



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

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

MATTER OF D-P- LLC

DATE: SEPT. 21, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a publisher, seeks to extend the Beneficiary's employment as a "bilingual publishing consultant/editor" under the H-1B nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 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, revoked the approval of the petition. The matter is now before us on appeal. On appeal, the Petitioner submits a brief and asserts that the Director erroneously revoked the approval of the petition.

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

### I. FACTUAL AND PROCEDURAL HISTORY

In the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner stated that the Beneficiary would provide her services as a bilingual publishing consultant/editor on a full-time basis with an annual salary of \$46,500. The Petitioner submitted a certified labor condition application (LCA) for a full-time position under the "Editors" occupational classification, corresponding to Standard Occupational Classification (SOC) code 27-3041.

In response to the Director's request for evidence (RFE), the Petitioner submitted a "corrected/amended" LCA and Form I-129 indicating that the position had been changed to a part-time position but at a higher wage rate. The "corrected/amended" Form I-129 indicated that the Beneficiary's total salary would remain \$46,500 per year.

The petition was approved on March 7, 2013. Subsequent to the approval of the petition, officers of the U.S. Citizenship and Immigration Services (USCIS) conducted a site visit confirming the Beneficiary's part-time status. USCIS also discovered that the Beneficiary was being paid a base salary of \$26,000 and \$20,500 as advance royalty for the books she would publish. During the site visit, the Petitioner provided USCIS with a copy of the Petitioner's publishing contract with the

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Beneficiary (identified as the “author”) stating that she would receive “a \$20,500 advance on royalties, upon Publisher’s acceptance of the manuscript, which will be by June 2013 for [REDACTED] by June 2014 for [REDACTED] and by June 2015 for [REDACTED].”

The Director issued a notice of intent to revoke (NOIR) notifying the Petitioner that it was not paying the Beneficiary proper wages. In response, the Petitioner submitted, among others, the following evidence:

1. The Beneficiary’s 2014 Miscellaneous Income (Form 1099-MISC) indicating the Beneficiary received \$20,500 nonemployee compensation from the Petitioner.
2. A copy of a check in the amount of \$20,500 the Petitioner made out to the Beneficiary.
3. The Beneficiary’s 2013 Wage and Tax Statement indicating that the Petitioner paid wages in the amount of \$26,000.
4. The Beneficiary’s 2013 Form 1099-MISC indicating the Beneficiary received \$20,500 nonemployee compensation from the Petitioner.
5. The Beneficiary’s 2012 tax return indicating her wages as \$26,000 and a business income of \$9,074. According to her Schedule C, Profit or Loss from Business (Sole Proprietorship), the Beneficiary received \$20,500 for gross receipts or sales, which the Petitioner highlighted as the amount of her annual royalty.
6. Several of the Beneficiary’s 2013 and 2014 pay statements showing her salary as \$1,000 bi-weekly.<sup>1</sup>

The Director found the evidence submitted insufficient and revoked the approval of the petition on the basis that the Petitioner is not paying the Beneficiary the wages stated in the approved petition and the accompanying LCA. The Director acknowledged that the Petitioner paid the Beneficiary a total of \$46,500 per year through the combination of the Beneficiary’s salary of \$26,000 and \$20,500 in advance royalties, but determined that the \$20,500 in advance royalties do not constitute payment of wages for the duties of the specialty occupation which the Beneficiary was approved H-1B status to perform. The Director also pointed out that the \$20,500 advance royalty payment was not guaranteed.

On appeal, the Petitioner asserts that “the [Director’s] instant finding that the royalty payment to the Beneficiary was unrelated to her job duties at the Petitioner company cannot be sustained as a matter of fact and law.” The Petitioner’s asserts that, by raising the issue of the Beneficiary’s job duties for the first time, the Director did not comply with the regulatory requirements regarding the issuance of

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<sup>1</sup> A salary of \$1,000 bi-weekly is equal to \$26,000 per year.

a NOIR. The Petitioner also points to the financial evidence demonstrating that it has actually paid the \$20,500 in advance royalties in 2012, 2013, and 2014, and thus claims that these payments are in fact “guaranteed.”

