identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

D2

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: NOV 08 2010

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael T. Kelley

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition the petitioner stated that it is an IT and management consulting firm. To employ the beneficiary in a position designated as a Product Lifecycle Management (PLM) Engineer, the petitioner endeavors to classify her 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, finding that the petitioner failed to establish (1) that the petitioner has standing to submit the visa petition as either a U.S. employer or a U.S. agent, (2) that the Labor Condition Application (LCA) submitted to support the visa petition is valid for employment in the area where the beneficiary would work, and (3) that the petitioner would employ the beneficiary in a specialty occupation. On appeal, counsel asserted that the director's bases for denial were erroneous, and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submitted a brief.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; (5) the Form I-290B appeal and counsel's brief and attached exhibits in support of the appeal.

The director based her denial of the petition, in part, on her determination that the petitioner had not established that the Form I-129 is supported by a corresponding LCA.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), defines an H-1B nonimmigrant as an alien:

> (i) who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 1184(i)(1) . . ., who meets the requirements of the occupation specified in section 1184(i)(2) . . ., and with respect to whom the Secretary of Labor determines . . . that the intending employer has filed with the Secretary an application under 1182(n)(1).

The regulation at 8 C.F.R. § 214.2(h)(1)(i) states:

> (h) Temporary employees--(1) Admission of temporary employees--(i) General. Under section 101(a)(15)(H) of the Act, an alien may be authorized to come to the United States temporarily to perform services or labor for, or to receive training from, an employer, if petitioned for by that employer. . . .

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(A) identifies a "United States employer" as authorized to file an H-1B petition. "United States employer" is defined at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

> *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:
>
> (1) Engages a person to work within the United States;
>
> (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
>
> (3) Has an Internal Revenue Service Tax identification number.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(F) allows a "United States agent" to file a petition "in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf."

The LCA in this matter is valid for employment in Beachwood, Ohio. On the Form I-129 visa petition, the petitioner indicated that it would employ the beneficiary at its own offices at [redacted] With the visa petition the petitioner provided numerous statements of work (SOWs) showing that the petitioner had contracted to provide various consultant services to various clients.

Some of those SOWs were unsigned. Almost all of those SOWs indicate that work would be performed at locations other than the petitioner's offices.[1] The remaining SOWs are silent as to the location where the work will be performed. The petitioner provided no evidence with that petition to demonstrate that it has specialty occupation work for the beneficiary to perform at its offices in Beachwood, Ohio.

---

[1] One SOW states, "[The petitioner's] travel will be limited to [the client's] location(s) in Tucson, AZ. Another states:

> The majority of the project work will be conducted at [the client's] offices in Orrville, Ohio. Travel to [the client's subsidiary's] facilities in Cincinnati and plants in Texas, Louisiana, and Missouri is likely.

One contract states, "[The petitioner] will conduct the work as described above to [the client's] satisfaction for a fixed fee inclusive or out-of-pocket travel and living expenses . . . ." Some state, "The work described in this letter will be delivered for a fixed professional fee . . . plus out-of-pocket travel and living expenses," or words to that effect. Two SOWs begin, "Thank you for the opportunity to continue to provide direct on-site consulting services . . . ." One states, "Out-of-town full[-]time resources will be on-site from Monday afternoon to Thursday close of business." One SOW states, "[The petitioner's] team will be given office and meeting space and will have network access for their computers . . . ."

On April 9, 2009 the service center issued an RFE in this matter. The service center requested, *inter alia*, that the petitioner clarify the employer-employee relationship between the petitioner and the beneficiary and state how many people work at its Beachwood, Ohio location. The service center also asked for a copy of the employment contract between the beneficiary and the petitioner; an itinerary of dates and locations where the beneficiary would work; copies of signed, valid contracts between the petitioner and its clients; and copies of signed and valid work orders from the petitioner's end-client companies for whom the beneficiary would actually work. The service center noted that the evidence must show specialty occupation work for the beneficiary with the actual end-user at whose location the beneficiary would work.

In a letter dated April 23, 2009 counsel stated that the petitioner has 30 workers in the United States. Counsel cited the previously provided SOWs as evidence that it has sufficient specialty occupation work at its Beachwood, Ohio location for the beneficiary to perform throughout the period of requested employment.

Counsel did not respond to the request for a copy of the employment contract between the petitioner and the beneficiary. Neither counsel nor the petitioner revealed, as requested, the number of workers at the petitioner's Beachwood, Ohio location.

