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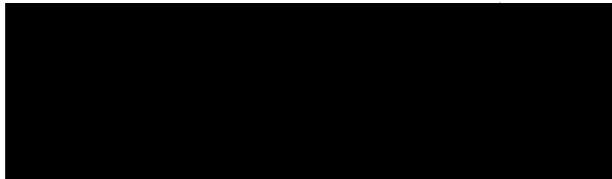


FILE: WAC 03 016 52802 Office: CALIFORNIA SERVICE CENTER Date: FEB 08 2005

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:



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.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the California Service Center 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 business that provides computer hardware and software services to its clients. It seeks to hire the beneficiary as an electrical engineer. The director denied the petition based on the petitioner's failure to respond to his request for evidence.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's request for an extension of 60 days in which to respond to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with a brief and supporting evidence. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the director appropriately denied the petitioner's Form I-129 when the petitioner failed to respond to his request for evidence.

In the instant case, the director issued a request for evidence on June 27, 2003, stipulating that the petitioner had until September 19, 2003 to submit the information requested. Although the petitioner did not respond to the director's request prior to the deadline, counsel for the petitioner wrote to the director on September 17, 2003 requesting a 60-day extension in which to provide the requested information. Pursuant to 8 C.F.R. § 103.2(b)(14), the director denied the petitioner's H-1B petition on November 7, 2003, as its failure to provide the requested information had precluded a material line of inquiry.

Counsel bases the petitioner's appeal on his contention that director's request for evidence was both frivolous and unduly burdensome, and that the director's failure to grant the petitioner a 60-day extension in which to respond to the June 27, 2003 request for evidence was erroneous and an abuse of discretion. He requests that the denial of the petitioner's Form I-129 be overturned on these grounds.

The AAO first turns to the issues that have been raised by counsel with regard to CIS' handling of the request for evidence issued to the petitioner.

Counsel asserts that the director not only delayed the petitioner's efforts to expand its operations, but abused his discretion when he failed to grant the petitioner additional time in which to respond to his request for evidence. However, the time period within which applicants and petitioners must respond to requests for evidence is set by regulation and is not a matter of discretion. The language at 8 C.F.R. § 103.2(b)(8) states that an applicant or petitioner shall be given 12 weeks to respond to a request for evidence, with no additional time granted. Counsel's request for a 60-day extension, while submitted prior to the response date, requested an action specifically precluded by regulation. Therefore, the fact that the petitioner was not granted the requested extension is neither an error on the part of CIS, nor an abuse of its discretion, as counsel contends.

On appeal, counsel also states that the director's request for evidence was both overly burdensome and irrelevant to the petition. Having reviewed the specific information requests made by the director, the AAO finds them to be minimal -- a statement from the petitioner clarifying the location and nature of the beneficiary's employment, copies of job announcements, and copies of the petitioner's most recent quarterly wage report and 2002 federal income tax return. In that the petitioner had three months in which to provide the director with the requested information, the AAO finds counsel's assertion that the director's request for evidence overly burdened the petitioner to be without foundation. It will now turn to counsel's contention that the request for evidence was irrelevant to the petition.

In his request for evidence, the director noted that the evidence submitted by the petitioner concerning its intended employment of the beneficiary raised the question of whether the beneficiary would be employed "in-house" or "contracted out" to the petitioner's clients. He, therefore, specifically asked for clarification of this aspect of the beneficiary's employment, and for the contracts and job descriptions covering any outsourcing of the beneficiary to the petitioner's clients. The director also asked for past and present job announcements, as well as any classified advertisements soliciting for the proffered position, and copies of the petitioner's most recent quarterly wage report and its 2002 federal tax return. On appeal, counsel states the director's request was "frivolous on its face" and, as a result, the petitioner's failure to submit the evidence did not preclude a "material line of inquiry" as stated by the director in his denial.

In support of his contention that the director's request for evidence was frivolous, counsel states that a petitioner seeking an H-1B nonimmigrant visa is not required to provide the type of information requested by the director. However, counsel fails to take into account the regulatory language at 8 C.F.R. § 103.2, which governs the filing of all applications and petitions, including H-1B nonimmigrant visa petitions. At 8 C.F.R. § 103.2(b)(8), CIS is specifically authorized to request evidence when it determines that information is missing from the initial filing of an application or petition, or that the submitted evidence does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility. In this case, the director determined that the evidence submitted by the petitioner did not allow him to determine whether the petitioner's proffered position was a specialty occupation and, based on the authority given him at 8 C.F.R. § 103.2(b)(8), he requested additional evidence.

