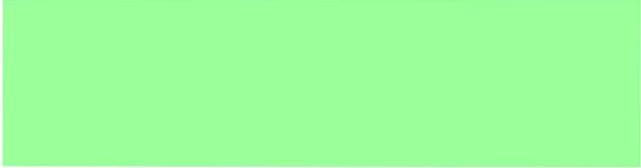


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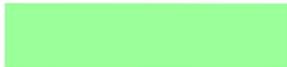
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: JAN 23 2014

OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner:
Beneficiaries:



PETITION: Petition for a Commonwealth of the Northern Mariana Islands (CNMI) Only Nonimmigrant Transitional Worker Classification Pursuant to 48 U.S.C. § 1806(d)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a CNMI-Only Nonimmigrant Transitional Worker (Form I-129CW) to the California Service Center on December 9, 2011. On the Form I-129CW petition, the petitioner describes itself as an enterprise, established in 2004, that provides general consulting, janitorial services, construction, child care, and manpower services. In order to employ the beneficiaries in what it designates as "building maintenance repairer" positions, the petitioner seeks to classify them as CNMI-Only Nonimmigrant Transitional Workers (CW-1) to work in the Commonwealth of the Northern Mariana Islands (CNMI) pursuant to 48 U.S.C. § 1806(d).

The director denied the petition on March 6, 2013, finding that the petitioner failed to establish eligibility for the benefit sought. Specifically, the director found that (1) the petitioner did not establish that it meets the definition of an eligible employer; and (2) the petitioner failed to submit evidence to establish that two of the seven beneficiaries were lawfully present in the CNMI at the time the petition was filed.¹ On appeal, the petitioner asserts that the director's bases for denial of the petition were erroneous and contends that it satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129CW; (2) the director's requests for evidence (RFE) dated January 10, 2012 and August 10, 2012; (3) the petitioner's response to the RFEs; (4) the notice of intent to deny (NOID) dated October 1, 2012; (5) the petitioner's response to the NOID; (6) the notice of decision; and (7) the Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In this matter, the petitioner filed the Form I-129CW on behalf of multiple beneficiaries as building maintenance repairers to work on a full-time basis. The petitioner did not submit any documentation in support of the petition. Thereafter, the petitioner issued an RFE on January 10, 2012. The response included a letter from the petitioner stating that "[w]ritten documentation of job announcements and eventual written contracts with all employees can be provided upon request[.]"

The director then issued a second RFE on August 10, 2012. The director outlined the evidence to be provided. The AAO observes that the director specifically requested that the petitioner submit probative evidence to establish that the petitioner considered all available U.S. workers for the positions.²

¹ Thereafter, in a letter dated April 20, 2013, the petitioner notified U.S. Citizenship and Immigration Services (USCIS) that these two individuals had left the CNMI and that the petitioner no longer wished to pursue CW-1 classification for them. The letter suggests that the petitioner wished to withdraw the petition on behalf of these beneficiaries. Accordingly, the AAO will not further address this issue.

² The director noted that such evidence may include, but is not limited to, a copy of job vacancy or job announcement; evidence that a job vacancy website or private recruitment firm was used; a statement regarding the number of individuals who responded to the job announcement; evidence that interviews were conducted and the results of the interviews.

The petitioner responded to the RFE by submitting the copies of Foreign National Worker Permits ("umbrella permit") and passports for several of the beneficiaries.

On October 1, 2012, the director issued a NOID. The director acknowledged that the petitioner responded to the RFE, but noting that the response failed to establish eligibility for the benefit sought. The director again requested that the petitioner submit evidence to establish that it is an eligible employer in accordance with the applicable regulatory provisions. The director specifically requested that the petitioner submit evidence that it had considered all available U.S. workers for the positions.³

In response to the NOID, the petitioner submitted documentation regarding its business operations. The petitioner also submitted a job posting placed on the CNMI Department of Labor website for three positions classified as "Installation, Maintenance, and Repair Occupations" (printed on October 30, 2011).

The director reviewed the evidence submitted and denied the petition on March 6, 2013. Specifically, the director stated that the petitioner had not demonstrated that it meets the definition of an eligible employer. The director noted that the petition was filed for seven employees, but the job vacancy announcement only showed that the petitioner is hiring three persons.⁴

Thereafter, the petitioner submitted an appeal of the director's decision. On appeal, the petitioner stated the following,

Please see the attached documentation that we did have two different job vacancy announcements for eight employees (no other people applied for any of the positions) and not a single job announcement for three employees (this announcement was for renewed employees only).

With the appeal, the petitioner submitted (1) the previously submitted job posting placed on the CNMI Department of Labor website (printed on October 30, 2011); (2) a letter dated November 15, 2011 from [REDACTED]; and (3) a document entitled "Job Vacancy Announcement Form" with an announcement date of November 7, 2011.

