



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **JUN 27 2013** 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:

[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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director initially approved the nonimmigrant visa petition. Upon subsequent review of the record, the director issued a notice of intent to revoke (NOIR), and ultimately did revoke 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 December 8, 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) in order to employ him in what the petitioner designates as a Computer Analyst position for a salary of \$51,293.04 annually. The visa petition identifies the petitioner as

The director approved the visa petition on May 6, 2010. However, on August 8, 2011, the director issued a notice of intent to revoke (NOIR) in this matter. The petitioner's response was received on September 8, 2011. Subsequently, on March 7, 2012, the director revoked approval of the visa petition. The petitioner filed a timely appeal.

The AAO has determined that the director did not err in his decision to revoke approval of the petition. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will remain revoked.

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 notice of intent to revoke (NOIR); (3) the response to the NOIR; (4) the director's revocation letter; and (5) 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.

Subsequent to the petition's approval, the director issued an NOIR in this matter, stating that USCIS had obtained new information regarding both the petitioner and the beneficiary's employment with the petitioner. The NOIR states that a website maintained by the Florida Department of State indicates that [REDACTED] identified as the petitioner in the instant case, was involuntarily dissolved on July 12, 1999, prior to the filing date of the instant visa petition. The director also requested evidence that the petitioner has been paying the beneficiary the full amount of the proffered wage. More specifically, the director requested the Form W-2 Wage and Tax Statements the petitioner issued to the beneficiary showing wages paid during 2005, 2006, 2007, 2008, 2009, and 2010; and pay statements showing wages the petitioner paid to the beneficiary during March, April, and May of 2011.

In response, counsel submitted: (1) documents related to the incorporation of [REDACTED] on July 12, 1999; (2) documents related to the incorporation of [REDACTED] on December 5, 2006; (3) an undated letter from the president of [REDACTED]; (4) W-2 forms issued to the beneficiary; and (5) pay statements showing amounts paid to the beneficiary.

In her undated letter, the president of [REDACTED] referred to the articles of incorporation provided as showing that [REDACTED] was incorporated on July 12, 1999, rather than being involuntarily dissolved on that date. The AAO observes that the petitioner's president is correct. The website of the Florida Department of State indicates that [REDACTED] was involuntarily dissolved on September 14, 2007, which is, nevertheless, a date prior to the filing of the instant visa petition on December 8, 2009, in the name of [REDACTED].

The W-2 forms provided show that [REDACTED], of [REDACTED] Wesley Chapel, Florida, paid the beneficiary \$17,207.75 during 2005, and \$19,993.44 during 2006; and that [REDACTED] of [REDACTED] in Walnut, California, paid the beneficiary \$13,846.08 during 2007. Other W-2 forms show that [REDACTED] of [REDACTED]

the same [REDACTED] address in Wesley Chapel, paid the beneficiary \$9,230.72 during 2007, \$31,153.68 during 2008, \$29,999.84 in 2009, and \$29,994.84 in 2010.

The pay statements provided show that during the seven two-week pay periods from February 5, 2011 to May 13, 2011, the beneficiary received gross pay of \$1,153.84. The AAO observes that a salary of \$1,153.84 every two weeks is equivalent to \$29,999.84 annually, and is consistent, therefore, with the amounts shown on the 2009 and 2010 W-2 forms issued to the beneficiary by [REDACTED] during those years.

After reviewing the 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 March 7, 2012. The director's revocation of approval of the petition was based on his finding that the evidence available indicates that (1) the statement of facts contained in the visa petition was not true and correct in that it misstated the petitioner's name, and (2) that the petitioner violated the terms of the approved visa petition in that it failed to pay the beneficiary the full amount of the proffered wage.

Counsel submitted a timely Form I-290B appeal, with which he provided a letter, dated May 1, 2012, from [REDACTED], the president of [REDACTED]. That letter is on the letterhead of [REDACTED] which the company's president states is a name under which [REDACTED] does business.¹

Counsel asserted that the petitioner and the beneficiary have an employer-employee relationship and that the proffered position is a specialty occupation position. The AAO observes that neither of those issues was the basis of the decision of revocation.

In her May 1, 2012 letter, the president of [REDACTED] stated:

Due to a split in the business in 2005, we renamed our business [REDACTED] and under this new name, we continued the same business, operations and services in Florida.

The petitioner's president further stated:

As regards to [the beneficiary's] salary, we confirm that he has been receiving the annual salary as required in the petition in the amount of \$51,293.04. However, due to economic hardship affecting our business, we included in [the beneficiary's] gross salary his house rental, car and gas allowance plus insurance, and utilities including telephone and electricity, as shown in below breakdown and the enclosed certification from [the beneficiary's] supervisor:

¹ Although no evidence was provided to corroborate that assertion, it does not appear to be relevant to any material issue in this case.

[REDACTED]

Rental of residence	\$900.00 per month
Gas allowance	\$350.00 per month
Car allowance + insurance	\$500.00 per month
Utilities	
-Telephone	\$100.00 per month
-Electricity	\$80 per month

We ask for consideration on this issue that we needed to deduct from [the beneficiary's annual salary the above-enumerated utility bills. However, please note that due to recent improvements in our business and the economy, we have adjusted [the beneficiary's] salary.

The AAO will first address the issue of whether the statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact, which is a basis for revocation on notice pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(2).

On the Form I-129 visa petition, the petitioner represented that it is [REDACTED] whereas the company that submitted that visa petition and has employed the beneficiary pursuant to it is [REDACTED]. A box at Part 2.2.b. of that form is checked, indicating that the visa petition is filed for "Continuation of previously approved employment without change with the same employer."

