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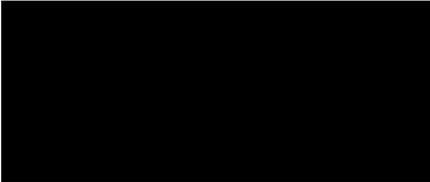
U.S. Department of Homeland Security
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U.S. Citizenship
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FILE: WAC 02 202 50757 Office: CALIFORNIA SERVICE CENTER Date: FEB 07 2005

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:



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, Director
Administrative Appeals Office

DISCUSSION: The service center director initially approved the nonimmigrant visa petition. Based upon information obtained during the beneficiary's subsequent nonimmigrant visa interview at the U.S. Embassy in Abu Dhabi the director determined that the beneficiary was not eligible for the benefit sought. Accordingly, the director served the petitioner with a notice of intent to revoke the approval of the petition. The director ultimately revoked the approval of the petition and the matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner describes itself as a professional employer organization that provides professional staffing services. It seeks to employ the beneficiary as an electronics engineer and to classify him 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 found that the record failed to establish the beneficiary was qualified to perform the services of 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.

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.

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.

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

- (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.

The record of proceeding before the AAO contains (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE), (3) the petitioner's response to the RFE and supporting materials, (4) the approval notice, (5) the notice of intent to revoke (NOIR), (6) the petitioner's response to the NOIR; (7) the notice of decision; and (8) Form I-290B and the appeal brief. The AAO reviewed the record in its entirety before issuing its decision.

In a letter accompanying its Form I-129 the petitioner described itself as a placement agency for professional workers in diverse fields such as engineering, finance, computers, medicine, and administrative services. One of the petitioner's clients is a building contractor, Serious Remodeling, which requests the temporary services of an electronics engineer employed by the petitioner. The duties of the proffered position were described by the petitioner as follows:

1. Performing research and testing of electronic and electrical components, equipment, systems, applying techniques and principles and knowledge of electronic engineering.
2. Directing engineering personnel in fabrication of test control equipment and determining methods, procedures and conditions for testing machines.
3. Developing application of controls, instruments and systems for new uses and improvement of existing items mentioned herein.
4. Writing of performance requirements and developing maintenance schedules.
5. Solving of electronic and electrical operating problems and estimating time and costs involved therein.
6. Attending to electronic and electrical circuits/systems schematic capture and layout.

According to the petitioner the contractor required the services of an individual with at least a bachelor's degree in electronics or electrical engineering or its equivalent to perform the duties of the job. The beneficiary earned a bachelor's degree in electronics on July 23, 1999 from Islamic Azad University, Arak Branch, in Iran. The record includes a letter from e-ValReports, an educational credentials evaluation service in Mukilteo, Washington, declaring that the beneficiary's degree is the equivalent of a bachelor's degree in electronics engineering from an accredited university in the United States.

In response to the RFE counsel repeated the six job duties previously itemized by the petitioner and estimated the percentage of time the beneficiary would spend on each as follows: Duty no. 1 – 10%; duty no. 2 – 10%; duty no. 3 – 20%, duty no. 4 – 10%, duty no. 5 – 20%, duty no. 6 – 30%. Counsel indicated that the contractor currently employed one electrical engineer, one civil engineer, and four general workers, that its projects included the renovation, restoration and upgrading of commercial and residential buildings, and that the projects always encompassed electrical work, either upgrading existing systems or designing and installing new systems. Counsel also stated that the beneficiary would not supervise any employees in the proffered position, nor delegate any duties, but rather perform all of the duties himself.

On September 10, 2002 the director approved the petition for an H-1B visa, with validity from then until May 31, 2005. The director notified the U.S. consulate in Abu Dhabi, where the beneficiary was interviewed on or about November 19, 2002. The director issued his NOIR on March 4, 2003, in accordance with 8 C.F.R. § 214.2(h)(11)(iii), advising the petitioner that the U.S. consular officer in Abu Dhabi had concluded, based on the interview she conducted the previous November, that the beneficiary was not qualified to perform the services of the proffered position. The director cited the statement in the letter from e-ValReports that the beneficiary had six and a half years of experience as an electronics engineer, but indicated that the beneficiary had produced no evidence of such experience at the interview. The director also noted the consular officer's observation that the beneficiary, whose native language is Farsi, could not speak English, and concluded that would undermine the beneficiary's ability to perform some of the job duties, such as directing other engineering personnel, determining the proper methods and procedures to apply, and developing application of controls, instruments and systems for new uses. In addition, the director referred to the beneficiary's statement that his sister in California found the proffered position for him after he had initially been denied a tourist visa. Based on the information from the interview, the director concluded that the beneficiary was not qualified to perform the services of the proffered position. The director also expressed "considerable doubt" about the "bona fides" of the position, but he did not explain what he meant by this observation and did not draw any conclusion that the proffered position was not a specialty occupation. In accordance with 8 C.F.R. § 214.2(h)(11)(iii)(B), the petitioner was afforded 30 days to submit additional evidence in rebuttal of the NOIR.

