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U.S. Citizenship
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FILE: EAC 04 091 51281 Office: VERMONT SERVICE CENTER Date: **AUG 18 2006**

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the 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 an employment staffing company that seeks to employ the beneficiary as an accountant. 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 record shows that the Form I-129 petition was initially submitted in February 2004. The service center sent the petitioner a request for evidence dated April 12, 2004 requesting, among other things, that the petitioner provide a copy of the petitioner's "contract with the specific facility where the beneficiary will be working" and a "copy of the employment contract between that facility and the beneficiary." The petitioner complied by submitting a letter dated June 15, 2004 listing the beneficiary's duties and hours and stating that the petitioner had two accountants in its employ.

The director then denied the petition because "the record lacks sufficient evidence to convince [CIS] that the beneficiary will be occupied primarily in a specialty occupation." The director stated that CIS "is not convinced that the petitioner actually requires the additional services of someone performing in a qualifying specialty occupation as an accountant in addition to the two accountants [the petitioner claims] to already employ." The director also denied the petition—citing section 274C(a) of the Act—because CIS was unable to make a determination of the "validity of any positions offered or claims made, or the authenticity of any documents submitted by [the petitioner]" due to "the large number of obvious and intentional alterations to various documents submitted by [the petitioner] as well as a number of misleading statements made by [the petitioner]." In particular, the director found that "contracts between [the petitioner] and the beneficiary as well as pay statements for several beneficiaries...had been obviously altered" to remove sponsorship or filing fee deductions. The director also noted inconsistencies in the number of employees the petitioner listed in the various petitions it had filed and in income tax statements submitted with these petitions. Finally, the director found that the petitioner made "false and misleading statements" in petitions it filed for "in-house accountants" concerning the number of accountants working for the petitioner.

On appeal counsel contends that the director erred in denying the petition on the basis of evidence not in the record of proceeding. Counsel also states that the petitioner has not altered any documents or intentionally misrepresented any fact to CIS and that the director erred in concluding that it had. Counsel asserts that CIS also mistakenly concluded that the petitions submitted by the petitioner for accountants were for an in-house accounting staff. Counsel indicates that the accountants for whom the petitioner petitioned will actually be working for the petitioner's clients. Counsel states that "these accountants do the work at [the] petitioner's main office instead of being assigned individually to work at the offices of [the petitioner's] clients which might not have the necessary space to house the accountants."

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 AAO concurs with the petitioner that the director erred in denying the petition on the basis of evidence not in the record of proceeding and without giving the petitioner an opportunity to address the reasons for denial. Each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Furthermore, 8 C.F.R. § 103.2(b)(16)(i) requires the director to advise the petitioner

“if a decision will be averse to the...petitioner and is based on derogatory information considered by the Service and of which the...petitioner is unaware”, and give the petitioner “an opportunity to rebut the information in his/her own behalf before the decision is rendered.” The request for further evidence sent by the director in this case did not give the petitioner adequate notice of the director’s intention to deny the petition on the basis of misrepresentations or alteration of documents or an opportunity to rebut this information.

However, the AAO finds that the petitioner has failed to submit sufficient evidence from which CIS may determine that the proffered 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 duties described by the petitioner indicate that the proffered position is for an accountant. The evidence of record establishes that the petitioner, in general, is an employment contractor in that the petitioner places individuals at multiple locations to perform services established by contractual agreements for third-party companies. The petitioner submitted inconsistent evidence concerning the intended employment of the beneficiary. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As stated above, counsel asserts that the beneficiary will actually perform accounting services on behalf of the petitioner's clients, and not for the petitioner itself as CIS previously determined. Counsel indicates that CIS mistakenly concluded from the evidence submitted by the petitioner that the beneficiary would perform services directly for the petitioner. The AAO notes that in the letter submitted by the petitioner in response to the director's request for evidence, the petitioner neither states that the beneficiary will be performing services directly for the petitioner nor that the petitioner will be performing services on behalf of the petitioner's clients. Nevertheless, the director's inference that the beneficiary would perform services directly for the petitioner—based on the fact that the petitioner submitted no evidence of a contract or work order with a third-party company pursuant to which the beneficiary would perform accounting services, combined with the petitioner's statement that the petitioner had two other accountants in its employ—was reasonable.

Even accepting counsel's explanation for the aforementioned inconsistency, the petitioner has failed to demonstrate that the proffered position is a specialty occupation because it has not provided contracts, work orders or statements of work describing the duties the beneficiary would perform for the entity actually receiving the beneficiary's services.

The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

In this case, the petitioner has submitted no contracts, work orders or statements of work describing the duties the beneficiary would perform for the entity actually receiving the beneficiary's services. Thus, as the record contains insufficient documentation establishing the specific duties the beneficiary would perform under contract for the petitioner's clients, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(1).

As demonstrated in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. 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.