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

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FILE: WAC 07 146 50786 Office: CALIFORNIA SERVICE CENTER Date: DEC 0 3 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed. The petition will be denied.

The petitioner is a software and information technology consulting firm which claims to currently employ fifteen persons. It seeks to employ the beneficiary as a business analyst 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 because he determined that the proffered position was not a bona fide position due to the material changes made by the petitioner to the position's title and duties in response to the director's request for evidence (RFE). In addition, the director found that the petitioner had failed to establish that it would comply with the terms and conditions of employment or that the beneficiary was qualified to perform the duties of a specialty occupation.

On appeal, counsel indicated on Form I-290B that a brief and additional evidence would be submitted within 30 days. The record reflects that a six-page brief was submitted by the petitioner on September 20, 2007 along with tax documentation. The Form I-1290B and the petitioner's brief state the same objections; namely, that the denial was arbitrary and capricious because the petitioner (1) qualifies as a U.S. employer and a job offer is immediately available; (2) the labor condition application (LCA) requirement was properly satisfied; and (3) the petition meets the requirements of a specialty occupation.

The director, however, provided an entirely different basis for denial of the petition. As discussed above, the key issue upon which the denial was based was the petitioner's material change to the description of duties of the beneficiary's position of business analyst submitted in response to the request for evidence. Moreover, the director also based the denial on the petitioner's failure to fully respond to the request for evidence, noting that the petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition under 8 C.F.R. § 103.2(b)(14). Additionally, the director noted numerous discrepancies pertaining the petitioner's business structure and its premises, in addition to the petitioner's failure and/or refusal to submit requested wage reports as requested in the RFE. The director also noted that, should the proffered position be deemed a specialty occupation, the beneficiary's qualifications for the proffered position were questionable. Finally, the director noted that despite approval of previous nonimmigrant petitions filed on behalf of the petitioner, U.S. Citizenship and Immigration Services (USCIS) is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988).

As discussed above, the main focus of the director's denial was the fact that the petitioner materially changed the beneficiary's position description from business analyst to that of a financial or market research analyst when responding to the request for evidence. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. 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). If significant changes are made to the initial request

for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, the AAO concurs with the director's denial.

On appeal, the petitioner fails to address this key issue, and further ignores the remaining four bases for denial cited by the director. In fact, the petitioner on appeal concentrates the focus of the brief on the nature of the petitioner's employment relationship with the beneficiary, who it now claims is a *programmer analyst*. The petitioner's newly introduced position of programmer analyst for the beneficiary once again represents a material change to the petition.

On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The director issued a nine-page decision, which provided a detailed analysis of the issues discussed above and specifically cited the deficiencies in the evidence of record. The general objections on the Form I-290B and in the petitioner's appeal seem to address an entirely different petition in that none of the issues discussed by the petitioner were raised or addressed by the director in her September 26, 2007 decision. These general statements, without specifically identifying any errors on the part of the director, are simply insufficient to overcome the well-founded and logical conclusions the director reached based on the evidence submitted by the petitioner. 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)).

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. 8 C.F.R. § 103.3(a)(1)(v). Counsel fails to specify how the director made any erroneous conclusion of law or statement of fact in denying the petition. Moreover, the petitioner materially changes the beneficiary's job title and provides no explanation or reasoning to support this change. As neither the petitioner nor counsel presents additional evidence on appeal to overcome the decision of the director, the appeal will be summarily dismissed in accordance with 8 C.F.R. § 103.3(a)(1)(v).

The burden of proof in this proceeding 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 summarily dismissed. The petition is denied.