## II. REVOCATION FRAMEWORK

### A. Regulatory Framework

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

- (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. Analysis

We find that the content of the Director's NOIR comported with the regulatory notice requirements, as it provided a sufficiently detailed statement that conveyed the proposed grounds for revocation encompassed by the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(A), and that it also allotted the Petitioner the required time for the submission of evidence in rebuttal that is specified in the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(B).

The Petitioner claims that the Director "failed to issue an NOIR in compliance with the regulatory requirements." The Petitioner's position is that, by raising the issue of the Beneficiary's job duties as an author as opposed to a bilingual publishing consultant/editor for the first time in its revocation decision, the Director "revoked the petition on a new ground for which the Petitioner was never notified and given a reasonable opportunity to respond." We do not agree.

The Director properly revoked the approval of the petition on the ground that the Petitioner is not paying the Beneficiary the wages stated in the approved petition and the accompanying LCA, and thus violated the terms and conditions of the approved petition. The Director did not base her decision solely on the nature of the Beneficiary's job duties, as portrayed by the Petitioner. Rather, the Director's decision discussed with sufficient detail the reasons why the advance royalty payments do not go towards meeting the Beneficiary's total rate of pay pursuant to the terms and conditions of the approved petition and LCA. Nevertheless, the regulations do not require the Director to spell out each and every factual consideration; it only requires the Director to provide "a detailed statement of the grounds for the revocation," which it did. 8 C.F.R. § 214.2(h)(11)(iii)(A). We therefore find that the Director's NOIR was sufficient.

## II. LCA TERMS AND CONDITIONS

We will now discuss the Director's ground for revoking the petition, i.e., that the Petitioner is not paying the Beneficiary the required wage pursuant to the terms of the approved petition and accompanying LCA.

### A. Regulatory Framework

The primary rules governing an H-1B petitioner's wage obligations appear in the U.S. Department of Labor regulations at 20 C.F.R. § 655.731. The regulations generally require 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) also 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, *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 . . . .

- (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).

....

- (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.

## B. Discussion

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A). 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.

Moreover, the regulations require a petitioner to pay the required wage to the beneficiary "cash in hand, free and clear, when due." 20 C.F.R. § 655.731(c)(1). In addition, the regulations at 20 C.F.R. § 655.731(c)(2) set forth several criteria for the purposes of satisfying the H-1B required wage or "cash wages paid," including the requirements that the payments be: shown in the employer's payroll records as earnings; properly reported as earnings to the IRS with required taxes paid; and assured, i.e., not conditional or contingent on some event. Like the Director, we find that the

Petitioner's payment to the Beneficiary of \$20,500 in advance royalties do not go towards satisfying the payment of the required wage, as required by the approved petition and LCA.<sup>2</sup>

Foremost, the record does not adequately demonstrate that these advance royalties are "guaranteed." The language in the publishing contract stating that the royalties will be received "upon Publisher's acceptance of the manuscript" and that "Publisher makes no promises or guarantees regarding estimated sales figures" is contrary to the regulatory requirement that future compensation be assured and not be contingent on some event. 20 C.F.R. § 655.731(c)(2)(v). Notably, there are no provisions in the contract guaranteeing that a minimum amount of royalties – advanced or not – must be paid to the Beneficiary. Instead, the \$20,500 represents the amount of "advance on royalties" to be paid in June 2013, June 2014, and June 2015. Afterwards, the Beneficiary will be paid a percentage of net revenue from book sales. The Petitioner has not documented, however, that the Beneficiary would continue to receive at least \$20,500 in royalties after June 2015 *regardless of the revenue of book sales*, which the Petitioner acknowledges "cannot be predicted with accuracy." The unknown, unguaranteed amount of royalties to be paid after June 2015 is critical to the matter at hand, as the Petitioner is requesting to employ the Beneficiary until December 30, 2015.

