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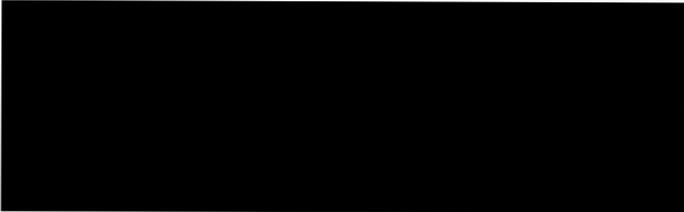


FILE: WAC 04 181 50720 Office: CALIFORNIA SERVICE CENTER Date: **OCT 19 2006**

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 materials 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 service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is a label manufacturer. It seeks to employ the beneficiary as an accountant and to extend his classification 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 on the grounds that the beneficiary was working for the petitioner at an hourly wage rate below the figure indicated in the petitioner's labor condition application (LCA), as certified by the Department of Labor (DOL), and at an annual pay rate below the figure indicated by the petitioner's CEO. These discrepancies had not been satisfactorily explained, the director stated, thereby undermining the credibility of all the petitioner's evidence that a bona fide specialty occupation position existed for the beneficiary.

On appeal counsel asserts that the petitioner increased the beneficiary's hourly wage rate to comply with the figure in the LCA as soon as it realized that the beneficiary was being underpaid in May 2004, and that the petitioner was also awarding the beneficiary back pay to compensate for the amount he was underpaid from the time the petitioner purchased the beneficiary's initial H-1B employer in March/April 2003. According to counsel, the evidentiary discrepancies cited in the director's decision have been resolved and the petition should be approved. The AAO agrees.

The record indicates that the beneficiary was initially granted H-1B classification on July 7, 2001, valid until June 13, 2004, pursuant to a petition filed by another employer (Rapture, Inc.); that the petitioner acquired the assets of the original employer in March/April 2003; and that the instant petition was filed on June 11, 2004 to extend the beneficiary's stay in H-1B status until May 10, 2007. Counsel acknowledges that the initial petition and accompanying LCA filed in 2001 listed the beneficiary's hourly wage as \$17.25, but that the beneficiary was not paid that amount by his initial H-1B employer or by the instant petitioner in the months following its takeover of the original employer in March/April 2003. Pay statements in the record establish that the petitioner paid the beneficiary at the hourly rate of \$12.75 during 2003, that the beneficiary's gross pay was \$1,020 every two weeks in the spring of 2004, and that in late May 2004 his gross pay was increased to \$1,400 every two weeks.¹ This documentation is consistent with counsel's assertion that the petitioner increased the beneficiary's wage rate in May 2004 to comport with the original LCA, as well as with the new LCA certified by the DOL on April 30, 2004, which lists the beneficiary's hourly wage as \$17.45. It is also consistent with the statement of the petitioner's CEO, in a letter dated October 1, 2004, that the beneficiary's "present annual pay is \$36,000," since multiplying \$1,400 by 26 pay periods yields an annual figure of \$36,400.

Based on the foregoing evidence, the AAO determines that the petitioner is complying with the wage conditions of its currently certified LCA, which was filed with the H-1B extension petition in June 2004. While the record does not demonstrate that the petitioner has made the promised back payments to the beneficiary to compensate him for the difference between the LCA wage rate and his actual pay rate during

¹ The record indicates that the beneficiary was on an unpaid leave of absence from January 1, 2004 to April 15, 2004.

the first fourteen months he worked for the company,² the beneficiary's post-May 2004 pay statements show that the petitioner is complying with its current LCA. Thus, the evidence of record establishes that the petitioner is in full compliance with its LCA obligations under the current petition.

The petition may not be approved, however, until the petitioner establishes that the proffered position is a specialty occupation and that the beneficiary is qualified to perform services in a specialty occupation. Notwithstanding the service center's previous approval of H-1B status for the beneficiary, the current petition to continue the beneficiary's H-1B status cannot be approved unless the record establishes current eligibility. Each nonimmigrant petition 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 petitioner's record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

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.

As provided in 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.

² Though the petitioner, in a letter from its CEO dated March 16, 2005, asserts that "we are also paying the full amount of back wages owing to [the beneficiary] from the time of the acquisition of [his initial H-1B employer] in March 2003 and continuing up to May 2004 in accordance with [DOL] regulations to amend this failure of compliance," there is no documentation showing that such back wages have actually been paid. The previous petition may be revoked by the director pursuant to revocation on notice under 8 C.F.R. § 214.2(h)(11) should the petitioner fail to compensate the beneficiary for the amount owed under that petition.

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.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), provides that an alien must have the following credentials to be qualified to perform the services of a specialty occupation:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

As further explained in 8 C.F.R. § 214.2(h)(4)(iii)(C), an alien must meet one of the following criteria to qualify to perform the services of a specialty occupation:

- (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.

In reviewing the documentation of record, the AAO notes that the petitioner neglected to submit a copy of its most recent federal income tax return, as requested by the director in his request for evidence. Instead, the petitioner submitted copies of the beneficiary’s federal income tax returns for the years 2001-2003. The AAO also notes that the current record fails to establish that the beneficiary is qualified to perform services in a specialty occupation. Though the petitioner has submitted an official transcript of the beneficiary’s academic record – showing that he graduated from Laguna College of Business and Arts in the Philippines with a bachelor of science in commerce and a major in accounting on June 1, 1987 – there is no report from an educational credentials evaluation service, or other documentation, confirming that this degree is equivalent to a bachelor’s degree in accounting or a related specialty from a U.S. college or university, as required for the beneficiary to qualify under 8 C.F.R. § 214.2(h)(iii)(C)(2) to perform services in a specialty occupation.

The petition is remanded for a determination by the director as to whether the proffered position qualifies as a specialty occupation and whether the beneficiary is qualified to perform services in a specialty occupation. The director may afford the petitioner reasonable time to provide evidence pertinent to those issues, as well as any other evidence the director may deem necessary. The director shall then issue a new decision based on the evidence of record. As always, the burden of proof rests with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision of February 24, 2005 is withdrawn. The petition is remanded to the director for entry of a new decision. If adverse to the petitioner, the decision shall be certified to the AAO for review.