The director denied the petition on May 1, 2009, finding, as was noted above, that the petitioner had failed to demonstrate that it has standing to file the visa petition as either the beneficiary's U.S. employer or agent, that the Labor Condition Application submitted to support the visa petition is valid for employment in the area where the beneficiary would work, and that the petitioner would employ the beneficiary in a specialty occupation.

On appeal counsel reiterated that the petitioner will employ the beneficiary at its office in Beachwood, Ohio and asserted that the LCA therefore corresponds with the visa petition and may be used to support it. Counsel stated that the SOWs provided do not lead to the conclusion that the beneficiary would work elsewhere. Counsel further stated that the request for the employment contract between the petitioner and the beneficiary was overreaching as 8 C.F.R. § 214.2(h)(4)(ii) does not require it.

Initially, the AAO notes that 8 C.F.R. § 214.2(h)(4)(ii) merely defines certain terms for the purposes of H-1B visa petitions. The section that requires the petitioner to provide a copy of the written employment contract between it and the beneficiary, or, if no written contract exists, then the summary of the terms of the oral agreement pursuant to which the beneficiary would be employed, is 8 C.F.R. § 214.2(4)(iv)(B). The petitioner's failure to provide that required evidence initially, and the petitioner's failure to provide any written contracts between it and the beneficiary when they were subsequently specifically requested, will both be discussed further below.

None of the SOWs provided mention the beneficiary by name. Further, as was noted above, most of the SOWs provided indicate that the petitioner's workers would perform their services off-site, at the petitioner's clients' offices, and the rest are silent as to that issue. The record contains no evidence to support the petitioner's assertion that it has sufficient specialty occupation work to occupy the

beneficiary's time at its Beachwood, Ohio location, or that it has any specialty occupation work at that location at all. The record does not demonstrate that the petitioner has any workers at its Beachwood, Ohio location. The petitioner has not, therefore, demonstrated that it would employ the beneficiary at that location.

As the petitioner has not demonstrated that it would employ the beneficiary at the Beachwood, Ohio location, which is the only location for which the approved LCA is valid, the petitioner has not demonstrated that the LCA submitted to support the visa petition corresponds with the visa petition.

The regulation at 20 C.F.R. § 655.705(b) states, in pertinent part, that in determining whether to approve a Form I-129 visa petition "[USCIS] determines whether the petition is supported by an LCA which corresponds with the petition." In order for an H-1B petition to be approvable, the location shown on the supporting LCA must correspond to the location where the beneficiary would work, as that location determines the prevailing wage threshold used to determine whether the wage or salary specified by the petitioner in the Form I-129 visa petition complies with the LCA attestation requirement that the petitioner pay the beneficiary the higher of the actual wage or the prevailing wage, as those terms are defined in the LCA regulations. The LCA has not been shown to correspond to the visa petition, and the visa petition may not be approved. The appeal will be dismissed and the visa petition denied on this basis.

The director also found that the petitioner had not established its standing to file an H-1B visa petition for the beneficiary because it had not demonstrated that it would be either the beneficiary's employer within the meaning of 8 C.F.R. § 214.2(h)(4)(ii) or her agent within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(F).

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(A) identifies a "United States employer" as authorized to file an H-1B petition. "United States employer" is defined at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

> *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:
>
> (1) Engages a person to work within the United States;
>
> (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
>
> (3) Has an Internal Revenue Service Tax identification number.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(F) allows a "United States agent" to file a petition "in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf."

Because it has not demonstrated where the beneficiary would work, at what company's offices, on what company's projects, at whose specific direction, or any other circumstances of the beneficiary's employment, and, most importantly, what entity would own and exercise the right to control the specific work to which the beneficiary would be assigned, in accordance with the common law principles governing this issue, the petitioner has not demonstrated that it would be the beneficiary's U.S. employer within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(A).

Also, the petitioner has not shown that PLM engineers are traditionally self-employed or use agents to arrange short-term employment on their behalf with numerous employers, nor has it shown that a foreign employer authorized the petitioner to act on its behalf. The petitioner has not shown that it has contracts with end-users for the beneficiary's services. The petitioner has not, therefore, demonstrated that it would be an agent with respect to the beneficiary's employment within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(F).

As the evidence in the instant case does not demonstrate that the petitioner is either a U.S. employer or agent, it does not demonstrate that the petitioner was qualified to file the visa petition. For this additional reason, the visa petition may not be approved. The appeal will be dismissed and the visa petition will be denied on this additional basis.