Furthermore, the Petitioner has not documented whether, under certain circumstances, the Beneficiary would have to pay back the "advance on royalties" she received. That is, the Petitioner has not explained and documented whether the payments of "advanced" or "advance on" royalties would need to be returned, whether directly or indirectly, depending upon certain event(s) arising. Thus, the record does not sufficiently establish that the Petitioner's payments of \$20,500 in advanced

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<sup>2</sup> In support of the initial petition, the Petitioner submitted an LCA for a full-time position at a Level I wage level. In this original certified LCA, the Petitioner attested that it would pay the Beneficiary \$28.90 per hour. In response to the Director's RFE, the Petitioner submitted a "corrected/amended" LCA and Form I-129 indicating that the position had been changed to a part-time position but at a higher wage level (Level II wage level) and a higher pay rate of \$29.80 per hour. The Petitioner explained that there was a "clerical mistake on the LCA form and I-129 form previously submitted," and that "[d]ue to slow economy, the company reduced [the Beneficiary's] hours to 30 hours per week." The "corrected/amended" Form I-129 nevertheless indicated that the Beneficiary's total salary would remain \$46,500 per year. The Director apparently accepted the Petitioner's "corrected/amended" LCA and Form I-129 in initially approving the petition.

With respect to the Petitioner's attempt to submit a "corrected/amended" LCA and H-1B petition, we find that it was error on the part of the Director to accept these changes. Not only is the Petitioner required to submit a *certified* LCA that *predates* the petition's filing date, 20 C.F.R. § 655.705(b), but the Petitioner is also required to "file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment," 8 C.F.R. § 214.2(h)(2)(i)(E). *See also* 8 C.F.R. § 103.2(b)(1) (the Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication); *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). The "corrected/amended" LCA was not certified and does not predate the petition's filing date, and thus could not be used to support the petition. In addition, the "amended" Form I-129 was not actually filed with USCIS with proper fee and other requirements.

Nevertheless, as the Director did not raise these issues during the revocation proceedings, we will not further address them, and they do not form the basis of our decision to dismiss the appeal.

royalties were received “cash in hand, free and clear,” and was “assured, i.e., not conditional or contingent on some event.” 20 C.F.R. § 655.731(c)(1)-(1). This finding is regardless of the fact that the Petitioner had actually paid these royalties in June 2013, June 2014, and June 2015, as the Petitioner’s past payments do not necessarily reflect upon the Petitioner’s future payments.

We highlight the Petitioner’s explanation that the language in the publishing contract is “standard language in any publishing contract *since the actual sales figure of any book cannot be predicted with accuracy* (emphasis added).” The Petitioner’s explanation thus reinforces the uncertain nature of the Beneficiary’s royalties, and supports the conclusion that these advanced royalties do not meet the regulations governing the Petitioner’s wage obligations pursuant to 20 C.F.R. § 655.731(c).

Furthermore, the evidence of record does not reflect that the Petitioner withheld appropriate taxes and contributions from the Beneficiary’s advanced royalty payments, as also required by 20 C.F.R. § 655.731(c)(i)-(iv). While the Petitioner made the requisite tax payments and contributions on the Beneficiary’s annual salary of \$26,000, it did not do so for the \$20,500 advanced royalties: instead, the Petitioner paid these royalties in the form of “nonemployee compensation” (on Form 1099-MISC as opposed to a Form W-2, Wage and Tax Statement) for which the Beneficiary – not the Petitioner – then made the appropriate tax payments and contributions. This is corroborated by the Beneficiary’s tax returns, in which she claimed the \$20,500 advanced royalties as business income (as a sole proprietorship) and paid taxes on accordingly. Therefore the evidence of record does not demonstrate that the advanced royalty payments meet the requirements of paragraphs (c)(2)(i) through (iv) of the regulation, i.e., recorded and reported as “earnings” with appropriate taxes and contributions withheld and paid by the employer.

The evidence in the record does not demonstrate that the Petitioner paid the Beneficiary the required wages and complied with the terms and conditions of the approved petition and LCA. For this reason, we will not disturb the Director’s decision. The approval of the petition remains revoked pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A).

