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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: MAY 03 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
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director revoked the approval of the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. Approval of the petition remains revoked.

On the Form I-129 visa petition, the petitioner describes itself as a seven-employee accounting firm¹ established in 1994. The approved petition that is the subject of the revocation action had been filed so that the petitioner could continue its employment of the beneficiary in what it designates as an accountant position² by extending 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 revoked the approval of the petition on the basis of his determination that the petitioner had failed to demonstrate that it is employing the beneficiary pursuant to the terms and conditions of the approved petition.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's notice of intent to revoke approval of the petition (NOIR); (3) counsel's response to the NOIR; (4) the director's letter revoking approval of the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record, the AAO finds that the petitioner has failed to overcome the director's ground for revoking the approval of this petition. Accordingly, the appeal will be dismissed, and approval of the petition will be revoked.

Beyond the decision of the director, the AAO finds an additional issue which, although not addressed in the director's decision, nevertheless would have been a proper basis for revocation of the approval of the petition, namely, the petitioner's failure to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation.³ Although the director did not revoke approval of the petition on this ground, this would not preclude the director from again initiating revocation-on-notice proceedings with regard to this issue.

¹ The petitioner provided a North American Industry Classification System (NAICS) Code of 541211, "Offices of Certified Public Accountants." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541211 Offices of Certified Public Accountants," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (accessed Mar. 27, 2013).

² The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O*NET/OES) Code 13-2011.00, the associated Occupational Classification of "Accountants and Auditors," and a Level I (entry-level) prevailing wage rate.

³ The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified this additional aspect of the petition.

Furthermore, the AAO also finds that the petitioner has failed to establish that the LCA submitted in support of this petition actually corresponds to it,⁴ and this issue undermines the credibility of the entire petition.

I. Procedural History

The petitioner filed the instant petition on October 27, 2009, and it was approved on November 6, 2009. Subsequent to the petition's approval, U.S. Citizenship and Immigration Services (USCIS) randomly selected the petitioner for a post-adjudicative site visit.

The record of proceeding reflects that when the USCIS site investigator visited the petitioner's business premises, only one of the petitioner's seven claimed employees was present – a receptionist. The receptionist contacted the official who signed the Form I-129 on behalf of the petitioner via telephone, and that individual informed the site investigator that the beneficiary was visiting a client at its location.

The director issued the NOIR on January 23, 2012. The petitioner, through counsel, submitted a timely response. The director did not find counsel's response persuasive, and he revoked approval of the petition on August 17, 2012. Counsel submitted a timely appeal.

II. The Beneficiary and the Proffered Position

On the Form I-129, the petitioner claimed that it has employed the beneficiary as an accountant, in H-1B status, since December 8, 2001.⁵ In its October 20, 2009 letter in support of the petition for which the approval was revoked, the petitioner claimed that the duties of the proffered position would include analyzing financial information; preparing balance sheets and profit and loss statements; analyzing daily transactions; reconciling and billing accounts; and computing, classifying, recoding, and verifying numerical data.

⁴ *See id.*

⁵ The petitioner has received five H-1B approvals on behalf of the beneficiary: (1) [REDACTED] valid March 18, 1999 through February 17, 2002 (an H-1B visa was granted pursuant to this petition approval on November 26, 2001); (2) [REDACTED] valid December 31, 2001 through December 31, 2001; (3) [REDACTED] valid December 31, 2004 through December 7, 2007; (4) [REDACTED] valid December 8, 2007 through December 7, 2008; and (5) [REDACTED] valid December 8, 2008 through December 7, 2009. As noted above, the instant petition was initially approved on November 6, 2009 prior to being revoked on August 17, 2012; it is the sixth H-1B approval granted to the petition on behalf of the beneficiary. Prior to its revocation, it was valid from December 8, 2009 through December 7, 2012.

A seventh petition filed by the petitioner on behalf of the beneficiary – [REDACTED] – was filed on October 14, 2012 and remains pending at the Vermont Service Center. In that petition, the petitioner proposes extending its H-1B employment of the beneficiary through December 7, 2015.

The petitioner claimed on the Form I-129 that this is a full-time position, and that the beneficiary would be paid a wage of \$52,000 per year.⁶

III. Authority to Revoke Approval of a Petition

In general, the authority to revoke approval of an H-1B petition is found at 8 C.F.R. § 214.2(h)(11), which states, in pertinent part, the following:

Revocation of approval of petition.

(i) *General.*

- (A) The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(H) of the Act and paragraph (h) of this section. An amended petition on Form I-129 should be filed when the petitioner continues to employ the beneficiary. . . .
- (B) The director may revoke a petition at any time, even after expiration of the petition.

* * *

(iii) *Revocation on notice—*

- (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
 - (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

⁶ As will be discussed below, the petitioner made the same assertions on the LCA.

