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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

*D2*

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: DEC 29 2010

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:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The director of the 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 dismissed. The petition will be denied.

The petitioner is a construction firm that states it has nine employees. It seeks to employ the beneficiary as an electrical engineer 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 finding that the petitioner failed to provide requested evidence that was material to determining its eligibility for the benefit sought in this matter and that the petitioner failed to demonstrate that the beneficiary is eligible for a seventh-year H-1B extension.

On July 6, 2009, the service center issued a Request for Additional Evidence (RFE) in this matter, the pertinent parts of which requested: 1) Federal Income Taxes; 2) Quarterly Wage Reports; 3) Business Licenses; 4) Evidence that the beneficiary either has a requisite license or is exempt from state licensing requirements; 5) Evidence that the beneficiary has been maintaining H-1B status, including his pay stubs and Form W-2; and 6) Evidence that the beneficiary is eligible to extend his H-1B beyond the six-year limit. With respect to the last item, the RFE specifically states, "Note: Provide proof of the approved Labor Certification pertaining to this petition."

In response to the RFE, counsel submitted some, but not all of the requested documentation. Among the documentation submitted was a copy of the petitioner's 2007 U.S. Income Tax Return, which indicated that the petitioner earned \$1,088,334 in gross income, but only paid \$12,000 in compensation to officers and \$10,050 in salaries and wages for that year. Counsel also submitted the beneficiary's 2007 U.S. Individual Income Tax Return, a year in which the beneficiary was supposed to be working for the petitioner in H-1B status. However, the 2007 U.S. Individual Income Tax Return indicates that the beneficiary did not earn any wage or salary from the petitioner, but instead earned \$25,000 in self-employment business income and \$9,303 in rental real estate income, even though the proffered salary from the petitioner for the prior petition covering the beneficiary's H-1B employment in 2007 was \$48,485, according to USCIS records. Therefore, the documentation submitted by counsel in response to the RFE does not establish that the petitioner has made a bona fide offer of employment to the beneficiary or that the beneficiary was in lawful H-1B status at the time this petition was filed as it appears that the petitioner has not been paying the beneficiary the proffered wage, and no evidence was provided by the petitioner to the contrary.

Additionally, counsel submitted a copy of the petitioner's I-140 petition receipt notice, demonstrating that the I-140 petition was filed on January 11, 2008, approximately seven months prior to the date the present H-1B petition and request for extension was filed on August 27, 2008. However, counsel did not provide any evidence that a labor certification application had been approved on the beneficiary's behalf, even though the RFE specifically requested proof of the approved labor certification.

In the director's denial decision, issued December 19, 2008, the director noted that the petitioner failed to provide the following documents, even though they were specifically requested in the RFE: 1) quarterly wage reports; 2) evidence that the beneficiary is currently employed in H-1B

status, such as the beneficiary's pay records; and 3) the beneficiary's Form W-2. The petitioner also failed to adequately respond to the director's request for evidence that the beneficiary is exempt from the six-year limitation imposed on H-1B nonimmigrant aliens.

On appeal, counsel for the petitioner submits one, but not all of the relevant documentation requested in the RFE. As will be noted below in the discussion of the USCIS regulations governing RFEs, all documents in response to an RFE must be submitted at the same time and within the response period specified in the RFE. In this matter, the petitioner's response to the RFE neither verbally addressed the issues raised in the director's RFE nor provided a large part of the requested documentation.

For the reasons discussed below, the AAO will not consider evidence submitted on appeal that was requested by the RFE, but not provided within the petitioner's response to the RFE. Consequently, in this particular proceeding the AAO will limit its review to the evidence of record that was before the director when she issued her decision to deny the petition.

A service center director may issue an RFE for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and his or her decision to approve a petition must be based upon consideration of all of the evidence as submitted by the petitioner, both initially and in response to any RFE that the director may issue. *See* 8 C.F.R. § 214.2(h)(9). The purpose of an RFE 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), (b)(8), and (b)(12).

