



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: EAC 02 281 54468 Office: VERMONT SERVICE CENTER

Date: OCT 25 2004

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

[REDACTED]

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director initially approved the nonimmigrant visa petition. Based upon his determination that the record contained significant inconsistencies between the Forms I-129 and I-539 (Application to Extend/Change Nonimmigrant Status), the director served the petitioner a Notice of Intent to Revoke (NOIR), and ultimately revoked the approval on March 12, 2003. 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, remodeling, and design company that seeks to employ the beneficiary as a project manager. 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 beneficiary submitted an application to extend his B-1 status from April 15, 2002 to December 15, 2002. On September 11, 2002, the petitioner filed the instant H-1B petition. The director approved the H-1B petition on October 8, 2002. A subsequent comparison between the I-539 application and the I-129 petition led the director to the conclusion that the information submitted in support of those forms was contradictory; hence, the director issued the petitioner a NOIR on October 18, 2002. The petitioner submitted a response on November 15, 2002. The director found that the petitioner did not overcome the reasons for revocation. The director concluded that the information provided in support of the beneficiary's application to extend his B-1 status and to change his status to H-1B was not truthful; thus the director denied the extension of B-1 status in a separate decision. Consequently, the beneficiary was considered to be out of status at the time of filing the instant petition on September 11, 2002. According to 8 C.F.R. § 214.1(c)(4), an extension of stay may not be approved for an alien whose status expired before the petition was filed; therefore, because the beneficiary was out of status at the time this petition was filed, the petition could not be approved. The director also stated that information submitted in response to the NOIR, when compared with information already on the record, led to the conclusion that the beneficiary was not qualified to perform the duties of a project manager. The director drew no conclusions regarding whether the proffered position was a specialty occupation, or with respect to the Labor Condition Application, Form ETA 9035 (LCA). On appeal, the petitioner submits a statement and additional documentation.

The record of proceeding before the AAO contains, in part: (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 NOIR; (5) the petitioner's response to the NOIR; (6) the director's Notice of Revocation; and (7) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

There is no appeal from the denial of extension or change of nonimmigrant status; thus, the AAO has no jurisdiction in this regard. The AAO has thoroughly reviewed the record, however, in order to determine whether the revocation of the I-129 was in accordance with the provisions of 8 C.F.R. § 214.2(h)(11).

The director determined that there were inconsistencies in the record regarding the beneficiary's work history and his reason for initially entering the United States as a visitor for business. On appeal, the petitioner reconciles these points to the satisfaction of the AAO. The petitioner's explanations sufficiently link each document such that they all fit within the context of the entire record. When the record is viewed as a whole, the documents do

not appear to contradict each other. The AAO's analysis of the facts regarding the appeal of the revocation is, thus, based on the finding that the documentation is not inconsistent.

The director found that the beneficiary would not be qualified to perform the duties of the proffered position. Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has 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)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The director found that the beneficiary was not qualified for the proffered position because the beneficiary's education, experience, and training were not equivalent to a baccalaureate degree in a specialty required by the occupation. In order to assess the beneficiary's qualifications with respect to the proffered position, the position must be accurately categorized. The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* in order to determine the most apt job title for a given set of job duties. In its letter in support of the petition, the petitioner wrote that the beneficiary would be in charge of cost estimation, ordering materials, and coordinating the overall logistics of the construction project. The beneficiary would also assist in structural steel and foundation design, as well as deal directly with clients. The petitioner indicated that a qualified candidate for the job would hold a bachelor's degree in engineering and have experience in project management.

The structural design duties fall within the *Handbook's* description of the position of civil engineer, which notes that structural engineering is a major specialty under this heading. The *Handbook* indicates that a

bachelor's degree in engineering is a prerequisite for entry into almost all engineering positions. While most engineers specialize, the *Handbook* states that engineers trained in one field may work in a related field, allowing employers more flexibility in meeting staffing needs, and affording engineers the opportunity to move into other fields.

The record contains an educational evaluation rendered by Morningside Evaluations and Consulting that indicates that the beneficiary's Argentine university degree is the equivalent of a U.S. bachelor of science in mechanical engineering. It appears that, pursuant to the second paragraph above, the beneficiary's degree would provide the basic qualification for a position involving structural engineering. It is therefore unnecessary to consider the evaluation of the beneficiary's work experience alone provided by Dr. Matt R. Wall of California Polytechnic State University.

There is an additional issue not addressed however, and that pertains to licensing. With regard to licensure for the H classification, 8 C.F.R. § 214.2(h)(4)(v), states the following:

(A) *General.* If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

(B) *Temporary licensure.* If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.

(C) *Duties without licensure.* In certain occupations which generally require licensure, a state may allow an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation. In such cases, the director shall examine the nature of the duties and the level at which they are performed. If the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted.

The state of New York requires individuals who practice structural engineering to obtain the appropriate state license. The record contains no information regarding whether the beneficiary possesses a license to practice structural engineering, or in the alternative, whether the beneficiary would be exempt from the licensure requirement. Thus, the AAO cannot conclude, based on information in the record, that the beneficiary would be fully qualified to perform the duties of the proffered position, were it determined to be a specialty occupation.

The director did not address the issue of whether the position is a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) 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 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record does not describe in sufficient detail the exact nature of the proposed duties, especially with regard to any responsibility for designing structures, to enable the AAO to determine if the position is more akin to that of a structural engineer or a construction manager. According to the *Handbook*, the latter position does not require a baccalaureate degree in a specific specialty as a minimum entry requirement. Beyond the decision of the director, the AAO cannot conclude, based on information contained in the record, that the instant position is a specialty occupation.

Beyond the decision of the director, the LCA was not timely submitted. In his request for evidence, the director requested that the petitioner submit a certified LCA. Neither in the NOIR nor in the Notice of Revocation, however, did the director bring up the defect in the LCA that the petitioner submitted in response. Before a petition is filed under this section, the petitioner must obtain an LCA that has been certified by the United States Department of Labor. 8 C.F.R. 214.2(h)(4)(i)(B) lists the requirement of a certified LCA, in the specialty occupation, obtained prior to the filing of a petition, as follows:

- (1) 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 in the occupational specialty in which the alien(s) will be employed.

The present petition was filed September 11, 2002, while the LCA included in the petitioner's response to the director's request for evidence was certified by the Department of Labor on September 13, 2002, two days later. The petitioner did not provide evidence that the Department of Labor had certified the LCA before the present petition was filed. Therefore, the beneficiary is ineligible for classification as an alien employed in a specialty occupation, and the approval of the petition was in violation of 8 C.F.R. § 214.2(h). Pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(5), the director must revoke approval of the petition in such circumstances. For this additional reason, the petition is denied.

In view of the foregoing discussion, the petitioner has failed to overcome the decision to revoke approval of the instant 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.