Finally, the decision of denial was based, in part, on the director's finding that the petitioner failed to demonstrate that the proffered position qualifies as a specialty occupation. The petitioner designates the beneficiary's job as a PLM engineer. It further asserts that the educational requirements for PLM engineer positions are equivalent to other software engineers.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not rely solely on the job title or the extent to which the petitioner's descriptions of the position and its underlying duties correspond to occupational descriptions in the Department of Labor's *Occupational Outlook Handbook (Handbook)*. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the alien will likely perform for the entity or entities ultimately determining the work's content.

The entity that determines the nature and content of the duties of the proffered position would be the entity assigning and overseeing the beneficiary's employment. *See Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). In the instant case, the evidence does not demonstrate where the beneficiary would work or who that end-user would be. As such, the evidence cannot demonstrate what the nature and substance of the beneficiary's duties would be if the visa petition were approved.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus

appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner's normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Because the petitioner did not demonstrate that it would employ the beneficiary in a specialty occupation, the petition was correctly denied. That basis has not been overcome on appeal, and the appeal will be dismissed and the petition denied for that additional reason.

The record suggests additional issues that were not addressed in the decision of denial.

Among the documents that must accompany an H-1B petition filed for a specialty occupation, the regulation at 8 C.F.R. § 214.2(h)(4)(iv)(B) specifies:

> Copies of any written contracts between the petitioner and beneficiary, or a summary of the terms of the oral agreement under which the beneficiary will be employed, if there is no written contract.

Further, the April 9, 2009 RFE contains the following request, "Please . . . submit the following evidence: . . . copies of signed and valid contracts between the petitioner and [the beneficiary]."

Counsel and the petitioner have not provided the required contract or contracts, nor have they provided any reason why that failure should be excused, other than counsel's erroneous assertion that the regulations do not require it. The petitioner was obliged to provide the beneficiary's written employment contract or, if none exists, evidence pertinent to the terms of the oral agreement pursuant to which he would be employed as part of the initial evidence in this matter and, because it did not, the petition may not be approved. The appeal will be dismissed and the petition denied for this additional reason.

Further, even if that contract were not initial evidence required by the regulations as part of the initial evidence in this matter, the regulations provide the director with broad discretionary authority to request evidence in support of a petition. Specifically, pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication.

Moreover, in addition to 8 C.F.R. § 214.2(h)(9)(i), the regulation at 8 C.F.R. § 103.2(b)(8) provides the director broad discretionary authority to require such evidence as contracts and itineraries to establish that the services to be performed by the beneficiary will be in a specialty occupation during the entire period requested in the petition. A service center director may issue a request for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and his or her decision to approve a petition must be based upon consideration of all of the evidence as submitted by the petitioner, both initially and in response to any request for evidence. *See* 8 C.F.R. § 214.2(h)(9). The purpose of a request for evidence is to elicit further information that clarifies

whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(1), (b)(8), and (b)(12).

The record raises the issue of whether an actual employer/employee relationship exists between the petitioner and the beneficiary. A copy of the employment contract, if one exists, or, if not, the terms of the oral contract between the petitioner and the beneficiary, is material to that issue which, in turn, is relevant to whether the instant petition may be approved.

The AAO finds that, in the context of the record of proceedings as it existed at the time the request for evidence was issued, the request for a copy of the written employment contract was appropriate under the above cited regulations, not only on the basis that the written contract or evidence of the terms pursuant to which the beneficiary would work was required initial evidence, but also on the basis that it addressed the petitioner's claim that it would be the beneficiary's actual employer and had been specifically requested.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Here, in addition to possibly being required initial evidence, as the employment contract was material to a determination of whether the petitioner would be the beneficiary's actual employer, the petitioner's failure to provide this specifically requested evidence precluded a material line of inquiry. As such, the appeal will be dismissed and the visa petition will be denied for this additional reason.

Similarly, the RFE requested that the petitioner reveal the number of workers at its Beachwood, Ohio location. Whether the petitioner actually employs any workers at that location is relevant to whether its claim that it would employ the beneficiary there is credible. The petitioner did not reveal that information, despite an explicit request for it. Again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The appeal will be dismissed and the petition will be denied on this additional basis.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a de novo basis).

The appeal will be dismissed and the petition will be denied for each of 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, and the petition is denied.