The AAO notes that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). Furthermore, the regulation at 8 C.F.R. § 214.2(w)(4) states the following regarding eligible employers:

³ The director again noted that such evidence may include, but is not limited to, a copy of job vacancy or job announcement; evidence that a job vacancy website or private recruitment firm was used; a statement regarding the number of individuals who responded to the job announcement; evidence that interviews were conducted and the results of the interviews.

⁴ As previously mentioned, the director also indicated that the petitioner failed to submit documentation to establish that two of the seven beneficiaries were lawfully present in the CNMI.

To be eligible to petition for a CW-1 nonimmigrant worker, an employer must:

- (i) Be engaged in legitimate business;
- (ii) Consider all available United States workers for the position being filled by the CW-1 worker;
- (iii) Offer terms and conditions of employment which are consistent with the nature of the petitioner's business and the nature of the occupation, activity, and industry in the CNMI; and
- (iv) Comply with all Federal and Commonwealth requirements relating to employment, including but not limited to nondiscrimination, occupational safety, and minimum wage requirements.

The regulation further specifies that documentary evidence establishing eligibility for CW status is required. 8 C.F.R. § 214.2(w)(6). A petition must be accompanied by evidence demonstrating the petitioner meets the definition of eligible employer. *Id.*

To begin, the AAO notes that the job posting from the CNMI Department of Labor website (printed on October 30, 2011) is only for three positions.⁵ Further, the posting indicates that the petitioner gives priority to those who are already working for it in the same business location as subcontracted for it. The posting also indicates that it is for a "Renewal," which is further confirmed by the petitioner on appeal, with the statement that "this announcement was for renewal employees only." Consequently, by including restrictive language in the advertisement and limiting the pool of applicants, the petitioner has not demonstrated that it considered all available United States workers for the position in accordance with the regulation at 8 C.F.R. § 214.2(w)(4).

With regard to the evidence submitted on appeal that was previously requested by the director's RFE and NOID, the AAO notes that this evidence is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. *See* 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the 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), (8), and (12). 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition, in response to the director's

⁵ The job posting was initially provided to USCIS by the petitioner in response to the director's NOID.

requests for evidence, or in response to the NOID. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO notes that it need not consider the sufficiency of such evidence previously requested by the director (in fact, repeatedly requested) but submitted for the first time on appeal.

Nevertheless, even assuming *arguendo* that the AAO considered the evidence submitted on appeal, it must be noted that the petitioner failed to demonstrate that it meets the definition of an eligible employer. More specifically, the petitioner has provided inconsistent information regarding the proffered positions. It appears that the job posting submitted with the appeal is for a different position than the proffered position as described in the Form I-129CW petition. For instance, in the Form I-129CW, the petitioner indicated that it was seeking eight employees to work on a full-time basis. In response to the NOID, the petitioner submitted a job posting that it placed on the CNMI Department of Labor website for three employees, which indicates that the positions are full-time, specifically 40 hours per week. Thereafter, with the appeal, the petitioner submitted a document entitled "Job Vacancy Announcement Form" for five employees, and indicating that the positions are for 32 hours per week. No explanation for the variances was provided.

Moreover, in the Form I-129CW petition and supporting documents, the petitioner did not state any particular requirements for the proffered positions. In the job posting placed on the CNMI Department of Labor website, the petitioner indicated that it seeks individuals with "at least two years of experience in general building and equipment maintenance." In the document entitled "Job Vacancy Announcement Form," the petitioner states "[a]t least 5 years of experience in General Building and Equipment Maintenance." The petitioner continues by stating, "High School Graduate, must know how to speak [a]nd [u]nderstand English and Tagalog languages." Thus, it appears that the advertisement will further limit the pool of applicants. The petitioner did not provide an explanation for the inconsistencies in the record of proceeding with regard to its requirements.

Furthermore, the AAO observes that the letter dated November 15, 2011 from [REDACTED] (provided by the petitioner with the appeal) indicates that five building maintenance positions were announced on the radio for seven consecutive days from November 8, 2011 to November 14, 2011. The document entitled "Job Vacancy Announcement Form" (also provided by the petitioner with the appeal) indicates the announcement occurred on just one day, specifically November 7, 2011. No explanation was provided by the petitioner regarding the discrepancy.

With the form I-129CW petition, the petitioner must provide an attestation certified as true and accurate that no qualified United States workers are available to fill the positions. 8 C.F.R. § 214.2(w)(6)(i)(A). However, for the reasons discussed above, the AAO must question the accuracy of the petitioner's attestation on this issue.

The AAO finds that the evidence submitted does not establish eligibility for the benefit sought. The documentation does not establish that the petitioner considered all available United States workers for the position being filled by the beneficiary and, thus, that it meets the requirements to establish that it is an eligible employer in accordance with 8 C.F.R. § 214.2(w)(4).

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.