That visa petition further states that the previously approved visa petition to which it refers is [REDACTED]. USCIS computer records show that [REDACTED] was filed for the instant beneficiary by [REDACTED]. The instant visa petition was not, however, for continuation of employment with [REDACTED] which had been involuntarily dissolved on September 14, 2007, prior to the filing of the instant visa petition on December 8, 2009. It was for employment with [REDACTED].

The visa petition misstated that it was filed for continuation of the beneficiary's employment with [REDACTED] which is a basis for revocation on notice pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(2). The appeal will be dismissed and approval of the visa petition will remain revoked on this basis.

The remaining basis for the denial of the visa petition is the director's finding that the petitioner violated terms and conditions of the approved petition, a basis for revocation on notice pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(3), in that it failed to pay the beneficiary the full amount of the wage proffered in the visa petition, to wit: \$51,293.04 per year.

The primary rules governing an H-1B petitioner's wage obligations appear in the U.S. 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, except as modified by "authorized deductions" described in that regulation.

The pertinent part of 20 C.F.R. § 655.731(c) reads:

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).

* * *

(9) "Authorized deductions," for purposes of the employer's satisfaction of the H-1B required wage obligation, means a deduction from wages in complete compliance with one of the following three sets of criteria (*i.e.*, paragraph (c)(9)(i), (ii), or (iii))—

(i) Deduction which is required by law (e.g., income tax; FICA); or

(ii) Deduction which is authorized by a collective bargaining agreement, or is reasonable and customary in the occupation and/or area of employment (e.g., union dues; contribution to premium for health insurance policy covering all employees; savings or retirement fund contribution for plan(s) in compliance with the Employee Retirement Income Security Act, 29 U.S.C. 1001, *et seq.*), *except that* the deduction may not recoup a business expense(s) of the employer (including attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer, e.g., preparation and filing of LCA and H-1B petition); the deduction must have been revealed to the worker prior to the commencement of employment and, if the deduction was a condition of employment, had been clearly identified as such; and the deduction must be made against wages of U.S. workers as well as H-1B nonimmigrants (where there are U.S. workers); or

(iii) Deduction which meets the following requirements:

(A) Is made in accordance with a voluntary, written authorization by the employee (Note to paragraph (c)(9)(iii)(A): an employee's mere acceptance of a job which carries a deduction as a condition of employment does not constitute voluntary authorization, even if such condition were stated in writing);

(B) Is for a matter principally for the benefit of the employee (Note to paragraph (c)(9)(iii)(B): housing and food allowances would be considered to meet this "benefit of employee" standard, unless the employee is

in travel status, or unless the circumstances indicate that the arrangements for the employee's housing or food are principally for the convenience or benefit of the employer (e.g., employee living at worksite in "on call" status));

(C) Is not a recoupment of the employer's business expense (e.g., tools and equipment; transportation costs where such transportation is an incident of, and necessary to, the employment; living expenses when the employee is traveling on the employer's business; attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer (e.g., preparation and filing of LCA and H-1B petition)). (For purposes of this section, initial transportation from, and end-of-employment travel, to the worker's home country shall not be considered a business expense.);

(D) Is an amount that does not exceed the fair market value or the actual cost (whichever is lower) of the matter covered (Note to paragraph (c)(9)(iii)(D): The employer must document the cost and value); and

(E) Is an amount that does not exceed the limits set for garnishment of wages in the Consumer Credit Protection Act, 15 U.S.C. 1673, and the regulations of the Secretary pursuant to that Act, 29 CFR part 870, under which garnishment(s) may not exceed 25 percent of an employee's disposable earnings for a workweek.

In the instant case, the deductions made were not of a type required by law, and are not, therefore, authorized deductions pursuant to 20 C.F.R. § 655.731(c)(9)(i).

The record contains no indication that the deductions in question were made pursuant to a collective bargaining agreement and no indication that they are reasonable and customary in the occupation and/or area of employment. Further, the record contains no indication that the deductions in question were revealed to the beneficiary prior to the commencement of his employment. The deductions in question have not been shown to be authorized deductions pursuant to 20 C.F.R. § 655.731(c)(9)(ii).

Finally, the deductions in question do not qualify as authorized deductions pursuant to 20 C.F.R. § 655.731(c)(9)(iii) for three reasons. First, they have not been shown to have been made pursuant

to a voluntary, written authorization executed by the beneficiary. Second, as the president of [REDACTED] made explicit that the deductions were taken from the beneficiary's salary because the petitioner had suffered a decrease in business, they do not appear to have been made primarily for the beneficiary's benefit. Third, the wage proffered in this matter is \$51,293.04 annually, which equates to \$4,274.42 per month. The petitioner's own figures show, however, that the monthly amount paid to the beneficiary was reduced by deductions totaling \$1,930, which is approximately 45% of the monthly amount due to the beneficiary and, in any event, far more than the maximum 25% permitted. For all of those reasons, the deductions from the proffered wage do not qualify as authorized deductions pursuant to 20 C.F.R. § 655.731(c)(9)(iii).

Therefore, the AAO finds that, during all of 2009, all of 2010, and from February 5, 2011 to May 13, 2011, the beneficiary received an amount less than the wage proffered in the visa petition, and the deductions taken from that wage have not been shown to be authorized deductions pursuant to any of the criteria of 20 C.F.R. § 655.731(c)(9). By failing to pay the amount of wages required the petitioner has violated the terms and conditions of the approved visa petition, which is a basis for revocation on notice pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(3). The appeal will be dismissed and approval of the visa petition will remain revoked on this additional basis.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.

Moreover, when the AAO dismisses an appeal on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

ORDER: The appeal is dismissed. The petition will remain revoked.