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FILE: WAC 03 085 51690 Office: CALIFORNIA SERVICE CENTER Date: NOV 23 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, Director
Administrative Appeals Office

DISCUSSION: The director denied the nonimmigrant visa petition and on a subsequent appeal, the Administrative Appeals Office (AAO) withdrew the director's January 21, 2004 decision, and remanded the matter for entry of a new decision. The director entered a new decision denying the petition and certified his decision to the AAO. The director's decision will be affirmed. The petition will be denied.

The petitioner is an importer and distributor of natural stone products. It seeks to employ the beneficiary as an architectural designer. 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). 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 have completed a baccalaureate degree in the specialty that the occupation requires.

The AAO's March 21, 2005 decision found that the proposed position qualified as a specialty occupation - that of an architect; but the AAO concluded that the evidence in the record was insufficient to establish that the beneficiary was qualified to perform the proffered position; and the matter was therefore remanded to the director to make this determination.

On remand, in response to a June 1, 2005 request for evidence, the director received an August 22, 2005 letter from the petitioner stating the following: the proposed position did not require supervision from a licensed architect or an architect's signature on plans; for a fee Mr. [REDACTED] would provide services as a licensed architect; and that no prior contract with Mr. [REDACTED] exists as he never provided services to the petitioner as a licensed architect. The director concluded that the beneficiary was not qualified for the proposed position since the petitioner did not submit evidence of the beneficiary's licensure as an architect, that it employed a licensed architect to review the beneficiary's designs, or that it had contracts that would demonstrate that it had the use of the services of a licensed architect to review the beneficiary's drawings.

Counsel submits a brief in response to the notice of certification. In the brief, counsel asserts that the proposed position is that of an architectural designer; it is not an architect. Counsel maintains that the petitioner had successfully established that the core duties of an architectural designer and architect are similar; however, counsel states this does not mean that an architectural designer is an architect. Counsel asserts that analogizing the proposed position to that of an architect was to demonstrate the complexity of the proposed duties. According to counsel, based on the definition of the practice of architecture, as set forth in section 5500.1 of the California Business and Professions code, the beneficiary does not require an architect's license or continual supervision from a licensed architect. Counsel asserts that in the response to the request for evidence the petitioner describes its business operations as divided into two components: importing stone products for large clients, which obviously does not require the services of an architectural designer; and handling small projects for retail customers that require architectural designer services. Counsel states that because the beneficiary will not offer, perform, or control site planning or design of buildings or structures, the beneficiary will not engage in the "practice of architecture" as defined in the Business and Professions code. Only when the beneficiary is required to render professional architectural services, counsel states, will the work be supervised by a licensed architect. Counsel asserts that as stated in the response to the request for evidence dated June 2005, it is not expected that

the beneficiary's duties would require supervision by a licensed architect in the near future, although the petitioner made it clear that it had an architect ready and willing to supervise and approve any work that would be defined as the practice of architecture. The petitioner is only involved in importing natural stones and designing its nature stone products to fit seamlessly into an architect's ultimate vision for the design of a building or structure, counsel states. Under section 5538 of the California Business and Professions code, counsel asserts that the beneficiary is exempted from licensure and from the supervision of a licensed architect; and the petitioner is not prohibited from furnishing labor and materials that do not affect the safety of a building or its occupants. The petitioner's stone products and designs are used strictly to enhance a building's beauty and aesthetic quality, counsel maintains, and the petitioner never claimed that its services enhanced or contributed to a building's safety or that of its occupants.

Upon review of the record, the petitioner has not established that the beneficiary is qualified to perform the duties of the proposed position: an architect.

The AAO finds that there are inconsistencies in the record regarding the description of the proposed position. In response to a June 30, 2003 request for evidence that sought evidence that would show that the beneficiary had licensure to practice as an architect, that the beneficiary could provide architectural services without a license, or that the beneficiary had a licensed architect as a supervisor, the petitioner's September 17, 2003 letter stated the following (we note that the petitioner's January 8, 2003 letter that accompanied the Form I-129 petition has the same language):

Since [the beneficiary] will be working under the direction of a licensed [a]rchitect, Ali OLFATI with license no. C22217 and will not be signing plans, no license is required for the position. See also, Architects, Guide #210 (1998), California Occupational Guides ("Architects who are responsible for the approval of projects plans and drawings must be licensed").

