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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 29 2013 OFFICE: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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 director initially approved the nonimmigrant visa petition. Upon subsequent review of the record, the director issued a notice of intent to revoke (NOIR), and ultimately did revoke the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The approval of the petition remains revoked.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on April 2, 2009. In the Form I-129 visa petition and supporting documentation, the petitioner described itself as company, established in 2004, that provides information technology services of software and hardware solutions, with no employees. In addition, the petitioner listed its gross annual income as $150,000.00 and its net annual income as $55,000.00 in the Form I-129 petition. In order to employ the beneficiary in what it designated as a computer programmer position, the petitioner sought to classify her 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 position was approved for what was designated as a computer programmer position. However, thereafter an onsite visit was conducted at the beneficiary's work location, as specified in the petition. Upon subsequent review of the record of proceeding upon which approval of the petition was based, the director issued a NOIR, and ultimately did revoke the approval of the petition. Thereafter, counsel for the petitioner submitted an appeal of the decision.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the director's NOIR; (5) the response to the NOIR; (6) the director's revocation notice; (7) the Form I-290B and supporting documents; (8) the AAO's request for additional and missing evidence; and (9) the response to the request for additional and missing evidence. The AAO reviewed the record in its entirety before issuing its decision.

As will be discussed below, the AAO finds that the petitioner has not overcome the specified ground for revocation. Accordingly, the appeal will be dismissed, and the approval of the petition will be revoked.

U.S. Citizenship and Immigration Services (USCIS) is required to revoke on notice the approval of an H-1B petition when one of five grounds is found. Specifically, 8 C.F.R. § 214.2(h)(11)(iii)(A) 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:
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> (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.

(A) 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.

As a preliminary matter, the AAO finds that the basis specified for the revocation action in the instant matter is a proper ground for such action. USCIS must be able to verify the information provided in the petition to further determine eligibility for an immigration benefit and/or compliance with applicable laws and authorities. To that end, agency verification methods may include but are not limited to review of public records and information; contact via written correspondence, the Internet, facsimile or other electronic transmission, or telephone; unannounced physical site inspections; and interviews. *See* 8 C.F.R. §§ 103, 204, 205, and 214, 8 U.S.C. §§ 1103, 1155, 1184 (2013). In the instant case, the beneficiary was not at the business premises on two separate occasions when the site visits were conducted. The director notified the petitioner that the beneficiary's employment as stated in the petition could not be verified, and the petitioner was provided an opportunity to submit evidence in support of the petition. The director's statements in the NOIR were adequate to notify the petitioner of the intent to revoke the approval of the petition.

As will be evident in the discussion below, the AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner has failed to credibly establish that it would comply with the terms and conditions of employment. The documents submitted in response to the NOIR and on appeal fail to effectively rebut and overcome the basis for revocation. Accordingly, the appeal will be dismissed, and approval of the petition will be revoked.

In this matter, the petitioner stated on the Form I-129 and supporting documentation that it seeks the beneficiary's services as a computer programmer for 20-30 hours per week at the rate of pay of $23.00 per hour ($23,920-$35,880 per year). In the March 30, 2009 letter of support, the petitioner stated that "[the beneficiary's] duties will involve all phases of developing and writing computer programs for our clients."

With the Form I-129 petition, the petitioner provided a certified Labor Condition Application (LCA) in support of the petition that corresponds to the occupational classification "Computer Programmers" at a Level I (entry level) wage. On the LCA, the petitioner reported that the beneficiary's salary as $23.00 per hour.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on July 14, 2009. The petitioner was asked to submit documentation to establish the beneficiary's place of employment. The director outlined the specific evidence to be submitted.

On August 31, 2009, the petitioner responded by submitting a brief and additional evidence. The petition was approved for what the petitioner designated as a computer programmer position. On November 12, 2009, an administrative site visit was conducted to verify the information within the petition. The beneficiary was not on-site on the day of the site visit and, therefore, it could not be determined that she was being employed in the capacity indicated in the petition. Subsequently, an additional site visit was conducted on June 24, 2010. Again, the beneficiary was not located at the work site.

