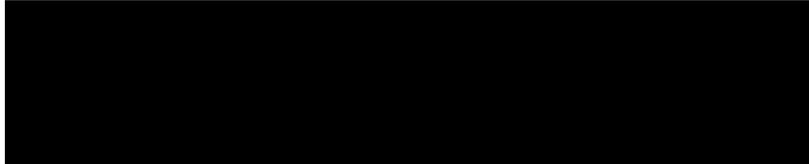




U.S. Citizenship
and Immigration
Services

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FILE: EAC 02 229 52941 Office: VERMONT SERVICE CENTER Date: JAN 25 2008

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:
[Redacted]

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 initially approved the nonimmigrant visa petition. Upon subsequent review of the record, the director issued a notice of intent to revoke (NOIR), and ultimately revoked, approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the director's decision affirmed. Approval of the petition will be revoked.

The petitioner, a manufacturer and installer of custom commercial kitchen equipment, seeks to employ the beneficiary as an electroplating manager.¹ 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation, filed on June 28, 2002; (2) the director's request for additional evidence, dated July 8, 2002; (3) the petitioner's September 28, 2002 response to the director's request for additional evidence; (4) the director's approval of the petition, dated October 9, 2002; (5) the consular return memorandum, dated November 6, 2002; (6) the director's February 20, 2003 notice of intent to revoke the petition's approval (NOIR); (7) the petitioner's March 14, 2003 response to the NOIR; (8) the director's May 20, 2003 revocation; and (9) the Form I-290B and supporting documentation, received at the service center on June 13, 2003. The AAO reviewed the record in its entirety before issuing its decision.

After obtaining the H-1B approval notice, the beneficiary appeared at the United States consulate in Almaty, Kazakhstan to obtain the visa. The interviewing officer, however, denied the visa and returned the petition to the service center.² In her November 6, 2002 memorandum the interviewing officer stated, in pertinent part, the following:

I asked the applicant to describe what the company does. She could not elaborate beyond stating they "deal in kitchen and ventilation equipment." "Kitchen and Ventilation Corp." appears in very large lettering on [the petitioner's] letterhead. When pressed, she stated that [the petitioner] manufactured this equipment, but she could not give one example of what type of equipment was manufactured other than to state "kitchen."

I asked the applicant to describe what her future duties would be. She could not elaborate beyond stating she will be an "Electroplating Manager" except to state that this is an administrative position and she will work to improve human performance and analyze the "process" but could not state what the process was in any way.

I asked the applicant to describe her previous employment other than her job in Dubai (which I have no way of confirming). She said that prior to Dubai she worked in a factory in Almaty where she used her chemical expertise. I asked her for documents from this prior professional experience but she could not produce anything. I asked her for her diploma(s) but she did not have these either.

¹ The AAO notes that counsel and the petitioner refer to the position as both "electroplating manager" and "electroplanting manager."

² Subsequent to the U.S. consulate in Almaty's refusal to grant the visa, the beneficiary applied for a visa at the U.S. consulate in Dubai, United Arab Emirates. The U.S. consulate in Dubai issued the visa. As the U.S. consulate in Almaty had returned the underlying petition to the service center when it rejected the visa application, the basis of the visa's issuance in the United Arab Emirates is unclear to the AAO.

The INS's Notice of Action of July 8, 2002 apparently requested additional information about whether this position qualifies as a "specialty occupation." The petitioner responded by stating that this position includes aspects of "support manager, operations research analyst, market analyst, resource manager, system architect, designer, chemist, and or project manager." The applicant, however, thought the job would be administrative and has no idea what she would be doing.

The petitioner also states that "the duties of the incumbent are highly technical requiring skills and experience of an individual with Chemistry, Biology, and Management." The applicant could only come back to the same two words "Electroplating Manager" though she had no idea what this meant.

* * *

The applicant has no idea what she'll be doing at this job which leads me to believe that this I-129 petition was filed on the applicant's behalf in order to get her in to the U.S., though the true intention of her travel does not seem to be to work in the capacity described in the petition. Due to the fact that the applicant appears to have no information about her qualifications, the operations of the petitioner's business, nor what she would be expected to do therein, I return this petition to INS for reconsideration in conjunction with this new information.

The interviewing officer relayed these concerns to the service center, and the director, finding that these issues constituted good and sufficient cause, issued the NOIR on February 20, 2003.

The director's NOIR included the memorandum from the consulate relaying the interviewing officer's concerns and provided the petitioner 30 days during which to address these concerns. Specifically, the director stated the following:

The Consulate has concluded that the alien is not qualified for the specialty occupation as an Electroplating Manager. It appears the alien does not possess the appropriate degree, equivalent work experience, or a combination of education and work experience for the specialty occupation. Further, it appears the alien does not have the requisite work experience in the electroplating field forgoing a bachelor's degree . . . appropriate to the field.

Consular officials made this determination during the conduct of an interview with the beneficiary. The beneficiary could not answer any of the questions asked regarding the electroplating process.

Submit additional evidence demonstrating that the alien qualifies [to perform the duties of a] "specialty occupation." Do not re-submit evidence previously submitted for consideration. The evidence required is of the type not previously reviewed or considered by this Service or submitted to the Consulate.