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 Obaighbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the document in response to the director's request for evidence. *Id.* As discussed below, the pertinent regulations, at 8 C.F.R. § 103.2, compel the same outcome.

The regulation at 8 C.F.R. § 103.2(b)(11) provides rules on responding to an RFE. The petitioner has three options during the response period specified in the RFE: submission of a complete response containing all of the requested information; submission of a partial response with a request for a decision based on the record; or withdrawal of the petition. Submission of only some of the requested evidence will be considered a request for a decision on the record. Materials in response to the RFE must be submitted together at one time, along with the original RFE, and they must be filed within the period afforded in the RFE. Further, the regulation at 8 C.F.R. § 103.2(b)(8)(iv) states that in no case shall the maximum response period provided in an RFE exceed 12 weeks, and that additional time to respond may not be granted. Thus, the petitioner is afforded only one opportunity to file materials in response to the RFE. Operation of this provision precludes the petitioner from submitting on appeal any type of documentation requested in the RFE, but not provided within the time specified in the RFE. In the context of this particular record of proceeding, this means that the AAO will not consider the documents submitted with the Form I-290B and the petitioner's letter on appeal, for they fall within the

category of documentary evidence requested by an RFE, but not included in the RFE response.

Because the petitioner submitted a response before the deadline stated in the RFE, the regulation at 8 C.F.R. § 103.2(b)(13) does not come into play, which states that, if the petitioner fails to respond to an RFE within the specified time, a petition may be summarily denied, denied based on the record, or denied for both reasons. However, pursuant to provisions at 8 C.F.R. § 103.2(b)(11) and (b)(14), if, as here, the petitioner submits a response to the RFE, however inadequate, the petitioner's RFE response will be deemed a request for a decision on the record, and a decision will be issued on the basis of the record as it existed upon receipt of the timely filed RFE response. For this reason also, the AAO shall not consider the documentary evidence submitted with the Form I-290B and the petitioner's letter on appeal.

Additionally, 8 C.F.R. § 103.2(b)(14) also states that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition.

In light of the regulations discussed above, the petitioner is foreclosed from now expanding USCIS consideration to evidence sought by, but not submitted in response to, the RFE; and the issue for the AAO's determination is whether the director's decision to deny the petition was the correct disposition for failure to submit requested evidence precluding a material line of inquiry.

On appeal, counsel includes a copy of the approved labor certification application filed by the petitioner on behalf of the beneficiary, indicating that this application was accepted for processing on October 2, 2003 and was certified on August 4, 2006. The AAO makes the following specific finding with regard to the labor certification approval, which is submitted for the first time on appeal. This document is submitted for its value as a document with the type of information sought by the RFE. As such, the fact that this document was submitted after the petitioner's RFE response forecloses its consideration in this appeal. However, even if it was a proper subject for consideration in this appeal, counsel and the petitioner still have not included the petitioner's quarterly wage reports, evidence that the beneficiary is currently employed in H-1B status, such as the beneficiary's pay records, and the beneficiary's Form W-2. Therefore, even if this document submitted for the first time on appeal was to be considered by the AAO, the petitioner has still failed to submit requested evidence precluding a material line of inquiry.

Counsel argues on appeal that the director did not provide an authority for finding that the petitioner failed to submit requested evidence that precludes a material ground of inquiry. However, as stated above, 8 C.F.R. § 103.2(b)(14) provides the requisite authority for denying the petition on this ground. Therefore, the AAO affirms the director's decision to deny the petition on this basis.

The AAO will next consider whether the beneficiary is eligible for a seventh-year H-1B extension. The AAO notes that in general section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4) provides that: "[T]he period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years." However, section 106(a) of the "American Competitiveness in the Twenty-First Century Act" (AC21), as amended by the "Twenty-First Century Department of Justice Appropriations Act" (DOJ21), removes the six-year limitation on the authorized period of stay in H-1B visa status for certain aliens whose labor certifications or immigrant petitions remain

undecided due to lengthy adjudication delays, and broadens the class of H-1B nonimmigrants who may avail themselves of this provision. See Pub.L.No. 106-313, § 106(a), 114 stat. 1251, 1253-54 (2000); Pub.L.No. 107-273, § 11030A(a), 116 stat. 1836 (2002).