After reviewing the information record of proceeding and the site visit reports, the director issued a notice of intent to revoke the approval of the petition. The NOIR contained a detailed statement regarding the information that USCIS had obtained and notified the petitioner that it was afforded an opportunity to provide evidence to overcome the stated grounds for revocation.

Prior counsel for the petitioner responded to the NOIR with a brief and additional evidence. Specifically, prior counsel submitted, in part: (1) the beneficiary's Form W-2 for 2009; (2) pay statements issued to the beneficiary for the periods ending July 31, 2010, August 31, 2010, September 30, 2010, October 31, 2010, and November 30, 2010;[1] and (3) the petitioner's 2010 Employer's Quarterly Federal Tax Return for quarters 1, 2, and 3.

In the December 28, 2010 brief, prior counsel claimed that "USCIS has made an erroneous conclusion regarding the annual salary" of $23,514 to $35, 271 per year. Counsel further stated that "[b]oth, the Form I-129 and the Labor Condition Application (LCA) stated a salary of $23.00 per hour, which has been paid. Neither the Form I-129 nor the LCA stated an annual salary."[2]

The director reviewed prior counsel's response but found the information submitted insufficient to refute the findings in the NOIR. The director noted that that the petitioner had not established that it was paying the beneficiary the required wage in accordance with the terms and conditions of the approved petition. The director revoked the approval of the petition on March 7, 2012.

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[1] It must be noted that the paycheck for October 31, 2010 indicates the "Year to Date" as $15,000. The following month's paycheck (November 30, 2010) indicates that the beneficiary was paid $1,750 and the "Year to Date" as $19,250. No explanation was provided as to the source of the additional $2,500.

[2] It must be noted for the record that in the Form I-129 (page 3), the petitioner indicated that the beneficiary will work 20-30 hours per week. In addition, in the Form I-129 (page 13) and LCA, the petitioner indicated that the beneficiary will be paid at the rate of $23.00 per hour. Notably, a salary of $23.00 per hour for 20 hours per week with 52 weeks in a year amounts to $23,920 per year. Moreover, $23.00 per hour for 30 hours per week with 52 weeks in a year amounts to $35,880 per year. Thus, the petitioner indicated that the beneficiary will be paid $23,920 to $35,880 per year.

Thereafter, counsel for the petitioner submitted an appeal. On appeal, counsel asserts that the director erred in the decision to revoke the approval of the petition. Furthermore, counsel claims that a client of the petitioner, failed to pay the petitioner in 2009 and 2010 and, therefore, the petitioner experienced "a temporary shortage of cash flow." Counsel further states that "[the petitioner] therefore discussed with Beneficiary[,] and she agreed, really without much choice, to accept two promissory notes, one for 2009, for the amount of $3,580.00 and another for 2010, for the amount of $6554.00 for hours she worked." In addition, counsel claims that "[the petitioner] has been paying on these promissory notes to the Beneficiary on a regular basis and will continue to do so until paid in full."

In support of the assertions, counsel submitted the following documents: (1) a promissory note from to the petitioner dated April 1, 2011; (2) two promissory notes from the petitioner to the beneficiary dated December 31, 2009 and December 31, 2010; (3) an affidavit from the beneficiary; (4) an affidavit from the petitioner; (5) a Payroll Summary signed by the petitioner and the beneficiary; (6) copies of the beneficiary's paychecks; (7) copies of the petitioner's Employer's Quarterly Reports for 2012 (quarter 1) and 2011 (quarters 1, 2, 3, and 4); (8) the beneficiary's Form W-2, Wage and Tax Statement, for 2011; and (9) a copy of the Wage Claim submitted by the beneficiary to the Texas Workforce Commission.[3]

The AAO reviewed the record of proceeding in its entirety, including the documents submitted with the petition, in response to the NOIR and in support of the appeal, as well as the information obtained during the site visits. As will be discussed, the petitioner has not met its burden of proof to establish that it has complied with the terms and conditions of the approved petition.