Counsel also contends that the information requested by the director to clarify how the petitioner intended to employ the beneficiary was already available in the petitioner's certified Labor Condition Application (LCA) and its September 17, 2002 letter of support. However, the AAO does not agree. While counsel states that the LCA clearly indicated that the beneficiary would be working at the petitioner's place of business, a review of the LCA shows that it indicated only that the beneficiary would be employed by the petitioner and would work in Anaheim, California. It did not provide the specific location of the beneficiary's employment, nor, as counsel asserts, did it state that he would work on the design and integration of networking systems and microprocessors at the petitioner's site. Further, a reading of the petitioner's September 17, 2002 letter does not support counsel's assertions that it confirmed the beneficiary would work exclusively at the employer's office site. Instead, the letter stated only that the petitioner intended to employ the beneficiary and to use his expertise to provide services to its clients. It did not discuss the manner in which the beneficiary would provide those services, nor where.

The AAO's review of the record finds no evidence to support counsel's contention that the information sought by the director regarding the nature of the beneficiary's proposed employment was provided by the petitioner at the time of filing. Instead, the evidence supports the director's finding that the petitioner's statements regarding its services-driven business and its proposed employment of the beneficiary raised the possibility that the beneficiary might be required to work at multiple sites in the Anaheim area or perform services for the petitioner's clients under separate contractual arrangements.

The AAO notes that in instances where a petitioner intends to use a beneficiary's services at multiple locations, the regulation requires that the petitioner submit an itinerary with the dates and locations of the employment. 8 C.F.R. § 214.2(h)(2)(i)(B). Further, petitioners that seek to employ H-1B beneficiaries for contract work with other businesses must submit the contracts under which the services of these beneficiaries will be provided, to ensure that the employment to be performed qualifies as a specialty occupation. See *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). Therefore, in the instant case, the AAO concludes that

the director's request for specific information regarding the nature of the beneficiary's employment was not irrelevant to the petition, but sought information required by the director for his analysis of the proffered position. As a result, it must be viewed as material to the director's determination as to whether the proffered position qualified as a specialty occupation.

Counsel also contends that the director's request for the petitioner's current and past job announcements, and classified advertisements for the proffered position is immaterial to the H-1B decision process. However, CIS routinely reviews evidence of a petitioner's current and past hiring practices to determine whether it may be able to establish its proffered position as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a petitioner's 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.

While a petitioner must establish eligibility under only one of these criteria, CIS is obligated to consider all four before determining that a position does not qualify as a specialty occupation. For example, a position that does not meet the requirements of the first criterion may yet qualify under one of the remaining three. As a result, CIS routinely requests information from a petitioner that will assist it in exploring the petitioner's ability to meet its burden of proof under any of the four avenues just described. In the instant case, the director's request for evidence sought information that would allow him to determine whether the petitioner had a history of imposing a degree requirement for its proffered position, as required by the third alternative criterion. Again, such a request, although a petitioner may not be able to provide evidence in response to it, is directly related to the director's determination of whether the proffered position qualifies as a specialty occupation and cannot be considered frivolous, as counsel contends.

The AAO now turns to the director's request for the petitioner's most recent quarterly wage report and its 2002 tax return. Counsel has concluded that the director's request sought information on the petitioner's ability to pay the prevailing wage and contends that CIS is usurping the authority of the Department of Labor. However, a reading of the language in the director's request for evidence shows that the director's stated purpose for his request was to confirm information provided by the petitioner in its Form I-129, Part 5. The following language was used by the director in his request for evidence:

The petitioner states on the petition that there are currently 7 employees at the petitioner's company. Provide a copy of the most recent **quarterly wage report (DE-6)**.

Income Tax Return: The petitioner states that the Annual Gross Income is \$538,000.00. Please submit a certified copy of the petitioner's 2002 income tax return.

The director's request for confirmation of information offered by the petitioner in the submission of an H-1B nonimmigrant visa petition is material to the decision process. The request for the tax documentation was not a frivolous request or an abuse of discretion.

The AAO now turns to its consideration of whether the petition was appropriately denied by the director on the grounds that the petitioner's failure to submit evidence precluded a material line of inquiry.

The AAO's review of the information requested by the director leads it to conclude that the director's decision was not contingent upon information regarding the petitioner's past hiring practices, nor necessarily upon the financial information he requested. However, the failure of the petitioner to respond to the director's request for information regarding the nature of the beneficiary's employment -- whether the beneficiary would be employed at multiple locations or under separate contracts with the petitioner's clients -- clearly precluded the director from being able to conduct an analysis of whether the proffered position qualified as a specialty occupation. As a result, the director's denial correctly relied on the language at 8 C.F.R. § 103.2(b)(14), which states that failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying an application or petition.

In reaching its decision, the AAO notes that counsel, on appeal, has responded to the director's request for evidence. The AAO will not, however, accept this evidence. When a petitioner, as in the instant case, has been put on notice of a deficiency in the evidence, has been given an opportunity to respond to that deficiency, and has failed to do so, the AAO will not accept the evidence when it is provided on appeal. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Therefore, for reasons related in the preceding discussion, 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.