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U.S. Citizenship
and Immigration
Services

D2



FILE: EAC 06 181 54301 Office: VERMONT SERVICE CENTER Date: OCT 29 2007

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.

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 general construction firm that seeks to employ the beneficiary as an architect. 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 his determination that the petitioner had failed to demonstrate that the beneficiary is qualified to perform the duties of the proposed position. On appeal, counsel contends that the director erred in denying the petition.

In an attachment to the Form I-129, the petitioner described the proposed duties as follows:

Plan layout project; prepare scale drawing; integrate engg. element into unified design, etc[.]

In its May 1, 2006 letter of support, the petitioner stated that the duties of the proposed position would include planning the layouts of projects; integrating engineering elements into unified designs; preparing scale drawings; preparing shop drawings; conducting periodic on-site observations of work during construction in order to monitor compliance with plans; consulting with clients to determine functional and spatial requirements of structures; administering construction contracts; and preparing renderings and 3D models for client presentation. The beneficiary would be required to use the following software programs: AutoCad; Adobe Acrobat; Adobe Photoshop; and Microsoft Office. Counsel's May 18, 2006 letter of support repeated this list of the proposed position's duties.

In her September 27, 2006 request for additional evidence, the director requested evidence that the beneficiary possesses licensure in the field of architecture or evidence that such licensure is not required.

In its October 12, 2006 response to the director's request for additional evidence, the petitioner changed the duties of the proposed position, stating the following:

The Beneficiary is going to be employed as a **Junior Architect** and her work would be supervised and directed by me. As a Registered Architect [in] this [S]tate I take a responsibility for every project completed [emphasis in original] . . .

Counsel stated the following in his response to the director's request for additional evidence, also dated October 12, 2006:

In accordance with NYS Architecture-Educational Law, Article 147, it is permitted to employ any person as a junior or assistant architect by a Registered/Licensed Architect

under him. The registered architect is directly responsible for every project and work done.

The director denied the petition on October 31, 2006, finding the beneficiary unqualified to perform the duties of the proposed position, as the petitioner had failed to establish that the beneficiary possesses a license to practice architecture, or establish that the beneficiary is exempt from licensure.

On appeal, counsel contends that the director erred in denying the petition. Counsel contends that, as the petitioner intends to hire the beneficiary as a junior architect, licensure is not required, and that the director erred in considering the position to be that of an architect. Counsel argues, in part, the following:

The job description in the I-129 Petition is not dispositive in decisions whether one is required to wield a professional license to enable one to practice in a given field in the United States. According to the Adjudicator's Field Manual . . . job titles are meaningless; therefore, the adjudicator must consider education and work experience, as well as the nature of the petitioner's business and the industry practice. . . .

Also, the adjudications officer confused the usage of the word "architect" in the context of legal responsibility and in the context of [the] position description.

* * *

The Petitioner sought to hire the Beneficiary[,] who would fulfill the responsibilities of a **Junior Architect**. As a result, in the I-129, the Petitioner indicated that [the beneficiary's] job title will be "**Architect**." [emphasis in original].

* * *

[The petitioner] indicated on the I-129 form that the Beneficiary's job title is "architect." As a result, the adjudications officer ("AO") assumed that the Beneficiary will be working strictly as a licensed architect . . . The AO erroneously assumed that the Beneficiary must be licensed in the State of New York to be eligible to execute her duties as stated on the I-129.

The AAO disagrees with counsel's analysis. The AAO finds that the changes made to the nature of the duties of the proposed position in response to the director's request for additional evidence did not merely clarify the initial submission or submit additional details to fill in missing information. Rather, they constituted a material alteration to the proposed position as set forth initially. The Form I-129, counsel's letter of support, the petitioner's letter of support, and certified labor condition application referred to the proposed position as "architect." The phrase "junior architect" did not appear until the petitioner's response to the director's request for the beneficiary's licensure as an architect. Moreover, the duties of the proposed position, as set forth in the Form I-129, counsel's letter of support, and the petitioner's letter of support made no mention of supervision, or that she would not work independently. Working under supervision is critically different than working independently.

A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The purpose of a 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. *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. Thus, the AAO will consider the petition under the evidence initially submitted.

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.

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.

In its initial submission, the petitioner, in addition to titling the proposed position as an architect, described the duties of an architect. In adjudicating H-1B petitions, the AAO routinely consults the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

At pages 126-127, the *Handbook* confirms that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry as an architect. Accordingly, the proposed position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

However, the AAO finds that the record fails to establish that the beneficiary is qualified to perform the duties of the proposed position, which is that of an architect. 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.

Pursuant to 8 C.F.R. § 214.2(h)(v)(A), 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.

At page 126, the *Handbook* states the following with regard to licensure:

All States and the District of Columbia require individuals to be licensed (registered) before they may call themselves architects . . .

There is no dispute in this case that the beneficiary does not possess licensure as an architect. As the AAO has determined that the position originally proposed in this position is that of an architect, and not that of a junior architect working under supervision, the beneficiary must possess licensure in order to be immediately eligible to perform the duties of the position. Accordingly, the AAO finds the beneficiary unqualified to perform the duties of the proposed position, and agrees with the director's finding in this regard. The petitioner has failed to overcome the basis of the director's denial.

The petitioner has failed to demonstrate that the beneficiary qualifies to perform the duties of a specialty occupation. Accordingly, the AAO will not disturb the director's denial of the petition.

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.