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U.S. Citizenship
and Immigration
Services



DR

JUL 01 2004

FILE: WAC 02 216 51548 Office: CALIFORNIA SERVICE CENTER Date:

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:

This is the decision of the Administrative Appeals Office 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.

Mari Johnson

to Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a construction and real estate business that seeks to employ the beneficiary as a civil engineer. The petitioner endeavors to classify the beneficiary 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 denied the petition because the petitioner is not a functioning business entity and, therefore, it has not established that there will be immediate work available for the beneficiary upon his arrival in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a civil engineer. Evidence of the beneficiary's duties includes: the I-129 petition [REDACTED] letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: planning, drawing, evaluating costs, designing, and executing construction projects; consulting with project managers; and conferring with clients. Although not explicitly stated, it appears that the petitioner requires a baccalaureate degree in civil engineering for the proffered position.

The director found that the petitioner had not established that there would be immediate work available for the beneficiary upon his arrival in the United States.

On appeal, counsel states that the petitioner has applied for its business license, Tax Identification Number, and other requirements to become fully operational. Counsel further states that the petitioner qualifies as an employer, pursuant to 8 C.F.R. § 214.2(h)(4)(ii).

Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director shall consider all the evidence submitted *and such other evidence as he or she may independently require to assist his or her adjudication.* (Emphasis added.)

Pursuant to 8 C.F.R. § 103.2(b)(12), an application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed.

In a Request for [REDACTED] the director requested evidence of business activity, including the petitioner's business license, sales invoices, and state and federal tax documentation.

In his response [REDACTED] counsel stated, in part:

Please be advised that employer has been newly incorporated and absent its required technical know-how, shall remain all but unable to commence its activities. A request for a business license is in the process albeit no other documents such as tax returns or quarterly wage reports have yet been materialized. After arrival of the Beneficiary and commencement of his services, Petitioner will be in the position to address other concerns distinctively.

In the present case, as the record contains no evidence of the level of business being conducted by the petitioner, the director properly requested additional evidence to determine the bona fides of the job offer. Counsel indicates that the petitioner is [REDACTED] and has not yet begun to conduct business but has applied for its business license. The petitioner's letter of support, dated April 30, 2002, indicates that the beneficiary "is being offered temporary employment in the position of Civil Engineer" to perform duties that include, in part, designing and executing construction projects. The record, however, contains no evidence that the petitioner has any customers or that it is licensed to conduct business. As such, the petitioner has not established that a specialty occupation is immediately available to the beneficiary upon entry to the United States, or that it will be able to engage the beneficiary to work within the United States, or that it otherwise meets the definition of a U.S. employer.

As related in the discussion above, the petitioner has failed to establish that a specialty occupation exists for the beneficiary or that it meets the definition of a U.S. employer. Accordingly, the AAO shall not disturb the director's denial of the petition.

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. The petition is denied.