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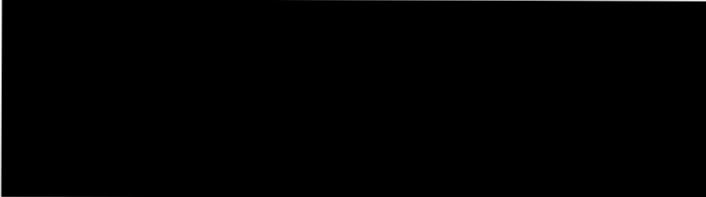
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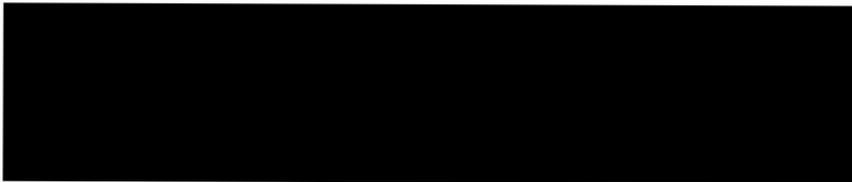


FILE: WAC 07 083 50656 Office: CALIFORNIA SERVICE CENTER Date: **SEP 03 2008**

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:



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.

For Michael T. Kelly
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 owns and operates a motel and also provides consulting and management services to a number of hotels and motels.¹ It seeks to employ the beneficiary as an accounting analyst. 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 director denied the petition, on determining that the petitioner had not established that it qualifies as a U.S. employer or that it has complied with the terms and conditions of employment.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the RFE; (4) the director's denial letter; and, (5) the Form I-290B, with counsel's brief and documentation in support of the appeal. The AAO reviewed the record in its entirety before reaching its decision.

Internet information cited in footnote 1 indicates that the petitioner's business status is inactive. The AAO sent a fax to counsel on July 9, 2008, requesting evidence that the petitioner is operating as a legal entity, and as a courtesy, providing counsel with five days to respond. Counsel, however, did not respond and no further documents have been received by the AAO to date. Thus, the record is considered complete.

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 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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.

¹ The website for the Tennessee Secretary of State Business Information Search at <http://www.tennesseeanytime.org/soscorp/details.jsp> reports an "inactive" status for the petitioner. In view of the foregoing, it is not clear that the petitioner is an active company.

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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), *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.

In a January 16, 2007 letter submitted in support of the petition, the petitioner asserted that it was in urgent need of an accounting analyst to maintain company records for all of the businesses that are owned and operated by the petitioner. The petitioner further described the proposed duties of the proffered accounting analyst position as follows:

- Review and analysis of the company's financial data;
- Preparation of reports for review by the executive management;
- Consult and advise senior management regarding cash flow and future prospects;

- Oversee, compile, and record financial data; examine the company's accounts and records to prepare financial statements; analyze the company's current and projected financial position;
- Analyze data to determine the various costs involved in operating the company's business, and check financial records for mismanagement, waste and/or fraud in order to reduce expenses and to increase the company's profitability;
- Review the company's financial data, and develop projections of the company's financial position based on past, present, and future earnings; advise senior management regarding the effect of business activities on revenue and expenditure;
- Analyze changes in management methods or services provided to determine the effects of costs; analyze actual costs and prepare periodic reports comparing standard costs to actual costs; and,
- Define, analyze, and design solutions for business, financial, and accounting problems; design computer programs for compiling and recording financial data; analyze user requirements, procedures and problems.

The record also includes a certified labor condition application (LCA) submitted at the time of filing, listing the beneficiary's work location in Memphis, Tennessee as an accounting analyst.

In an RFE, the director requested additional information from the petitioner, including an itinerary and copies of contracts between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work/work orders, and/or service agreements for the beneficiary. The director also requested quarterly wage reports for all the petitioner's employees for the last three quarters that were accepted by the state where they were filed, the beneficiary's pay receipts, the petitioner's federal income tax returns for 2005 and 2006, and the petitioner's business licenses.

In response to the RFE, counsel reiterated the above listed duties and stated that the beneficiary would work at the petitioner's location. Counsel also stated that the petitioner qualifies as an employer, as it meets all the requirements of 8 C.F.R. § 214.2(h)(4)(ii). Counsel stated further that the petitioner was waiting for its accounting firm to file its 2006 federal income tax return. As supporting documentation, the petitioner submitted the following: the petitioner's business permit with an expiration date of June 30, 2007; a Department of Health "Hotel/Motel Inspection Report" for the petitioner, dated January 19, 2007; the petitioner's permit for a public swimming pool, with an expiration date of March 30, 2008; the petitioner's Certificate of Occupancy permit issued on January 14, 2004; the petitioner's Health Department permit, with an expiration date of June 30, 2007; the petitioner's Memphis public works permit, with an expiration date of February 5, 2012; the petitioner's financial documentation for 2005; the petitioner's 2004 and 2005 federal income tax returns; excerpts from the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* "Accountants and Auditors" occupational category; and the beneficiary's W-2 forms and pay stubs.

The director denied the petition on the basis of her determination that the petitioner had not submitted contracts, statements of work, work orders, service agreements, or letters from end-client firms requiring the beneficiary's hospitality-related services. The director also found that the petitioner had submitted outdated supporting documentation and failed to submit all of the evidence requested in the RFE, namely, the petitioner's 2006 federal income tax return and quarterly wage reports for all employees for the last three quarters that were accepted by the state where they were filed.

On appeal, counsel states that the petitioner is the beneficiary's employer, and that the petitioner was unable to provide its 2006 federal income tax return and its federal and state quarterly filings, as its accountant had been incarcerated. As supporting documentation, counsel submits copies of previously submitted evidence.

The AAO acknowledges counsel's assertion that that the petitioner qualifies as an employer, as it meets all the requirements of 8 C.F.R. § 214.2(h)(4)(ii). As discussed above, however, Internet information cited in footnote 1 indicates that the petitioner's business status is inactive. As counsel did not respond to the AAO's July 9, 2008 request for evidence that the petitioner is operating as a legal entity, the petitioner's status as a U.S. employer has not been established. The petitioner therefore has not overcome this portion of the director's objections.

The AAO also acknowledges counsel's assertion that the petitioner was unable to provide its 2006 federal income tax return and its federal and state quarterly filings because of the incarceration of its accountant. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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 petitioner has not overcome this additional portion of the director's objections.

Beyond the decision of the director, the petitioner has also failed to establish that the proffered position is a specialty occupation. The record contains insufficient evidence on this issue. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). For this additional reason, the petition may not be approved.

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 *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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