- (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. . . .

IV. The LCA Submitted by the Petitioner in Support of the Petition

Before addressing the director's grounds for revoking the approval of this petition, the AAO will first discuss the LCA submitted by the petitioner in support of this petition. As noted above, the LCA submitted by the petitioner in support of the petition was certified for the SOC (O*NET/OES) Code 13-2011.00, the associated Occupational Classification of "Accountants and Auditors," and a Level I (entry-level) prevailing wage rate. The *Prevailing Wage Determination Policy Guidance*⁷ issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only 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 [emphasis in original].

It is unclear to the AAO how, if the beneficiary has indeed been working for the petitioner as an accountant since 2001, that fact is not materially inconsistent with the petitioner's submission of an LCA certified for a Level I, entry-level position. The LCA's wage level (Level I, the lowest of the four that can be designated) is only appropriate for a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels quoted above, this wage rate is appropriate for positions in which that the beneficiary is only required to have a basic understanding of the occupation; will be expected to perform routine tasks requiring

⁷ Available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf (last accessed Mar. 27, 2013).

limited, if any, exercise of judgment; will be closely supervised and his work closely monitored and reviewed for accuracy; and will receive specific instructions on required tasks and expected results.⁸

⁸ Furthermore, by obtaining an LCA certified for a Level I, entry-level position, the petitioner also implicitly claimed that the duties of the proffered position fall below those of a Level II, III, or IV position in terms of complexity and/or specialization.

The aforementioned *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level II wage rates:

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

It describes the Level III wage designation as follows:

Level III (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. . . .

Finally, the *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

Level IV (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

Again, it is unclear to the AAO how, given the petitioner's claims that the beneficiary has worked for it as an accountant since 2001 and that the beneficiary possesses the knowledge and competence to visit client sites and conduct audits of its clients, a Level II, III, or IV wage-level designation would not have been the more appropriate than the Level I wage-level to have designated on the LCA.

The assertions made by the petitioner's representative to the USCIS site investigator (and repeated in its September 24, 2012 letter submitted on appeal) that the beneficiary was visiting a client site on the date of the site visit lend further credence to the AAO's determination in this regard. If the beneficiary possesses the competence and occupational understanding to visit a client site alone, it is not clear how the proffered position is, in fact, a Level I, entry-level position.⁹

This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the proffered position's educational demands and level of responsibilities. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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).

The U.S. Department of Labor (DOL) has clearly stated that its LCA certification process is cursory, that it does not involve substantive review, and that it makes the petitioner responsible for the accuracy of the information entered in the LCA. With regard to LCA certification, the regulation at 20 C.F.R. § 655.715 states the following:

Certification means the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies.

Likewise, the regulation at 20 C.F.R. § 655.735(b) states, in pertinent part, that "[i]t is the employer's responsibility to ensure that ETA [(the DOL's Employment and Training Administration)] receives a complete and accurate LCA."

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion

⁹ The AAO notes that an LCA certified for a Level II (qualified), a Level III (experienced), or a Level IV (fully competent) accountant would have necessitated a much higher wage being paid to the beneficiary. On the date the LCA was certified, the prevailing wage for a qualified (Level II) accountant would have been \$66,165 per year; the prevailing wage for an experienced (Level III) accountant would have been \$80,309 per year; and the prevailing wage for a fully competent (Level IV) accountant would have been \$94,474 per year.

model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The AAO finds that this conflict between the petition and the LCA the petitioner submitted in its support undermines the credibility of the petition because it materially undermines the credibility of the petitioner's statements with regard to the nature and level of work that the beneficiary would perform. Having made this initial observation, the AAO will turn next to the director's grounds for revoking the approval of the petition.

V. Compliance with Terms and Conditions of the Approved Petition

In revoking approval of the petition on this basis, the director found that the petitioner has not been paying the petitioner in accordance with the terms and conditions set forth in the petition. The petitioner stated on the Form I-129 and in the LCA that the beneficiary would be paid a wage of \$52,000 per year. However, his Forms W-2 indicate he was paid \$39,220.90 in 2009, \$38,920 in 2010, and \$29,870 in 2011.

In the February 22, 2012 letter it submitted in response to the director's NOIR, the petitioner noted that the prevailing wage for a Level I accountant in the area of intended employment – the [REDACTED] – was \$25 per hour at the time the petition was filed, and it claimed that it has always paid the beneficiary at that rate. The petitioner also claimed that the beneficiary took a 12-week unpaid leave of absence in 2011. The director found these claims unpersuasive.

The petitioner makes the same claims in its September 24, 2012 letter submitted on appeal. In his September 24, 2012 appellate brief, counsel argues that USCIS lacks jurisdiction to determine compliance with the terms and conditions of the LCA. Upon review, the AAO finds neither the claims of the petitioner nor the arguments of counsel persuasive.

