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U.S. Citizenship
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Services

02

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APR 05 2007

FILE: WAC 05 153 51932 Office: CALIFORNIA SERVICE CENTER Date:

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:

SELF-REPRESENTED

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director 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 computer consulting firm that seeks to employ the beneficiary as a developer/computer programmer and to extend his stay in the United States. The petitioner, therefore, endeavors to extend the beneficiary's classification 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 under 8 C.F.R. § 103.2(b)(14), which states that a petitioner's failure to submit evidence requested by the director that precludes a material line of inquiry shall be grounds for denying a petition.

In his August 16, 2005 request for additional evidence the director requested, among other items not at issue here, the following information "to clearly substantiate the information concerning annual income, current number of employees, and type of business on the Form I-129": (1) copies of the petitioner's 2003 and 2004 federal income tax returns; (2) a copy of the employer's most recently filed Form DE-6, Quarterly Wage Report; and (3) copies of the petitioner's current city, county, state, and federal government business licenses.

In its response to the director's request, which was received at the service center on October 20, 2005, the petitioner did not submit any of the items. Regarding its 2003 and 2004 federal income tax returns, the petitioner stated that it was not required to provide any of its federal tax information. Nor did the petitioner submit a copy of its most recently filed Form DE-6; rather, it submitted the second page of a two-page payroll summary of information that the petitioner was to submit to the California Employment Development Department.¹ Finally, in response to the request for the petitioner's business licenses, the petitioner submitted a certificate from the Arizona Corporate Commission stating that, as of October 19, 2000, the petitioner had filed all affidavits and annual reports, and paid all required taxes.

The director therefore denied the petition, stating the following:

In the instant case, the petitioner has not submitted the requested tax information, names of any of its employees, or any proof that it employs nine individuals, as claimed on the petition. . . .

On appeal, the petitioner submits another quarterly payroll summary; this one is for the period July 1, 2005 through September 30, 2005 and lists 14 employees.² It is not, however, the requested Form DE-6. The petitioner also submits a copy of its 1995 Articles of Incorporation. Finally, the petitioner resubmits the aforementioned second page of a two-page payroll summary of information that the petitioner was to submit

¹ This document indicates that in the period April 1, 2005 through June 30, 2005, the beneficiary earned \$10,336 in wages.

² This document indicates that in the period July 1, 2005 through September 30, 2005, the beneficiary earned \$36,992 in wages, and had earned a total of \$57,328 in wages in 2005.

to the California Employment Development Department and certificate from the Arizona Corporate Commission stating that, as of October 19, 2000, the petitioner had filed all affidavits and annual reports, and paid all required taxes.

The petitioner states that "I do not have any federal tax forms to show you. . . ." and that the information submitted "clearly shows all taxes charged for each employee."

The AAO rejects the assertion of the petitioner in its response to the director's request for additional evidence that it was not required to provide any of its federal tax information when petitioning Citizenship and Immigration Services (CIS) for immigration benefits. The regulation at 8 C.F.R. § 214.2(h)(9)(i) provides that [t]he director shall consider all the evidence submitted and such other evidence as he or she may independently require to assist his or her adjudication. The information requested by the director would corroborate the petitioner's statement on the Form I-129 that it employs nine people and earns \$227,530 gross annual income, and was within the director's discretion to request. The petitioner identifies no statutory or other authority to invoke a privilege or immunity against disclosure in these proceedings.

When CIS requests a specific item, the petitioner must either provide it or provide alternative evidence which would satisfy the director's request for that evidence. The petitioner may not unilaterally decline to submit a requested item while offering no substitute evidence addressing the director's concerns.

The information of record does not establish that the petitioner will employ the beneficiary in a specialty occupation. The forms submitted by the petitioner have not been filed with any government entity; they are simply internal accounting records and do not prove that any taxes have been paid to any government entity. Nor do they prove that any wages were in fact paid to any of the stated employees. Without the federal income tax returns or equivalent information, CIS is unable to verify the other information listed on the Form I-129. The petitioner has not established that it is a going concern that will employ the beneficiary as stated in the petition.

The term "employer" is defined at 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.

The petitioner has not established itself as an "employer" under the criteria set forth at 8 C.F.R. § 214.2(h)(4)(ii), as it has not established that it has employees or that it will employ the beneficiary.

Accordingly, the AAO finds that the director correctly denied the petition under 8 C.F.R. § 103.2(b)(14), which states that a petitioner's failure to submit evidence requested by the director that precludes a material line of inquiry shall be grounds for denying a petition.

Beyond the decision of the director, the petition may not be approved for another reason. 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.

The term “specialty occupation” is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n 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.

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 record is clear that the beneficiary would not perform his duties at the petitioner’s place of business in Arizona. Rather, the beneficiary would work for Wells Fargo Bank in San Francisco, California. Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary with the dates and locations of employment if the beneficiary’s duties will be performed in more than one location.³ While

³ See also Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term “Itinerary” Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995).

the Aytes memorandum cited at footnote 1 broadly interprets the term “itinerary,” it provides CIS the discretion to require that the petitioner submit the dates and locations of the proposed employment.

The Form I-129 states that the beneficiary would work at 155 5th Street in San Francisco, California from May 16, 2005 through December 15, 2007 and the LCA states that he would work in San Francisco from May 16, 2005 through January 16, 2007.⁴ However, the information submitted by the petitioner does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as it does not cover the entire period of requested employment: the “Statement of Work” does not list an end-date, and the April 29, 2005 offer of employment specifically states that the petitioner’s contract with Wells Fargo expires on December 31, 2005. The evidence contained in the record does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as it does not cover the entire period of the beneficiary’s employment by the petitioner. The Statement of Work does not identify the beneficiary and has no dates. Thus, the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and, for this additional reason the petition, as presently constituted, may not be approved.⁵

The petition may not be approved for another reason, as the record does not establish that the proposed position is a specialty occupation. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proposed position is a specialty occupation, the petitioner acting as an employment contractor is merely a “token employer,” while the entity for which the services are to be performed is the “more relevant employer.” The *Defensor* court recognized that evidence of the client companies’ job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proposed position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services.

As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner’s client, specifically Wells Fargo Bank, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies for classification as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(I). The petition, therefore, may not be approved for this additional reason.

Finally, the AAO finds that the petition may not be approved for an additional reason. The record also does not establish that the petitioner will comply with the terms and conditions of the LCA, as required by 8 C.F.R. § 214.2(h)(4)(iii)(B)(2). The certified LCA indicates that the wage rate for the beneficiary will be \$68 per hour, or \$141,440 per year for full-time work. However, the Form I-129 states that the

⁴ This discrepancy has not been explained. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

⁵ As noted by Assistant Commissioner Aytes in the cited 1995 memorandum, “[t]he purpose of this particular regulation is to [e]nsure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment.”

beneficiary's annual wage will be \$120,000 per year, which is below the wage rate on the LCA. 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).

Based on the foregoing analysis, the AAO has determined that the director correctly denied the petition under 8 C.F.R. § 103.2(b)(14), which states that the failure to submit evidence requested by the director that precludes a material line of inquiry is grounds for denying a petition. Beyond the decision of the director, the AAO has determined that the record fails to establish that the beneficiary would be performing services in a specialty occupation, as defined in section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), that the employer has submitted an itinerary of employment, or that the petitioner would pay the beneficiary in accordance with the terms of the LCA. Accordingly, the AAO will not disturb the director's denial of the petition.

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.