



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF G-D-M-, INC.

DATE: SEPT. 8, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, an information technology firm, seeks to temporarily employ the Beneficiary as a “programmer analyst” under the H-1B nonimmigrant classification for specialty occupations. See Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director, Vermont Service Center, initially approved the H-1B visa petition. However, in response to new evidence and upon subsequent review, the Director issued a notice of intent to revoke (NOIR), and ultimately revoked, approval of the petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(3), finding that the Petitioner had violated the terms and conditions of the approved petition.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and contends that the petition’s approval should be reinstated.

Upon *de novo* review, we will dismiss the appeal.

**I. LEGAL FRAMEWORK**

**A. Revocation Authority**

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

- (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 . . . .

#### B. Requisite Payment of H-1B Wages

Section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A) (2012), requires an employer to pay an H-1B worker the higher of either the prevailing wage for the occupational classification in the "area of employment" or the actual wage paid by the employer to other employees with similar experience and qualifications who are performing the same services.<sup>1</sup> See 20 C.F.R. § 655.731(a); *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 422 & n.3 (4th Cir. 2005); *Michal Vojtisek-Lom & Adm'r Wage & Hour Div. v. Clean Air Tech. Int'l, Inc.*, No. 07-97, 2009 WL 2371236, at \*8 (Dep't of Labor Admin. Rev. Bd. July 30, 2009).

Implemented through the labor condition application (LCA) certification process, section 212(n)(1) is intended to protect U.S. workers' wages by eliminating economic incentives or advantages in hiring temporary foreign workers. See, e.g., 65 Fed. Reg. 80,110, 80,110-111, 80,202 (2000). The LCA currently requires petitioners to describe, *inter alia*, the number of workers sought, the pertinent visa classification for such workers, their job title and occupational classification, the prevailing wage, the actual rate of pay, and the place(s) of employment.

To promote the U.S. worker protection goals of a statutory and regulatory scheme that allocates responsibilities sequentially between the U.S. Department of Labor (DOL) and the U.S. Department of Homeland Security (DHS), a prospective employer must file an LCA and receive certification

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<sup>1</sup> The prevailing wage may be determined based on the arithmetic mean of the wages of workers similarly employed in the area of intended employment. 20 C.F.R. § 655.731(a)(2)(ii).

from DOL before an H-1B petition may be submitted to USCIS. 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b)(2).

With regard to the payment of wages, the pertinent part of 20 C.F.R. § 655.731(c) states 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. . . .
- (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

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actual receipt of the benefits that are offered by the employer and elected by the H-1B nonimmigrant(s).

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- (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.

## II. PROCEDURAL HISTORY

The Petitioner stated in the H-1B petition that the Beneficiary would be compensated at a rate of \$65,000 per year, which equates to approximately \$31.25 per hour. The Petitioner also stated that the Beneficiary would work at [REDACTED] in [REDACTED] New Jersey from October 1, 2013, until August 31, 2016. The petition was approved on August 31, 2013.

The petition was selected for an administrative inquiry, and USCIS officers spoke to the Petitioner's business development manager on October 23, 2013, and then contacted the Petitioner for additional information via email on January 8, 2014. The NOIR was issued on September 23, 2014, and the Director revoked the approval of the petition on December 12, 2014, pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(3), finding that the Petitioner had violated the terms and conditions of the approved petition. Specifically, the Director found that the Petitioner had not paid the Beneficiary the wage specified in the H-1B petition.

### III. ANALYSIS

Upon review of the record, we find that the Petitioner had violated the terms and conditions of the approved petition, and the approval of this H-1B petition was properly revoked pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(3).