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 the filing of 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 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 \$52,000 per hour for full-time work. However, the beneficiary’s Forms W-2 indicate he was paid only \$39,220.90 in 2009, \$38,920 in 2010, and \$29,870 in 2011.¹⁰ This

¹⁰ The beneficiary’s 2009 Form W-2 indicates that the petitioner may have also violated the terms and conditions of its prior petition approved on behalf of the beneficiary. The director should therefore consider initiating revocation-on-notice proceedings with regard to that petition in order to explore this issue further.

significant underpayment does not support a finding that the petitioner paid the beneficiary the required wage under the relevant statutory and regulatory provisions.

The petitioner's claim that it has always compensated the beneficiary at a rate of \$25 per hour, which is the hourly prevailing wage rate, fails for two reasons. First, the petitioner did not claim on the Form I-129 and in the LCA that the beneficiary would be compensated at that rate of pay. As noted, the petitioner claimed that the beneficiary would be paid \$52,000 per year,¹¹ and it failed to compensate him at that rate in 2009, 2010, and 2011. Second, by making the argument that it in fact paid the beneficiary at the prevailing wage rate of \$25 per hour, the petitioner is implicitly admitting that the beneficiary did not work for it on a full-time basis during any of these years.¹² However, the petitioner specifically stated on the Form I-129 and in the LCA that it would employ the beneficiary on a full-time basis. Accordingly, this claim does not establish that the petitioner has complied with the terms and conditions of the approved petition.

The petitioner's claim that the beneficiary took 12 weeks of unpaid leave in 2010 does not establish that the petitioner has complied with the terms and conditions of the approved petition, either. First, as noted by the director, this assertion does not address the petitioner's 2009 and 2011 underpayments. Moreover, this assertion was not supported by any documentary evidence. Simply 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)). Further, the AAO notes that the evidence of record has not established that the beneficiary's periods of absence from productive status (even if spent on leave and travel) were not "due to a decision of the employer (e.g. because of lack of assigned work)" but were, instead, "due to conditions unrelated to employment which take the nonimmigrant away from his or her duties at his or her voluntary request and convenience." See the provisions at 20 C.F.R. § 655.731(c)(3)(iii)(C)(7).

Nor is the AAO persuaded by counsel's argument that USCIS lacks jurisdiction to take into account a petitioner's underpayment of a beneficiary when considering whether that petitioner has violated the terms and conditions of an approved petition. The revocation language contained in the regulation at 8 C.F.R. § 214.2(h)(11) was set forth above, and it does not limit its applicability to DOL. To the contrary, it is noted that 8 C.F.R. § 214.2(h)(11)(ii)(B) specifically states that "[t]he director may revoke a petition at any time. . . ."; 8 C.F.R. § 214.2(h)(11)(iii)(A)(3) states that "[t]he director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that . . . [t]he petitioner violated terms and conditions of the approved petition"; and 8

¹¹ It is noted that both the Form I-129 and the LCA provided the petitioner with the option of specifying an hourly wage rate. The petitioner did not choose to specify an hourly rate. As noted, the petitioner specifically stated that it would pay the beneficiary \$52,000 per year.

¹² If the beneficiary was in fact paid \$25 per hour during each of these years, then he would have worked approximately 1,569 hours in 2009 (or approximately 30 hours per week), approximately 1,557 hours in 2010 (again, approximately 30 hours per week), and approximately 1,195 hours in 2011 (or approximately 23 hours per week).

C.F.R. § 214.2(h)(11)(iii)(B) states that “[t]he *director* shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part” (emphasis added).

Furthermore, the statutory language counsel cites addresses LCAs only. The regulation at 8 C.F.R. § 214.2(h)(11)(iii)(A)(1) specifically grants USCIS the authority to revoke the approval of a petition if it finds that the petitioner is no longer employing the beneficiary in the capacity specified in the petition, and 8 C.F.R. § 214.2(h)(11)(iii)(A)(3) grants USCIS the authority to revoke the approval of a petition if it finds that the petitioner violated the terms and conditions of the approved petition. Even if the AAO were to accept counsel’s apparent argument that USCIS is not permitted to review an LCA, approval of the petition would still be revoked on these grounds because the LCA was not the only place in which the petitioner claimed it would employ the beneficiary on a full-time basis, at a rate of \$52,000 per year. As noted above, the petitioner made that same claim on the Form I-129. Counsel’s argument, therefore, fails.

The petitioner has failed to establish that it paid the beneficiary the appropriate salary for his work, as required under the Act and as specified by the petitioner in the petition. The record therefore establishes that the petitioner is no longer employing the beneficiary in the capacity specified in the petition, and the director properly revoked approval of the petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(1). The record also establishes that the petitioner violated the terms and conditions of the approved petition, and the director also properly revoked approval of the petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(3). Accordingly, the appeal will be dismissed and approval of the petition will remain revoked on these bases.

