



U.S. Citizenship
and Immigration
Services

(b)(6)

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:

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. After a site visit and investigation were performed, 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.

On the Form I-129 visa petition, the petitioner describes itself as an "accounting and auditing services" firm. In order to employ the beneficiary in what it designates as a senior auditor 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 (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petition was approved on September 9, 2009. However, the service center director revoked that approval, by a decision issued to the petitioner on June 15, 2012. The revocation decision followed an NOIR and the petitioner's response to that notice. After the decision of revocation was issued, the petitioner filed a timely appeal.

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 NOIR; (3) the response to the NOIR; (4) the director's letter of revocation; and (5) the Form I-290B and present counsel's submissions on appeal.

U.S. Citizenship and Immigration Services (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.

The visa petition was initially approved for employment from September 14, 2009, to September 13, 2012 and states that the proffered wage in this case is \$32.82 per hour.

The record contains pay statements showing wages paid to the beneficiary during pay periods ending January 1, 2010, January 15, 2010, January 29, 2010, February 12, 2010, February 26, 2010, March 12, 2010, and March 26, 2010. Those pay statements show that during each of those pay periods the petitioner paid the beneficiary \$32.80 per hour, an amount almost equal to the proffered wage.

However, the record also contains pay statements showing wages paid to the beneficiary during pay periods ending April 9, 2010, April 23, 2010, May 7, 2010, May 21, 2010, June 4, 2010, June 18, 2010, July 2, 2010, July 16, 2010, and July 30, 2010. Those pay statements show that during each of those pay periods the petitioner paid the beneficiary \$24.00 per hour.

Yet further, the record contains pay statements showing wages paid to the beneficiary during pay periods ending August 13, 2010, August 27, 2010, September 10, 2010, September 24, 2010, October 10, 2010, October 24, 2010, November 7, 2010, November 21, 2010, December 5, 2010, December 19, 2010, January 1, 2011, January 16, 2011, January 30, 2011, February 13, 2011, February 27, 2011, March 13, 2011, March 27, 2011, April 10, 2011, April 24, 2011, May 8, 2011, July 17, 2011, July 31, 2011, August 26, 2011, September 9, 2011, September 23, 2011, October 21, 2011, December 2, 2011, December 16, 2011, and December 30, 2011. Those pay statements show that during each of those pay periods the petitioner paid the beneficiary \$26.00 per hour.

In an NOIR issued January 10, 2012, the director observed that the evidence indicates that the petitioner has violated the terms and conditions of the approved H-1B visa petition by failing to pay the beneficiary the full amount of the proffered wage.

In a letter, dated February 8, 2012, and submitted in response to the NOIR, present counsel asserted that the petitioner was not obliged to pay the beneficiary \$32.82, the wage proffered in the visa petition, because that amount was shown as the result of "an incorrect LCA," and that the petitioner filed a subsequent labor condition application (LCA) which was certified on January 12, 2010. A copy of the subsequent LCA was provided. That LCA was certified for a wage less than that

proffered in the visa petition. With that letter, present counsel provided the wage statements discussed above.¹ Present counsel also asserted that, in any event, enforcement of the wage obligation is exclusively the responsibility of the Department of Labor, rather than USCIS.

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 June 15, 2012 finding, as was noted above, that the petitioner had not been paying the beneficiary the wages stated in the approved visa petition.

On appeal, present counsel reiterated his previous arguments and also asserted that the director had incorrectly calculated the hourly wage paid to the beneficiary because he made no deduction for uncompensated sick days. The AAO observes that no such calculation is necessary, as the pay statements show that the hourly compensation the petitioner paid to the beneficiary was less than the wage proffered in the visa petition.

The AAO further observes that the regulation at 8 C.F.R. § 214.2(h)(2)(E) states that any material change in the terms or conditions of employment in the instant visa category requires the petitioner to file a new visa petition including a new LCA. The newly certified LCA upon which counsel relies did not effectively change the wage proffered to the beneficiary in the approved visa petition. Absent a new, approved visa petition, the petitioner was obliged to pay the beneficiary the full amount of the proffered wage, subject to exceptions not shown to be present here. Any failure to pay the beneficiary the full amount of the proffered wage as stated in the visa petition would be a failure to abide by the terms and conditions of H-1B visa status, and would be grounds for revocation pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(3).

USCIS has the responsibility to revoke approval of H-1B visa petitions in the event that the petitioner violates the terms and conditions of the approved petition. Present counsel's assertion that the AAO has no jurisdiction over such a failure to abide by the terms and conditions of an approved visa petition is therefore unconvincing.

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 (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 In his February 8, 2012 letter, present counsel stated that he was submitting "all paystubs not previously provided." In fact, however, some pay statements are missing. The significance of those omissions, if any, is unknown to the AAO.

- (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.

The pay statements listed above demonstrate that the petitioner paid the beneficiary \$24.00 per hour from April 2010 to July 2010, and \$26.00 per hour from August 2010 to December 30, 2011. Both of those amounts are less than the \$32.80 wage proffered in the approved visa petition, and both of those periods are entirely within the period of employment for which the instant visa petition was approved. Thus, the petitioner violated terms and conditions of the approved petition, and approval of the visa petition was correctly revoked pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(3). For this reason, the AAO will not disturb the director's decision. The appeal will be dismissed and the visa petition will remain revoked 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 will remain revoked.

It is noted that the failure of the petitioner to pay the beneficiary the full amount of the proffered wage raises another issue, i.e., whether the petitioner intends, in the future, to abide by the terms and conditions of its employment of the beneficiary. The petitioner's previous failure to pay the beneficiary the full amount of the proffered wage, and present counsel's assertion that the petitioner is not bound to pay the beneficiary the full amount of the wage proffered in the visa petition, suggests that the petitioner does not so intend.

FURTHER ORDER: The director shall review all pending visa petitions, and all approved visa petitions, both immigrant and nonimmigrant, and determine whether a preponderance of the evidence demonstrates that the petitioner intends to abide by the terms and conditions of those petitions, and specifically, whether the petitioner intends to pay the full amount of the wage proffered in those cases.