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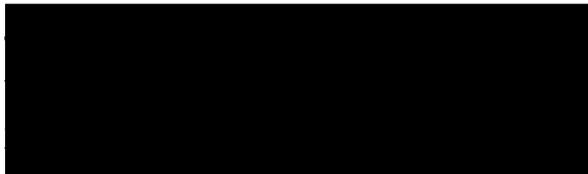
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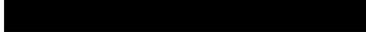
U.S. Citizenship
and Immigration
Services

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FILE: SRC 06 108 50660 Office: TEXAS SERVICE CENTER Date: **OCT 05 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:



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 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 firm that seeks to employ the beneficiary as a foreign business advisor. 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; (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.

The director denied the petition on the basis of her determination that the petitioner had failed to establish that the beneficiary qualifies to perform the duties of a specialty occupation. On appeal, the petitioner contends that the director erred in denying the petition.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), in order to qualify to perform services in a specialty occupation, an 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.

According to an evaluation contained in the record of proceeding, the beneficiary possesses the equivalent of two degrees: (1) a bachelor's degree in Kyrgyz legal studies; and (2) a master's degree in Kyrgyz legal studies. The AAO has utilized data from the website of the American Association of Collegiate Registrars and Admissions Officers' Electronic Database for Global Education¹ to conduct its own analysis of the beneficiary's qualifications, and concurs. The beneficiary, therefore, is minimally qualified under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2).

¹ See <http://aacraoedge.aacrao.org> (accessed September 18, 2007).

The director did not question whether the beneficiary qualifies under this criterion, however. Rather, she found him unqualified under 8 C.F.R. § 214.2(h)(4)(v).² 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.

According to the 2006-2007 edition of the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), a resource upon which the AAO routinely relies for its information about the duties and educational requirements of particular occupations:

² While the director did not cite this provision of the Code of Federal Regulations, this was clearly the section to which she was referring when she found the beneficiary to lack licensure as an attorney.

To practice law in the courts of any state or other jurisdiction, a person must be licensed, or admitted to its bar, under rules established by the jurisdiction's highest court. All States require that applicants for admission to the bar pass a written bar examination; most States also require applicants to pass a separate written ethics examination.

The question before the AAO, therefore, is whether the beneficiary must be a licensed attorney in the State of Alabama in order to perform the duties of the proposed position.

In its February 15, 2006 letter of support, the petitioner stated that the duties of the proposed position would include planning business operations; advising the petitioner on foreign legal contracts; participating in foreign negotiations; analyzing and planning foreign business operations; performing legal research and support involving Uzbekistan and Kyrgyzstan; communicating with local government agencies; and advising the petitioner on local customs.

In her May 15, 2006 request for additional evidence, the director requested additional information as to how the petitioner intends to utilize the beneficiary's services. In its August 10, 2006 response, the petitioner stated that it is engaging in a business venture outside the traditional practice of law. The petitioner explained that one of its partners has a background in metallurgical engineering, and in the course of representing one of the petitioner's clients, that partner's assistance was requested in developing a company to import scrap steel. Due to the partner's background, the petitioner agreed to acquire partial ownership of Transvaal Strategic Resources, Inc. (TSR), a company with a long-term contract to supply steel to Vietnam. The petitioner stated that the issues involved with this contract and the amount of steel involved would become the single largest part of the petitioner's law practice, and would "eclipse in revenue all other work combined."

The petitioner further explained that the countries that comprised the former Soviet Union are the largest producer of scrap steel in the world. The petitioner, therefore, stated that it wishes to utilize the services of the beneficiary in order to keep abreast of the market in that part of the world, as well as to aid the petitioner in business culture, business law, and in deal-making. Regarding the director's concern over Alabama licensure, the petitioner asserted that such licensure would be unnecessary since the beneficiary would not deal with the laws of Alabama (or any U.S. State). Further, the petitioner stated the following:

In conclusion, [the beneficiary's] position as a Foreign Business Advisor will be to conduct foreign market analysis, advise on regional business practices, coordinate with foreign businesses and provide *business* advice, not *legal* advice. [The petitioner's] business in the scrap steel market is becoming the primary focus of [the petitioner's] practice; therefore it requires the full-time services of a Foreign Business Advisor [*italics in original*]. . . .