Counsel asserts that only when the beneficiary is required to render professional architectural services will the work be supervised by a licensed architect; and in an August 22, 2005 letter, which is submitted in response to the director's June 1, 2005 request for evidence, the petitioner now states that "no supervision from a licensed [a]rchitect is required" for the proposed position. This letter further states:

A signature of an [a]rchitect on plans is not required because no plans are submitted for "plan check" at the Building and Safety Department (where projects are permitted). Just in case we ever need the supervision and signature of a licensed [a]rchitect, we can always request the services of Mr. [REDACTED] who will provide us with his services for a fee to be agreed upon. Until now, we never had a need to use Mr. [REDACTED]'s services. Therefore, I am providing you with a copy of Mr. [REDACTED] license, but I am not able to provide you a copy of a contract and proof of payment to Mr. [REDACTED] because they don't exist.

The above passage directly conflicts with the petitioner's assertions in the September 17, 2003 and January 8, 2003 letters. In the September 17, 2003 and January 8, 2003 letters the petitioner claims that since the beneficiary will be working under the direction of Mr. Olfati, a licensed architect, and will not be signing

plans, no license is required for the position. On remand, the petitioner asserts that Mr. [REDACTED] will not be required to supervise the beneficiary. Whether the beneficiary will work under the supervision of a licensed architect goes to the heart of determining whether the beneficiary is qualified to perform the proposed position of an architect. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The AAO finds that no independent evidence in the record resolves the inconsistencies between the petitioner's initial assertion that the beneficiary will be "working under the direction of a licensed [a]rchitect," and the later statement in the August 22, 2005 letter that this supervision is not required. CIS 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)(12). Any facts that come into being subsequent to the filing of a petition cannot be considered when determining whether the beneficiary is qualified to perform a particular specialty occupation. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).

Counsel's reference to the petitioner's August 22, 2005 letter is not persuasive in establishing the beneficiary's qualifications as the content in the August 22, 2005 letter is inconsistent with the petitioner's earlier January 8, 2003 letter delineating the proposed position. In a January 8, 2003 letter, the petitioner described the proposed position as follows:

We have integrated computer technology into all phases of the design process from conceptual design to the generation of final construction drawings. Accordingly, we are in need of an [a]rchitectural [d]esigner who is not only able to plan, design, and administer building projects for clients, but can also provide technical knowledge in computer aided design ("CAD").

The petitioner also stated that as an architectural designer the beneficiary "will be responsible for developing and originating designs detailing the interior and exterior of our construction projects."

The petitioner portrays the beneficiary as being responsible for evaluating design ideas based on an understanding of:

[M]ethods of construction, building materials, applicable zoning and building codes, client specifications and computer aided design (CAD) and imaging capabilities. His duties include survey of existing conditions, schematic design, and design development, preparation of construction documents, programming, project scheduling, budgeting, bid qualifications and construction administration. [The beneficiary] will be responsible for 3d models, perspectives and animations for every project [the petitioner] works on. After which, he will conceive, plan[,] and construct models for new or modified structures.

Counsel states that the beneficiary will not engage in the "practice of architecture" as the beneficiary will not "offer, perform, or control site planning or design of buildings or structures." The petitioner's January 8, 2003 letter, however, does state that the beneficiary will be involved with structures; in this letter the petitioner stated that the beneficiary will "conceive, plan[,] and construct models for new or modified structures." In light of the other duties described in the January 8, 2003 letter, the proposed position involves the "practice of architecture" as that term is described in the California Business and Professions code. Thus, the proposed position requires proper licensure or supervision by a licensed architect.

In the August 22, 2005 letter the petitioner states that its business operations are divided into two parts: the importation of stone products, and the small projects that require architectural design services. The assertion that the beneficiary will work on "small projects," is not suggested by the petitioner in the January 8, 2003 letter, the contents of which are set forth above in this decision. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*. The AAO finds that no independent evidence in the record resolves the inconsistencies relating to architecture services described in the January 8, 2003 and the August 22, 2005 letters.

The AAO notes that counsel's assertion that the petitioner's stone products and designs are used strictly to enhance a building's beauty and aesthetic quality, and that the petitioner never claimed that its services enhanced or contributed to a building's safety or to that of its occupants is not persuasive in light of the AAO's discussion in this decision.

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has failed to meet that burden.

ORDER: The director's October 3, 2005 decision is affirmed. The petition is denied.