



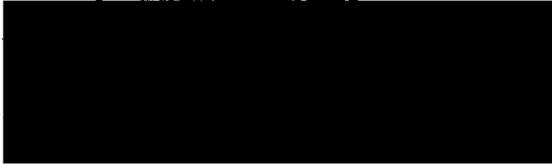
DR

U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: LIN-00-111-52039 Office: Nebraska Service Center

Date: **DEC 17 2002**

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)

IN BEHALF OF PETITIONER: SELF-REPRESENTED

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an engineering consultant business with 250 employees and a gross annual income of \$18 million. It seeks to employ the beneficiary as an FEA engineer/analyst for a period of three years. The director determined the petitioner's revised labor condition application was filed subsequent to the filing of the visa petition.

On appeal, the petitioner resubmits the original labor condition application that was submitted at the time of the filing of the instant petition.

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), provides in part for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to section 214(i)(2) of the Act, 8 U.S.C. 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. Evidence that the alien qualifies to perform services in the specialty occupation . . .

The record contains two labor condition applications for the petitioner. The first labor condition application, ETA case #05373821, was filed on November 15, 1999, for 30 nonimmigrant FEA engineer/analysts. In a request for evidence dated January 2, 2001, the director requested additional information from the petitioner, including a current list of all previously filed H-1B petitions that used the labor condition application, ETA case #05373821. In a letter dated January 11, 2001, the petitioner's chief financial officer responded, in part, as follows:

Upon looking through the visa petition we realized that we accidentally sent an exhausted Labor Condition Application, LCA Memo, and prevailing Wage with [the beneficiary's] petition. Please see the revised, Labor Condition Application and Memo, and Prevailing Wage Form, which reflects the correct information.

The petitioner then submitted a revised labor condition application for 50 nonimmigrant FEA engineer/analysts, ETA case #90218340, that was filed on September 14, 2000, subsequent to the filing date of the petition on March 2, 2000. The director denied the instant petition, reasoning that the revised labor condition application was filed subsequent to the filing of the instant petition, and therefore did not comply with regulations at 8 C.F.R. 214.2(h)(4)(i)(B)(1), which provide that before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application.

On appeal, the petitioner resubmits the original labor condition application, ETA case #05373821, and states, in part, as follows:

The reasons for your denial are certainly valid, but were due to a clerical error on our behalf. Upon looking through the visa petition we realized that we accidentally sent a Labor Condition Application, Labor Condition Application Memo and Prevailing Wage with [the beneficiary's] petition.

In our Response to the Request for Evidence, we submitted the corrected information (a new Labor Condition Application, LCA Memo, and prevailing Wage Form, which reflects the correct information.

The record contains no explanation as to why the petitioner is resubmitting its original labor condition application, ETA case #05373821, which the petitioner's chief financial officer had previously determined to be "exhausted." Doubt cast on any aspect of the petitioner's proof may lead to a re-evaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, it is incumbent on the

petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies will not suffice. Matter of Ho, 19 I&N Dec. 582. (Comm. 1988).

In view of the foregoing, the petitioner has not persuasively demonstrated that it has submitted a properly filed labor condition application. For this reason, the petition may not be approved.

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. Accordingly, the decision of the director will not be disturbed.

ORDER: The appeal is dismissed.