



U.S. Citizenship
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FILE: WAC 06 037 51189 Office: CALIFORNIA SERVICE CENTER Date: JAN - 2 2009



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)

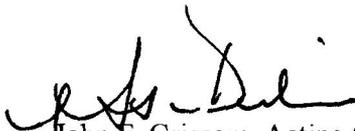
ON BEHALF OF PETITIONER:



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.

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).


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director of the service center denied the request for continuation of the beneficiary's previously approved employment without change with the same employer. The director treated a subsequent appeal as a motion to reopen and reconsider, as the appeal was untimely filed. The director denied the petition, finding that the petitioner had not complied with the terms and conditions of the certified labor condition application (LCA) and thus the petitioner had not established that the beneficiary is entitled to a seventh-year H-1B extension. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed.

The petitioner is a landscape maintenance business that seeks to extend its authorization to employ the beneficiary as a full-time accountant. 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 determined that the beneficiary was not entitled to be employed for an additional year under the provisions of the "American Competitiveness in the Twenty-First Century Act," (AC21) and the "Twenty-First Century Department of Justice Appropriations Authorization Act" (21st Century DOJ Appropriations Authorization Act) because the petitioner did not provide evidence that it had complied with the terms and conditions of the certified LCA for the current and previous petitions filed on behalf of the beneficiary.

The record of proceeding before the AAO contains: (1) 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; (5) Form I-290B, with counsel's brief; (6) the director's decision to treat the appeal as a motion to reopen and reconsider; (7) the director's denial letter; and (8) Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before issuing its decision.

The record reflects that the beneficiary has been in the United States in H-1B status since December 6, 1998. The record also includes evidence that the petitioner has filed an application for alien employment certification on behalf of the beneficiary, with a priority date of November 25, 2002. The petitioner filed the instant petition on November 15, 2005. The requested start date of employment in the petition is December 6, 2005.

The director denied the petition because the beneficiary's tax returns show that he earned no more than 58% of the pay certified by the petitioner on the petitions and the LCAs for the previous three-year period. Therefore, the petitioner had not complied with the terms and conditions of the certified LCAs for the current and previous petitions filed on behalf of the beneficiary, and the beneficiary had not maintained his nonimmigrant H-1B status.

On appeal, counsel states, in part, as follows:

In the instant case, Beneficiary's yearly salary of \$69,600 was based on the hourly rate of \$36.25. For the year 2005, Beneficiary worked a total of 1125 hours and received an income of \$40,600 from the employer. Likewise for the year 2004, Beneficiary worked a total of 876 hours and received an income of \$31,750 from the employer. Similarly, for the year 2003, Beneficiary worked a total of 837 hours for a compensation of \$30,344. Beneficiary's hourly

rate of pay for all three years exceeded the prevailing wage for an accountant's position in Alameda County, California.

The CIS abused its discretion in finding that Petitioner had failed to comply with the prevailing wage requirements of the labor condition applications for the preceding three years without first inquiring why Beneficiary was not paid the yearly salary listed on the labor condition applications.

Counsel's assertion that the director abused her discretion by failing to request further evidence before denying the petition, is noted. In this matter, the director issued an RFE, for additional documents, including payroll information. The regulation at 8 C.F.R. § 103.2(b)(8) requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. The director did not deny the petition based on insufficient evidence of eligibility.

The regulation at 8 C.F.R. 214.2(h)(10)(ii), which governs denials that must be preceded by notice, states:

(ii) *Notice of intent to deny.* When an adverse decision is proposed on the basis of derogatory information of which the petitioner is unaware, the director shall notify the petitioner of the intent to deny the petition and the basis for the denial. The petitioner may inspect and rebut the evidence and will be granted a period of 30 days from the date of the notice in which to do so. All relevant rebuttal material will be considered in making a final decision.

A review of the record of evidence does not indicate that the director was required to issue a notice of intent to deny, pursuant to 8 C.F.R. 214.2(h)(10)(ii), as the director did not base her decision on derogatory information of which the petitioner was unaware.

Moreover, as the director pointed out in her March 29, 2007 decision, in the appeal/motion to reopen and reconsider, the petitioner failed to provide any additional evidence or explain the wage discrepancies, even though it had the opportunity to do so. In addition, in the instant appeal, counsel submits another copy of the previously submitted brief, and still does not provide any additional evidence or explain the wage discrepancies.

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).

On the Form I-290B, the petitioner fails to specify how the director made any erroneous conclusion of law or statement of fact in denying the petition. As the petitioner does not present 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 dismissed.