VI. Beneficiary’s Qualifications to Perform the Duties of a Specialty Occupation

The AAO will now address an issue not raised by the director, but which would have been a proper basis for revocation of the approval of this petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(5) because the director’s approval of the petition violated section (h) of that paragraph. Specifically, the petitioner has failed to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

As the beneficiary did not earn a baccalaureate or higher degree from an accredited college or university in the United States, he does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(1). As he does not possess a foreign degree that has been determined to be equivalent to a baccalaureate or higher degree from an accredited college or university in the United States, he does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), either.¹³ As the petitioner has not demonstrated that the

¹³ Although the record of proceeding contains an evaluation of the beneficiary's academic credentials, it does not establish that those credentials are equivalent to a bachelor's degree awarded by an accredited institution of higher education in the United States. Instead, it opines that the beneficiary's academic studies are equivalent to "three years of undergraduate education." Accordingly, that evaluation does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(C)(2). Although this evaluation also evaluates the beneficiary's work experience, and that portion of the evaluation will be discussed below when the AAO analyzes the beneficiary's qualifications under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) and 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), this particular portion of the evaluation is not material to the AAO's analysis under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2)

beneficiary holds an unrestricted state license, registration or certification to perform the duties of a specialty occupation, he does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(3), either. Accordingly, 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) remains as the only avenue for the petitioner to demonstrate the beneficiary's qualifications to perform the duties of the proffered position.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) requires a demonstration that the beneficiary's education, specialized training, and/or progressively responsible experience is equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation, and that the beneficiary also has recognition of that expertise in the specialty through progressively responsible positions directly related to the specialty. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating a beneficiary's credentials to a United States baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) is determined by at least one of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;¹⁴
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

because it addresses the beneficiary's work experience. In order to be relevant under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), an evaluation must be based upon the beneficiary's academic credentials alone.

¹⁴ The petitioner should note that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not experience.

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The record contains an evaluation of the beneficiary's academics and work experience prepared by [REDACTED] an adjunct professor at [REDACTED] and an evaluator employed by [REDACTED] [REDACTED] dated February 19, 1999. According to [REDACTED] the beneficiary's foreign education and work experience are equivalent to a U.S. bachelor's degree in accounting.

However, [REDACTED] evaluation does not demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), as the petitioner has not demonstrated that [REDACTED] currently possesses the authority to grant college-level credit for training and/or experience at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience. Simply 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. at 165.

For all of these reasons, the beneficiary does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

No evidence has been submitted to establish, nor does the petitioner assert, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(2), which requires submission of the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI).

Nor does the beneficiary qualify under 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). As was the case under 8 C.F.R. §§ 214.2(h)(4)(iii)(C)(1) and (2), the beneficiary is unqualified under this criterion because the record contains no evidence that he earned a baccalaureate or higher degree from an accredited college or university in the United States; and the beneficiary does not possess a foreign degree that has been determined to be equivalent to a baccalaureate or higher degree from an accredited college or university in the United States.

No evidence has been submitted to establish, nor does the petitioner assert, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(4), which requires that the beneficiary submit evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) states the following with regard to USCIS analyzing an alien's qualifications:

For purposes of [USCIS] determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty

evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;¹⁵
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Although the record contains some information regarding the beneficiary's work history, it does not establish that this work experience included the theoretical and practical application of specialized knowledge required by the proffered position; that it was gained while working with peers, supervisors, or subordinates who held a bachelor's degree or its equivalent in the field; and that the beneficiary achieved recognition of her expertise in the field as evidenced by at least one of the five types of documentation delineated in 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i)-(v).

Accordingly, the beneficiary does not qualify under any of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i)-(v) and therefore does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4). As such, the petitioner has failed to establish that the beneficiary qualifies to perform the duties of a specialty occupation, and reinitiation of revocation proceedings on this additional ground, pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(5), would be within the director's discretion.

VII. Conclusion

As set forth above, the AAO agrees with the director's grounds for revoking the approval of this petition. Accordingly, the appeal will be dismissed, and the petition will remain revoked.

¹⁵ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. See 8 C.F.R. § 214.2(h)(4)(ii).

Beyond the decision of the director, the AAO finds that reinitiation of revocation proceedings on the basis of the petitioner's failure to establish that the beneficiary qualifies to perform the duties of a specialty occupation would be within the director's discretion.

Finally, the AAO also finds that the conflict between the LCA and the petition described above adversely affects the merits of this petition, because it materially undermines the credibility of the petition's statements with regard to the nature and level of work that the beneficiary would perform.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. Approval of the petition remains revoked.