The director denied the petition on October 17, 2006, finding that the petitioner "has not demonstrated that the position differs from that of a licensed attorney and . . . has not demonstrated that the beneficiary is a licensed attorney."

On appeal, the petitioner contends that the director erred in denying the petition. On the Form I-290B, received at the service center on November 20, 2006, the petitioner states the following:

Petition was denied based on the wrong conclusion, that is that the Beneficiary would be acting as a lawyer in the U.S. This is not at all what the Petitioner needs Beneficiary for. As legal counsel and (OWNER) of a company involved in international trade Beneficiary's

skills are unique because we are forging contracts between a U.S. company and former Soviet countries.

In its December 19, 2006 appellate brief, the petitioner states, in part, the following:

To satisfy signatories to contracts involving three different countries is very complex. It is obvious to anyone who has done international law that the narrow education that a lawyer educated in the U.S. is inadequate [sic] to advise someone on transacting international commerce. It requires forging an alliance with various skills and talents. . . .

The AAO agrees with the petitioner. A careful review of the duties proposed by the petitioner reveals that they do not involve the practice of the law of Alabama, nor that of any other State in the United States. While the AAO disagrees with the petitioner's statement in its response to the director's request for additional evidence that the proposed duties do not involve providing legal advice, it does agree that the duties of the proposed position primarily involve providing business, rather than legal, advice. The small percentage of duties that involve providing legal advice (providing advice on contracts) do not involve contract law in the United States, but rather the contract law of the countries in which the beneficiary would work. As the petitioner is a law firm, the AAO presumes it has ample legal manpower that can competently determine whether a contract on which the beneficiary has provided advice regarding foreign requirements meets the requirements, if any, of Alabama law. The AAO, therefore, disagrees with the director's finding that the proposed position requires Alabama licensure, and finds that he is qualified to perform the duties of the proposed position.

The director did not address the question of whether the proposed position qualifies for classification as a specialty occupation. Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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.

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 proposed position.

The proposed position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires a showing that the nature of the specific duties of the proposed position is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The petitioner has submitted detailed information regarding the duties of its proposed position, which in combination with this particular record's extensive information regarding the business upon which the beneficiary would advise the beneficiary, establishes that the duties of the proposed position are so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. Accordingly, the proposed position qualifies for classification as a specialty occupation.

Although the AAO has determined that the proposed position qualifies for classification as a specialty occupation and that the beneficiary is qualified to perform the duties of a specialty occupation, the petition may not be approved, as the petitioner has failed to satisfy all of the requirements to obtain approval of an H-1B petition.

The instant petition was received at the service center on February 16, 2006, but it did not contain a certified labor condition application (LCA).³ In her request for additional evidence the director requested, in addition to the items discussed previously in this decision, a certified LCA. In response to the director's request, the petitioner submitted an LCA that had been certified on February 22, 2006, six days subsequent to the date the petition was filed.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

³ The LCA submitted with the initial filing (ETA case number [REDACTED] was not certified; it was annotated as "HOLD." The petitioner did not wait until the hold was removed, and the LCA certified, before filing the petition.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition “[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary.” Thus, in order for a petition to be approvable, the LCA must have been certified before the H-1B petition was filed. The submission of an LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). Further, CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12).

Thus, although the AAO agrees with the petitioner that its proposed position qualifies for classification as a specialty occupation and that the beneficiary qualifies to perform its duties, the petition may not be approved. Although the AAO’s denial of this petition is without prejudice to the filing of a new petition with certified LCA and fee, the petitioner’s failure to procure a certified LCA prior to filing the instant petition precludes its approval. The regulations contain no provision for the AAO to provide discretionary relief from the LCA requirements.

Remand of this petition for further action by the director would serve no purpose, as the petitioner cannot cure the technical deficiency in this petition; obtaining an LCA certified prior to February 16, 2006 is not possible. The regulations contain no provision for the director to provide discretionary relief from the LCA requirements. The petition must be denied.

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.