### III. BENEFICIARY AS AN AUTHOR

We will now briefly address the issues concerning the Beneficiary’s job duties as an author, as raised by the Petitioner on appeal.<sup>3</sup>

As the Petitioner acknowledges, the Beneficiary is the author of the three books for which she received royalty payments. The Petitioner states in its appeal brief that “it is clear that the purpose of creating the book in the first place by the Petitioner was to, through the Beneficiary, manage and promote the Petitioner’s publishing projects in Korea by introducing the author, the Beneficiary.”

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<sup>3</sup> We reiterate that the nature of the Beneficiary’s duties do not form a basis for our decision. We are discussing the Beneficiary’s duties to address the Petitioner’s appeal, and to raise the Petitioner’s awareness of potential issues for future proceedings.

Contrary to the Petitioner's assertions, however, these aspects of the Beneficiary's job duties were not "clear" from the evidence of record. For example, the LCA was certified for a position falling under the "Editors" occupational classification (SOC code 27-3041). This occupational classification does not encompass the duties of creating and writing original works.<sup>4</sup> Nor did the Petitioner's initial or subsequent job descriptions – which accounted for 100% of the Beneficiary's time – contain the job duty of writing original works for which the Beneficiary would then edit, manage, and promote. Therefore, the Director properly commented that the Petitioner's payment of advanced royalties to the Beneficiary for authoring these books did not constitute payment of the proffered wage for the duties of the specialty occupation for which the Beneficiary was approved H-1B status. The Director properly considered the nature of the Beneficiary's job duties in concluding that the Petitioner violated the terms and conditions of the approved petition.

Although not articulated by the Director, the nature of the Beneficiary's job duties raises additional questions concerning her eligibility for the benefit sought. For instance, we observe that the record of proceedings does not contain evidence that the job duty of authoring books constitutes a specialty occupation.<sup>5</sup> We further observe that the Petitioner's payment of advanced royalties in the form of "nonemployee compensation" to the Beneficiary, and her corresponding tax returns as a "self-proprietor," raise questions regarding whether the Beneficiary is an independent contractor, and whether the Petitioner has an employer-employee relationship with her. As the evidence of record is insufficient to establish these fundamental matters, it would have been within the scope of the Director's authority to initiate revocation-on-notice proceedings regarding these issues upon proper notice to the Petitioner of her intent to do so.

#### IV. CONCLUSION

Upon review of the record, we determine that the Director properly revoked the approval of the petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A). The petition will remain revoked and the appeal dismissed for the above stated reason.

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<sup>4</sup> For more information about this occupation, see the Occupational Information Network Details Report for the occupation "Editors," available at <http://www.onetonline.org/link/details/27-3041.00> (last visited Sep. 20, 2016).

<sup>5</sup> There is no provision in the law for specialty occupations that permits the performance of non-qualifying, i.e., non-specialty occupation, duties. It is noted that, where a petitioner seeks to employ a beneficiary in two distinct occupations, the petitioner should file two separate petitions, requesting concurrent, part-time employment for each occupation. While it is not the case here, if a petitioner does not file two separate petitions and if only one aspect of a combined position qualifies as a specialty occupation, USCIS would be required to deny the entire petition as the pertinent regulations do not permit the partial approval of only a portion of a proffered position and/or the limiting of the approval of a petition to perform only certain duties. See generally 8 C.F.R. § 214.2(h). Furthermore, the petitioner would need to ensure that it separately meets all requirements relevant to each occupation and the payment of wages commensurate with the higher paying occupation. See generally 8 C.F.R. § 214.2(h); U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf). Thus, filing separate petitions would help ensure that a petitioner submits the requisite evidence pertinent to each occupation and would help eliminate confusion with regard to the proper classification of the position being offered.

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In visa petition proceedings, it is the Petitioner's burden to establish 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 D-P- LLC*, ID# 8686 (AAO Sept. 21, 2016)