As noted above, the wage rate specified in the H-1B petition - \$65,000 per year – breaks down to approximately \$32.50 per hour. The Petitioner claims that the Beneficiary gave birth to a child in August 2013, took maternity leave, and then worked pursuant to the H-1B petition from April 10, 2014, until it received notice of the revocation decision in December 2014.<sup>2</sup>

The Beneficiary's pay statements<sup>3</sup> in the record indicated she was compensated as follows:

Month	Hourly Pay Rate	Number of Hours Worked	Gross Pay	Year-to-Date Gross Pay
July 2014	\$25.00	175	\$4,375.00	\$16,475.00
August 2014	\$27.50	172	\$4,730.00	\$21,205.00
September 2014	\$27.50	168	\$4,620.00	\$25,825.00
October 2014 <sup>4</sup>	\$32.50	169.5	\$5,508.75	\$31,333.75
November 2014	\$32.50	152	\$4,940.00	\$36,273.75
December 2014 <sup>5</sup>	\$32.50	144	\$4,680.00	\$47,453.75

The Beneficiary's Form W-2 indicates that she was compensated \$47,453.75 in 2014, and the Petitioner emphasizes that when prorated for the period of time actually worked, that figure comports with the wage proffered in the H-1B petition.<sup>6</sup> While ostensibly true, as set forth below, we decline to afford that factor significant weight and agree with the Director that the Petitioner did not compensate the Beneficiary in accordance with the terms of the approved petition.

Specifically, the Beneficiary's pay statements make clear that she was compensated at a rate of \$27.50 per hour until October 2014, when her salary rose to \$32.50 per hour. In other words, her hourly compensation rose to the level specified in the H-1B petition only after the Director issued the NOIR.

<sup>2</sup> For purposes of this decision only, we will not question the veracity of the Petitioner's claim that the Beneficiary was not working during this time due to being on maternity leave.

<sup>3</sup> The pay statements and Form W-2 display a Texas address for the Beneficiary. If she was living in Texas as indicated during this time, it is not clear how she was performing her duties at the New Jersey address specified in the petition. However, because we are finding that the petition was properly revoked pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(3) we need not explore that issue at this time.

<sup>4</sup> The October 2014 pay statement was the first pay statement issued after the Director's NOIR was issued.

<sup>5</sup> The December 2014 pay statement was issued on December 31, 2014, several weeks after the Director's decision revoking the approval of the petition was issued.

<sup>6</sup> If the Beneficiary worked approximately eight months in 2014, and earned \$47,453.75 during that time, she would have earned approximately \$71,180.63 over a 12-month period using a multiplier of 1.5.

Moreover, that pay raise only cured the problem of the Beneficiary's ongoing compensation. It did not cure the problem of the Beneficiary's months-long underpayment. At the time the Director issued her decision revoking approval of the petition, the Beneficiary had only been earning a wage commensurate with the figure specified in the H-1B petition for two months (October and November). Her compensation during the first five months of employment had been deficient, and by the time the Director's revocation decision was issued she had earned only \$36,273.75 for nearly seven months of work.

The December 2014 pay statement was issued after the revocation decision, and it indicated that the Beneficiary had earned \$4,680 during that month. However, while the November 2014 pay statement reported year-to-date earnings of \$36,273.75, the December pay statement reported year-to-date earnings of \$47,453.75. If the Beneficiary earned \$4,680 in December, her total year-to-date compensation would have been \$40,953.75 – a figure that, even prorated for eight months of employment, fell below the H-1B wage of \$65,000. The December 2014 pay statement does not indicate where this extra payment of \$6,500 came from, and the Petitioner does not otherwise explain it. Given the timing of this extra payment of \$6,500 – after the revocation of the petition's approval – it appears as if it was made only to make a deficient petition conform to the H-1B requirements. Therefore, the evidence of record does not establish that the Beneficiary was paid the requisite wage, "cash in hand, free and clear, when due." *See* 20 C.F.R. § 655.731(c)(1).

#### IV. CONCLUSION

The record makes clear that, at the time the Director issued her decision, the Petitioner had violated the terms and conditions of the approved H-1B petition. Consequently, we find that approval of this H-1B petition was properly revoked pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(3).<sup>7</sup>

The burden is on the Petitioner to show eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

Cite as *Matter of G-D-M-, Inc.*, ID# 8421 (AAO Sept. 8, 2016)

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<sup>7</sup> While the issue is not before us, we note that it is not apparent that the proffered position is a specialty occupation. If the Petitioner is able to overcome the issues discussed in our decision the Director should consider exploring this issue before considering reinstatement of the H-1B petition's approval.