Although specifically instructed not to resubmit evidence already contained in the record of proceeding, counsel's March 14, 2003 response to the director's NOIR resubmitted evidence already contained in the record of proceeding. Counsel stated the following:

The consul has chosen to disregard evidence which clearly establishes the beneficiary as a professional and therefore acted arbitrarily in refusing the visa. We are again submitting copies of all the pertinent documents including a diploma and a job experience letter which was presented.

Counsel also stated that the interviewing officer at the U.S. consulate made damaging statements and acted with hostility toward the beneficiary; stated that the beneficiary was able to subsequently obtain a visa in the United Arab Emirates with no difficulties; and asserted that the director was estopped from revoking approval of the petition.³

As counsel's submission did not respond to the director's NOIR, the director revoked the petition's approval on May 20, 2003. The director stated the following:

Counsel provided a detailed response stating the reasons the beneficiary should be considered qualified for the specialty occupation. However, you did not provide new corroborating evidence to support these claims. The evidence you provided consisted of previously considered documentation submitted to the Service and to Consular officials.

On appeal, counsel cites several precedent decisions and regulations regarding classification of a proposed position as a specialty occupation. However, such citations are misplaced: the status of the proposed position as a specialty occupation is not at issue here; the issue is whether the beneficiary is qualified to perform the duties of the proposed position. In this regard, counsel submits another copy of the beneficiary's diploma, as well as another copy of a letter regarding the beneficiary's previous work experience. Counsel stated the following:

Electroplating Specialist⁴ is a profession based on the complexity of duties, which a person without a degree in chemistry would not be able to perform with sufficient competence.

³ The AAO is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of CIS from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). Estoppel is an equitable form of relief that is available only through the courts. The jurisdiction of the AAO is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). The jurisdiction of the AAO is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). The AAO, therefore, has no authority to address the petitioner's equitable estoppel claim.

⁴ The AAO notes that counsel has changed the title of the proposed position on appeal, from that of an electroplating "manager" to that of an electroplating "specialist." However, such changes are not permitted. A petitioner may not offer a new position to the beneficiary, or materially change a position's title, level of authority within the organizational hierarchy, or the associated job responsibilities on appeal. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

To illustrate the complexity of the knowledge and training required for the position offered, we refer you to [the] description of prior experience which has already been provided to the Service. It provides a clear idea of the technicalities and complexities involved in the electroplating process.

The position requires complete understanding of the principles of chemical analysis and the computer applications necessary to develop technologies for application[s] in process.

It appears that the Service was confused because the position offered did not directly correspond to the beneficiary's degree . . . Such a degree does not exist . . . In order for that portion of the statute which reads "equivalent" to have any meaning it would have to include not only skill, knowledge, work experience[,] or training but also various combinations of academic and professional experience.

The AAO has conducted a *de novo* review of the record of proceeding. Upon review, it finds that the petitioner has not overcome the director's revocation. The AAO finds that the petitioner has not established that the beneficiary is qualified to perform the duties of the proposed position.

First, the AAO notes that the petitioner has failed to produce any new documentation regarding the beneficiary's qualifications to perform the duties of the proposed position, as specifically requested by the director. For this reason alone, the director's decision will be affirmed, as the failure to submit requested evidence that precludes a material line of inquiry is a ground for denying the petition. 8 C.F.R. § 103.2(b)(14).

Nor has counsel made any attempt to explain why the beneficiary was unable to answer basic questions regarding the petitioner's business operations. Counsel's statements regarding the interviewer's hostility do not address this issue, and do not overcome the concerns of the interviewing officer at the consulate. No evidence, such as affidavits or other primary evidence directly from the beneficiary has been provided. The record contains no evidence to address, or overcome, such concerns.

Nor does it appear that the beneficiary's background has prepared her for the performance of the duties of the proposed position. Counsel has conceded that the beneficiary's degree does not "not directly correspond" to the proposed position. Counsel states that, because the regulation "allow[s] for a bachelor's degree or its equivalent," CIS should take into account the beneficiary's work experience. However, the petitioner has not provided additional evidence regarding the beneficiary's work experience requested by the director, despite being afforded ample opportunity to do so. The letters submitted, and resubmitted, by the petitioner do not establish that she qualifies to perform the duties of the proposed position. The beneficiary's work experience has not been evaluated by an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience.

The regulations and caselaw cited by counsel govern classification of the proposed position as a specialty occupation; they do not relate to demonstrating that the beneficiary is qualified to perform the duties of the specialty occupation. The requirements for establishing that the beneficiary is qualified to perform the duties of a specialty occupation are set forth at 8 C.F.R. § 214.2(h)(4)(iii)(C).

These issues raised by the consular official relate directly to the issue of the beneficiary's qualifications to perform the duties of the proposed position. The director afforded the petitioner 30 days to address these concerns, but the petitioner failed to do so. Rather, counsel resubmitted copies of documents already contained in the record of proceeding – documents that were before the interviewing officer at the time of the visa interview. Simply resubmitting these documents and asserting that they overcome the interviewing officer's specific concerns does not meet the petitioner's burden of proof in this matter.

Pursuant to 8 C.F.R. § 214.2(h)(11)(B)(iii)(5), the director may revoke an H-1B petition if approval of the petition violated paragraph (h) of 8 C.F.R. § 214.2, or involved gross error. In this instance, approval of the petition was in violation of paragraph (h) of the cited regulation because the beneficiary is not qualified to perform the services of the specialty occupation.

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 director's May 20, 2003 decision is affirmed. Approval of the petition is revoked.