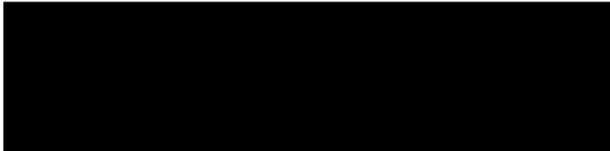


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FILE: WAC 06 048 52365 Office: CALIFORNIA SERVICE CENTER Date: **DEC 26 2007**

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:

SELF-REPRESENTED

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.

James Blinzinger, for

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 a law office that seeks to extend its authorization to employ the beneficiary as a full-time accountant. The petitioner, therefore, 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 director denied the petition determining that the petitioner failed to establish that there is a specialty occupation available for the beneficiary. The director also found that the petitioner failed to establish the total number of beneficiaries who have utilized the accompanying labor condition application (LCA).

The petitioner checked the block indicating that the petitioner would be sending a brief and/or evidence to the AAO within 30 days. The AAO sent a fax to the petitioner on October 31, 2007, informing the petitioner that no separate brief and/or evidence was received, to confirm whether or not the petitioner had sent anything else in this matter, and as a courtesy, providing the petitioner with five days to respond. On November 8, 2007, the petitioner mailed a brief; however, no evidence of the original filing date was included. Although the petitioner has not established that the brief was timely filed, the submission will be considered. The brief erroneously refers to the petition as a Form I-140 Petition for Immigrant Worker.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B, with the brief. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the petitioner demonstrated that there is a specialty occupation available for the beneficiary. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education,

business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a 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.

Pursuant to 8 C.F.R. § 103.2(a)(2):

By signing the application or petition, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the application or petition, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. . . .

Citizenship and Immigration Services (CIS) consistently interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The petitioner seeks the beneficiary's services as a full-time accountant. Evidence of the beneficiary's duties includes: the petitioner's October 18, 2005 letter in support of the petition and the petitioner's April 18, 2006 response to the director's request for evidence. As stated by the petitioner, the proposed duties are as follows:

1. Oversee client and attorney trust accounts;
2. Identify possible improvements to the efficiency of the petitioner's financial operations by studying its financial statements;
3. Provide financial and tax advice to management;
4. Recommend methods for tax-related improvements;
5. Provide information to the petitioner's staff related to the design of accounting and data-processing systems;
6. Prepare budgets;
7. Manage assets and investments; and
8. Audit financial statements.

The director found that the petitioner failed to provide the requested information concerning prior petitions filed, approved, or pending for the two accountant positions reflected on the LCA certified on December 8, 2005. The director also found that the petitioner had misstated the beneficiary's wage on the petition, as the DE-6 submitted in response to the director's RFE reflects only \$4,626.00 paid to the beneficiary for the first quarter of 2006, which is not consistent with the annual wage reflected on the petition: \$38,626.00. The director concluded that the petitioner thus failed to comply with the certification requirements of 8 C.F.R. § 103.2(a)(2), and thus failed to establish that there is a specialty occupation available for the beneficiary.

On appeal, the petitioner states, in part, that it has been in business for over 17 years and handles thousands of clients, thereby requiring an accountant to handle its financial reporting and record maintenance. The petitioner also states that it already provided the requested information about the identity of the individuals who have utilized the LCA.

Pursuant to 8 C.F.R. § 214.2(h)(4)(i)(B)(3):

If all of the beneficiaries covered by an H-1B labor condition application have not been identified at the time a petition is filed, petitions for newly identified beneficiaries may be filed at any time during the validity of the labor condition application using photocopies of the same application. Each petition must refer by file number to all previously approved petitions for that labor condition application.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. Evidence that the alien qualifies to perform services in the specialty occupation. . . .

The record contains a letter, dated January 4, 2006, from the petitioner listing the beneficiary's name and the additional name of [REDACTED]. The petitioner also provides two ETA case numbers. The petitioner, however, does not provide the file numbers of all previously approved petitions for the LCA, in compliance with 8 C.F.R. § 214.2(h)(4)(i)(B)(3). Nor does the petitioner address the director's finding that the beneficiary's wage is misstated on the petition. As noted in 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), the petitioner must certify that it will comply with the terms of the LCA for the duration of the authorized period of stay. Although the petitioner certifies that it intends to comply under the terms of the current LCA, it has not previously complied with the LCA wage requirement. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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 petitioner therefore has not overcome the director's objections. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

Accordingly, the AAO shall not disturb the director's denial of the petition.

Although the director did not make a specific determination regarding the eligibility of the beneficiary to perform H-1B level services, the AAO observes beyond the decision of the director that the record does not contain an evaluation of the beneficiary's foreign education or other evidence demonstrating the beneficiary's qualifications as required by 8 C.F.R. § 214.2(h)(4)(iii)(C).

In addition, the petitioner has not provided a certified labor condition application that is valid for the period of the requested extension. It is noted that the dates of the intended employment, as reflected on the petition, are from October 1, 2005 to October 30, 2007, while the LCA – ETA Case # [REDACTED] is certified for Date Starting December 8, 2005 and Date Ending October 1, 2007. Moreover, that application was certified on December 8, 2005, a date subsequent to December 1, 2005, the filing date of the visa petition.

The regulation at 8 C.F.R. § 214.2(h)(15)(ii)(B) provides that the request for extension must be accompanied by either a new or photocopy of the prior certification from the Department of Labor that the petitioner continues to

have on file a labor condition application valid for the period of time requested for the extension. 8 C.F.R. § 103.2(b)(12) requires that evidence must establish eligibility as of the time of filing.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). For these additional reasons, the petition will not be approved.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.