

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D2

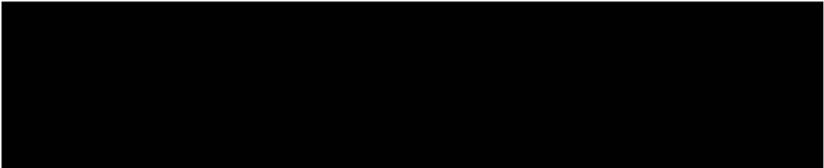


FILE: WAC 07 058 51676 Office: CALIFORNIA SERVICE CENTER Date: **AUG 01 2008**

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 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 dry cleaning establishment that seeks to continue its employment of the beneficiary as a consulting attorney. The petitioner, therefore, endeavors to extend the beneficiary's 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 basis of her determination that the petitioner had failed to demonstrate that the beneficiary qualifies to perform the duties of a specialty occupation. Specifically, the director found that the beneficiary lacked the licensure required by the State of Florida for this position. On appeal, counsel contends that the director erred in denying the petition.

The record of proceeding before the AAO contains (1) the 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) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

As a preliminary matter, the AAO notes that the proposed position's status as a specialty occupation is not at issue; it accepts that the proposed position of a consulting attorney qualifies for classification as a specialty occupation.

In its November 20, 2006 letter of support, the petitioner stated the following:

We continue to require the position of Consulting Attorney due to the complex dry cleaning regulations which are constantly changing and due to the current number of stores in operation. With each store the company opens and operates copious amounts of negotiations and legal advice is required not to mention the human resources aspects and the legal advice this will entail [underlining in original].

According to the petitioner, its proposed position would consist of the following duties: (1) reviewing government regulations, contracts with other companies, and property interests; (2) advising the petitioner's directors on business transactions, liabilities, and legal rights and obligations; (3) researching and studying statutes, regulations, and local ordinances to properly advise the petitioner's directors on business transactions or business disputes; (4) interpreting laws and regulations for the petitioner; (5) preparing and drafting contracts; (6) acting as the petitioner's legal representative; (7) negotiating, administering, extending, terminating, and renegotiating contracts; and (8) handling "all matters relating to the corporation, amendments, renewals, and the like." With regard to Florida bar licensure, the petitioner stated the following:

This is a non-licensed position since legal advice is not offered to individuals or other entities, rather the position requires analysis of legal issues, procedures[,] and documents related to the petitioner entity.

In her July 10, 2007 denial, the director stated the following:

It does not matter that the area of concern involves advising the petitioner only. What matters is that the beneficiary is providing legal advice to the petitioner and acting as the legal representative for the petitioner. . . .

[T]he beneficiary would not be able to perform a majority of the proffered duties mentioned above because the beneficiary is not eligible to fully practice law in the State of Florida.

[T]he petitioner has not established that the beneficiary possesses the appropriate licensure as required by the proffered position, or has proven an exemption or exception from said requirement.

In his September 7, 2007 appellate brief, counsel asserts that the director abused her discretion by denying the petition. Counsel contends that the petitioner “submitted documentation to support its continued need to employ the Beneficiary in the capacity of Consulting Attorney without ever requiring that the Beneficiary have a law license.” Counsel further states the following:

The fact that the Beneficiary is called a “Consulting Attorney” within the organization does not mean and should not be inferred that the Beneficiary will act in the traditional capacity as a licensed Attorney. . . .

It is clear that the Beneficiary possess[es] the skills and degrees necessary to be an Attorney in the United States but for lack of licensure. However, it should be noted that the Petitioner does not REQUIRE the work of a licensed, Florida Attorney but rather it requires the services of an individual with the knowledge of legal terminology, regulations, statutes, and the like in order to work in a consulting capacity . . . In the instant case, the Beneficiary will not represent the Petitioner in any legal proceedings whatsoever. The Beneficiary will act in a consulting capacity; it could even be said that the Beneficiary will be acting in a regulatory consulting capacity rather than in a representative capacity. Although the original Petitioner letter states that the Beneficiary will be acting as a legal representative for the Petitioner, it was further clarified . . . that the Beneficiary will only spend about 3 hours a week in this minimal role.¹ This role does not require the Beneficiary to represent the Petitioner in any legal proceedings, but rather that he review and sign as Consulting Attorney any documents to be presented by the Petitioner to a governmental agency or the like. . . .

The Petitioner continues to maintain that a license is not required for the Beneficiary to act as a Consulting Attorney. The Beneficiary is not representing the Petitioner in any legal proceedings and is not identified as having any legal and binding authority over the company. . . .

¹ The petitioner submitted a copy of the beneficiary’s resume with the Form I-129. On his resume, the beneficiary describes his job duties for the petitioner as follows:

Acted as a legal representative for the company in the areas of franchising, negotiations, and international relations. Negotiated and reviewed contracts in which the company took part. Researched, studied, and interpreted statutes, regulations[,] and local ordinances in order to advise the company directors concerning business transactions.

The Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), a resource the AAO routinely consults for its information about the duties and educational requirements of particular occupations, confirms that licensure is required for attorneys in every State. Pursuant to 8 C.F.R. § 214.2(h)(4)(v), if the State requires licensure in order to work in the specialty occupation, the beneficiary must possess the license prior to approval of the H-1B petition:

- (A) General. If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.
- (B) Temporary licensure. If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.
- (C) Duties without licensure. In certain occupations which generally require licensure, a state may allow an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation. In such cases, the director shall examine the nature of the duties and the level at which they are performed. If the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted.
- (D) H-1C nurses. For purposes of licensure, H-1C nurses must provide the evidence required in paragraph (h)(3)(iii) of this section.
- (E) Limitation on approval of petition. Where licensure is required in any occupation, including registered nursing, the H petition may only be approved for a period of one year or for the period that the temporary license is valid, whichever is longer, unless the alien already has a permanent license to practice the occupation. An alien who is accorded H classification in an occupation which requires licensure may not be granted an extension of stay or accorded a new H classification after the one year unless he or she has obtained a permanent license in the state of intended employment or continues to hold a temporary license valid in the same state for the period of the requested extension.

As noted previously, the sole issue on appeal is whether licensure is required to perform the duties of the proposed position. If so, then it is clear from the record that the beneficiary does not satisfy the criteria at 8 C.F.R. § 214.2(h)(4)(v), and the petition must be denied.

Upon review, the AAO finds that the duties of the proposed position clearly require licensure from the Florida Bar Association.² The duties of the proposed position as delineated above are those of a practicing attorney, and he is held out by the petitioner as its attorney. He interprets regulations, provides legal advice, and acts as the petitioner's legal representative. The record of proceeding establishes that the beneficiary is engaging in the practice of law. The beneficiary, however, does not possess a license to practice law in the State of Florida. Nor is he certified as a foreign legal consultant under Rule 16 of the Rules Regulating the Florida Bar, or as an authorized house counsel under Rule 17 of the Rules Regulating the Florida Bar.³

As the duties of the proposed position require licensure, and the beneficiary does not possess such licensure, the record does not demonstrate that the beneficiary would be able to fully perform the duties of the proposed position. Accordingly, the petition was properly denied.

Regarding the director's previous approval of an H-1B petition on behalf of this beneficiary, the AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.2(b)(16)(ii). If the previous petition was approved based upon the same evidence contained in this record, its approval was gross and material error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director approved the nonimmigrant petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The petitioner has not established that the beneficiary meets the licensure requirements as set forth at 8 C.F.R. § 214.2(h)(4)(v), and the AAO will 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.

² The website of the Florida Bar Association may be accessed at <http://www.floridabar.org>.

³ See *id.*