner has not complied with this requirement, as the record indicates it underpaid the beneficiary by approximately \$2,314.61 in 2008 and by approximately \$3,166.93 through June 30, 2010.

Counsel argues further that the director should have raised this issue in the RFE, stating the following. However, it must be noted that the petitioner did not submit the Forms W-2 when it filed the petition initially. The documents were not received and, consequently reviewed by USCIS, until the petitioner sent the document to USCIS *in response to the RFE*. Furthermore, with the RFE, the petitioner was put on notice that additional evidence was required to determine its eligibility and was given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The burden to establish eligibility in this matter remains solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Counsel’s assertion is tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. His attempt to shift the evidentiary burden in this proceeding is without merit. When any person makes an application for a “visa or any other document required for entry, or makes an application for admission [ . . . ] the burden of proof shall be upon such person to establish that he is eligible” for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm’r 1972).

---

<sup>4</sup> Although the actual “total gross pay” figure stated on the paystub is \$21,383.07, as discussed above \$900 of that amount was actually back wages owed from 2009.

<sup>5</sup> As USCIS records indicate the stated wage in the petition governing the period beginning January 1, 2010 and ending March 1, 2010, [REDACTED] was \$45,900, the beneficiary should have been paid approximately \$7,650 during that period of time. The petition and the LCA governing the period beginning March 2, 2010 and ending June 30, 2010 are the current petition and LCA, which state a wage of \$48,000 and, as such, the beneficiary should have been paid approximately \$16,000 during that period of time. The sum of these two figures (\$7,650 and \$16,000) is \$23,650.

The regulations indicate clearly that issuance of an RFE is discretionary and that the director may instead deny an application when eligibility has not been established. *See* 8 C.F.R. § 103.2(b)(8). There is no requirement for USCIS to issue an RFE or to issue an RFE pertinent to a ground later identified, for the first time, in the decision denying the visa petition. The regulation at C.F.R. § 103.2(b)(8) unambiguously permits the director to deny a petition for failure to establish eligibility without his or her having to first request evidence regarding the ground or grounds that that the director's decision specifies as the reason for denial.

With regard to this perception by counsel of error by the director in not issuing an additional RFE, or a Notice of Intent to Deny (NOID) the petition based upon the concerns raised by the wage records submitted in response to the RFE, the AAO also notes, hypothetically, that, even if the director had erred as a procedural matter in not issuing an additional RFE or a NOID - and the AAO finds no such error - it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and, on appeal, had the opportunity to submit evidence to overcome the grounds of the acting director's decision. Therefore, it would serve no useful purpose to remand the case simply to afford the petitioner yet another additional opportunity to supplement the record with evidence. In this regard, it should also be noted once again that the AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004), and that even after the petitioner was afforded the opportunity on appeal to submit evidence to effectively rebut and overcome the acting director's findings, it elected to not do so.

Based upon a complete review of the record, the petitioner has failed to establish that it would pay the beneficiary an adequate salary for her work, as required under the Act, if the petition were granted. The AAO finds that the director was correct in the determination that the petitioner failed to credibly establish that it would comply with the terms and conditions of employment. Accordingly, the appeal will be dismissed and the petition denied on this 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 is denied.