The AAO notes that USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 ('Reg. Comm'r 1978).

Further, the AAO reminds the petitioner that 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 AAO notes that 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) states the following:

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[3] In the Wage Claim, the beneficiary indicated that the scheduled payday for the claimed wages was "Oct 2009 to Jan. 2011." The beneficiary signed and (apparently) submitted the Wage Claim in April 2012 (approximately one month after the director's decision was issued revoking the approval of the H-1B petition). No explanation was provided for the delay in submitting the Wage Claim.

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 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.

As previously mentioned, in the instant case, the petitioner stated that it will pay the beneficiary $23 per hour for 20-30 hours per week ($23,920-$35,880 per year). Notably, by submitting and signing the Form I-129 and LCA, the petitioner's owner obliged the petitioner to comply with the wage requirements. The record, however, demonstrates that the terms and conditions of the beneficiary's employment relative to the proffered wage was not adhered to during the years identified. For example, the following documentation submitted by the petitioner does not demonstrate that the beneficiary was paid the required wage:

Documentation submitted by the petitioner:	The petitioner paid the following amount:	The petitioner was required to pay the following amount:
Form W-2 for 2009 (October, November, and December)	$2,400	$5,980
Paycheck for November 30, 2010	"Year to Date" $19,250	$22,080
Quarter 1 of 2010	$3,600	$5,980
Quarter 2 of 2010	$3,600	$5,980
Quarter 3 of 2010	$3,600	$5,980

On appeal, counsel states that the petitioner "experienced a temporary shortage of cash flow" and that the beneficiary "agreed, really without much choice" to accept promissory notes for hours she worked. Counsel claims that the petitioner is correcting the discrepancy in the proffered wage by "paying back some of the back pay" to the beneficiary and, therefore, the petitioner complied with all the requirements of the H-1B petition and the LCA.

The AAO is not persuaded by counsel's assertion. 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.

As stated above, the regulations require a petitioner to pay the required wage to the beneficiary, "cash in hand, free and clear, when due." *Id.* The regulations further indicate that for hourly-wage employees, the required wages are due for all hours worked and/or for any nonproductive time at the end of the employee's ordinary pay period (e.g., weekly) but in no event less frequently than monthly. In addition, the regulation at 20 C.F.R. § 655.731(c)(7) states, in pertinent part, that "[i]n all cases the H-1B nonimmigrant must be paid the required wage for all hours performing work within the meaning of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*" To meet the wage obligation, a petitioner may use some other form of nondiscretionary payment to supplement the employee's regular/pro-rata pay. However, the employer's documentation of wage payments 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." *Id.*

The petitioner's arrangement to provide promissory notes (with five year maturity dates) to the beneficiary "in lieu of full payment owed to [the beneficiary] for all of the wages owed to [her] from October 2009 to January 2011" 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). The petitioner has not demonstrated compliance with the regulations under the provisions relating to

hourly-wage employees. The documentation does not establish that the required wage rate for all hours worked was paid at the end of the beneficiary's ordinary pay period. As such, the petitioner has failed to establish that it paid the beneficiary an adequate salary for her work, as required under the applicable statutory and regulatory provisions. The AAO therefore agrees with the director that the petitioner failed to establish that it complied with the terms and conditions of the approved petition.

Counsel does not cite any statute, regulation, or precedential decision supporting its claim that the petitioner's "back pay" arrangement meets the requirements of the terms and conditions of the H-1B petition and the certified LCA submitted in support of the petition. The burden to establish eligibility in this matter remains solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. 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)).

Therefore, the evidence in the record shows that the petitioner did not comply with the terms and conditions of the instant, approved H-1B petition. For this reason, the AAO will not disturb the director's decision. The approval of the petition remains revoked.

The burden of proof in this proceeding rests solely with the petitioner.[4] Section 291 of the Act. The petitioner has not sustained that burden.

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

[4] The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). However, as the appeal is dismissed, and the petition remains revoked for the reasons discussed above, the AAO will not further discuss the additional issues and deficiencies that it observes in the record of proceeding.