As amended by § 11030A(a) of DOJ21, § 106(a) of AC21 reads:

(a) EXEMPTION FROM LIMITATION. -- The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. § 1184(g)(4)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of such Act (8 U.S.C. § 1101(a)(15)(H)(i)(b)), if 365 days or more have elapsed since the filing of any of the following:

(1) Any application for labor certification under section 212(a)(5)(A) of such Act (8 U.S.C. § 1182(a)(5)(A)), in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act (8 U.S.C. § 1153(b)).

(2) A petition described in section 204(b) of such Act (8 U.S.C. § 1154(b)) to accord the alien a status under section 203(b) of such Act.

Section 11030A(b) of DOJ21 amended § 106(b) of AC21 to read:

(b) EXTENSION OF H-1B WORKER STATUS--The [Secretary of Homeland Security] shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one-year increments until such time as a final decision is made—

(1) to deny the application described in subsection (a)(1), or, in a case in which such application is granted, to deny a petition described in subsection (a)(2) filed on behalf of the alien pursuant to such grant;

(2) to deny the petition described in subsection (a)(2); or

(3) to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.

Pub. L. No. 107-273, §11030A, 116 Stat. 1836, 1836-37 (2002).

As mentioned previously, the I-140 petition filed by the petitioner on behalf of the beneficiary had not been pending for 365 days or more prior to the present H-1B petition being filed. Therefore, the copy of the I-140 petition receipt submitted in response to the RFE was not sufficient to demonstrate that the beneficiary qualifies for a seventh year in H-1B status under AC21. Also mentioned previously, counsel now, for the first time on appeal, provides a copy of the labor certification application filed by the petitioner on behalf of the beneficiary, which evidences it was filed over 365 days prior to the filing of the present petition. Although this document, together with the I-140 petition receipt, would demonstrate that the beneficiary may be eligible for consideration of a seventh year of H-1B status under AC21, because the petitioner

did not submit this evidence until the appeal, even though it was specifically requested by the director in the RFE, the AAO will not consider this document on appeal. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. As discussed previously, the petitioner failed to submit the requested evidence and now submits it for the first time on appeal. Therefore, the AAO will not consider this evidence for any purpose, and the petitioner has thereby failed to demonstrate that the beneficiary is eligible for a seventh year H-1B extension under AC21, based on the evidence of record before the director. *See Matter of Soriano*, 19 I&N Dec. 764; *Matter of Obaigbena*, 19 I&N Dec. 533.

Beyond the decision of the director, the AAO finds that the petitioner failed to establish that it has sufficient work for the beneficiary to be employed in a specialty occupation. As mentioned above, no documentation was submitted to establish that the petitioner has been paying the beneficiary the proffered H-1B wage or that the beneficiary was in lawful H-1B status at the time the petition was filed. Indeed, the documentation submitted in response to the RFE indicates that the beneficiary has been self-employed and that the petitioner has not been paying him the prevailing wage. Without such documentation, the AAO cannot establish whether the petitioner has made a bona fide offer of employment to the beneficiary such that it could be found that it will fully comply with the terms and conditions of employment as attested to in the instant petition. *See generally* 8 C.F.R. § 214.2(h)(4). For this additional reason, the petition must be denied.

Beyond the decision of the director and based on the above findings, the AAO also finds that the petitioner does not qualify as a United States employer as it has failed to establish that it has sufficient work and resources for the beneficiary such that it has demonstrated that it will have and maintain an employer-employee relationship as claimed in the petition and as required by 8 C.F.R. § 214.2(h)(4)(ii). The petition must also be denied on this basis.

Finally, the above findings also draw questions of whether the beneficiary would in fact be employed as an electrical engineer as claimed in the petition. The AAO thereby also finds that the evidence of record is insufficient to establish that the beneficiary would be employed in a specialty occupation. The petition must therefore be denied on this additional basis.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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.