Under 8 C.F.R. § 214.2(h)(11)(iii)(A), an approved petition may be revoked on any of the following grounds:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
- (2) The statement of facts contained in the petition was not true and correct; or
- (3) The petitioner violated terms and conditions of the approved petition; or

- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

On April 1, 2003 counsel responded to the NOIR, asserting that the U.S. consular officer provided no factual basis for her conclusion that the beneficiary is not qualified to perform the services of the proffered position, and has no demonstrated knowledge of the field of electrical/electronic engineering to be able to judge the beneficiary's professional competence. Counsel asserted that the beneficiary has the requisite educational requirements to perform the job, as documented in the record, and that evidence of his work experience was attached to the visa petition. Counsel asserted that mastery of the English language is not a prerequisite for the position of electronics engineer because most of the duties involve the application of universal principles of electrical/electronic engineering and do not require conversing in English. He also indicated that other employees of the petitioner spoke both Farsi and English, who could therefore interpret and translate for the beneficiary, as necessary. Counsel contended that there was nothing improper or fraudulent in the beneficiary's previous petition for a tourist visa and subsequent petition for an H-1B visa. Counsel also noted that the law allows an alien to reside in the United States for a temporary period as an H-1B nonimmigrant, while at the same time seeking to become a permanent resident of the United States. *See* 8 C.F.R. § 214.2(h)(16).

On September 11, 2003 the director issued his decision revoking the approval of the petition. After incorporating the factual findings and analysis of the NOIR, the decision quoted language from the NOIR referring to the consular interview in which the beneficiary provided no evidence of his alleged six and one half years of employment experience and was unable to communicate in English. The director declared that "[d]iscrepancies encountered in the evidence call into question the petitioner's ability to document the requirements under the statute and regulations." He also declared that "[t]he discrepancies in the petitioner's submissions have not been explained satisfactorily." Various excerpts of the petitioner's response to the NOIR were quoted, but the director determined that "none of the arguments are supported [by] evidence to overcome the deficiency in the petition." The director did not cite a specific regulatory ground as the basis for revocation, though his language appears to indicate a reliance on either 8 C.F.R. § 214.2(h)(11)(iii)(A)(2) or 8 C.F.R. § 214.2(h)(11)(iii)(A)(5).

In his appeal brief counsel reiterates the arguments previously presented in response to the NOIR. Counsel points out that there was no finding in the decision that the beneficiary's educational credentials failed to meet the regulatory requirement to qualify him to perform the services of a specialty occupation. Counsel contends, based on the nature of the job duties, that minimal English proficiency is required to perform the services of the position. Counsel reiterates the argument that the beneficiary's previous attempt to secure a tourist visa to enter the United States does not, in and of itself, impact his eligibility for an H-1B visa. The AAO agrees, and notes that the director did not make any determination in the decision based on the information about the denial of a tourist visa.

Counsel's appeal fails to overcome the bases for the director's denial of the instant petition. In the decision the director cited the beneficiary's failure to substantiate his alleged six and one half years of work experience as an electronics engineer. The letter from e-ValReports, dated April 5, 2002, refers to translated copies of two letters certifying that the beneficiary was employed as an electronics engineer

and technical manager from July 1995 to December 2001. No such documents are in the record. Though counsel asserts in the appeal that these employment letters were submitted with the petition, they were not in fact submitted at that time and have not been submitted subsequently in this proceeding. As the director stated in his decision, it is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Id.*

With regard to the issue of English language competency, counsel does not contest that the beneficiary's knowledge of the language is minimal. But he argues that little English is needed to perform the services of the proffered position because other employees of the petitioner could interpret and translate for him, when needed. There is no evidence in the record, however, as to who those employees would be. The petitioner has provided no information, by letter or other documentation, that it has employees fluent in Farsi and English whose tasks include providing on-call interpreting and translating services to the electronics engineer. Thus, counsel's assertions are not supported by any documentary evidence. Mere assertions by counsel will not satisfy the petitioner's burden of proof. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, the AAO agrees with the director that the ability to read and speak English at a reasonably competent level is necessary to adequately perform the duties of the proffered position. The electronics engineer will be in ongoing contact with English-language workers at the job site, and the petitioner has not demonstrated how the beneficiary can adequately interact with his co-workers and perform his various duties without some competence in English. The scenario painted by counsel – that only 10% of the beneficiary's time will be spent directing English-speaking workers and that other employees will interpret and translate for him – is both unsupported by the record and by the job duties to be performed at the construction site.

The AAO concludes that the director properly revoked the prior approval of the petition under 8 C.F.R. § 214.2(h)(11)(iii)(A)(2) and (5). The record does not establish that the beneficiary has six and one half years of work experience as an electronics engineer as alleged in the attachments to the petition, indicating that the statement of facts in the petition was not true and correct, or that the beneficiary has the ability to perform the duties of the proffered position, thus establishing that the approval of the petition violated 8 C.F.R. § 214.2(h) or involved gross error. The record does not establish that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101 (a)(15)(H)(i)(b).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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