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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
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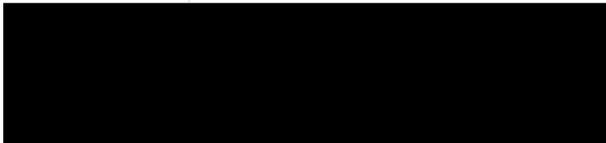
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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **JUL 30 2010**

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:



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 \$585. 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 service center 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.

On the Form I-129 visa petition, the petitioner stated that it is an IT consulting firm. To employ the beneficiary in a position designated as a programmer analyst, the petitioner endeavors to classify her 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 denied the petition, finding that the petitioner failed to provide requested evidence, specifically, an itinerary of the locations where the beneficiary would work and the work she would do at those locations. On appeal, counsel stated that, because the visa petition has not been approved, the petitioner is unable to provide a contract specifically listing the beneficiary. Counsel also provided contracts evincing agreements for the petitioner to provide information technology workers to other companies. Counsel did not contest that the beneficiary would be provided to those other companies to work on their projects.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

Service or training in more than one location. A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

In a letter dated March 27, 2008 and submitted with the visa petition, the petitioner's president stated, "The venue and location of the service that will be performed is at [REDACTED]. On April 24, 2008 the service center issued an RFE requesting that the petitioner submit, *inter alia*,

Documentary evidence of the business'[s] activities for the past year by submitting copies of business contracts. The contracts submitted should include definite starting and ending dates, as well as the specific employee(s) of the petitioner that will be servicing the contract. All contracts submitted should be current and include signatures from representatives of both companies involved.

The service center also requested that the petitioner,

Submit a detailed itinerary of the work sites the beneficiary is to be assigned to, to include specific dates, locations, and clients that the beneficiary will be servicing. Also provide a copy of the contract with the end user which specifically mentions the beneficiary and the duties [s]he will perform with that end user.

The service center noted that if, in the alternative, the petitioner would be working on in-house projects it might submit evidence pertinent to those projects.

In response to the RFE, counsel submitted a letter, dated May 22, 2008, from the petitioner's president. That letter lists the petitioner itself as the client the beneficiary will service, the beneficiary's address as the address where the work will be performed, and the entire period of requested employment as the dates during which the beneficiary would work at that address. Counsel and the petitioner failed to submit evidence pertinent to the projects the beneficiary would be working on. The director denied the petition, finding that the petitioner had failed to provide requested evidence.

On appeal, counsel and the petitioner abandoned the assertion that the beneficiary would work at the petitioner's location for the entire period of the intended employment. In an undated letter the petitioner's president stated, "[The beneficiary] will be working initially at out office, later [she] will be outsourced to our client companies." The president did not indicate why he had earlier misrepresented that the beneficiary would be employed at the petitioner's location for the entire period of the intended employment.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

With the appeal, counsel submitted contracts between the petitioner and its clients. The AAO notes that this evidence was previously requested by the director prior to adjudication in the RFE.

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. The petitioner failed to timely submit the requested evidence and submitted it for the first time on appeal. However, the Administrative Appeals Office will not consider this evidence for any purpose.¹ *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In the appeal brief, counsel stated that the petitioner is unable to provide any contracts for the beneficiary's services because "it can not specifically name the Beneficiary in any contracts with third parties until [the beneficiary] is approved for his or her visa." Counsel provided no authority for that assertion. It is unclear

¹ The AAO notes, however, that some flaws exist in that evidence. Some of the "contracts" are unsigned. Others are signed only by a representative of the petitioner. None are signed by a representative of any of the petitioner's clients. Thus, even if those documents had been timely submitted and had shown that the petitioner has specific work to assign to the beneficiary, their submission would not have been responsive to the RFE.

whether counsel was claiming that a legal impediment exists or merely that identifying the beneficiary in a contract prior to approval of the visa petition would be impractical.

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory “must” and its inclusion in the subsection “Filing of petitions,” establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations. After first insisting that the beneficiary would be employed exclusively at the petitioner’s own location, the petitioner has now admitted that she will also be employed in one or more other locations. This indicates that the petitioner, when it filed the Form I-129 in this matter, did not provide the initial evidence required by 8 C.F.R. § 214.2(h)(2)(i)(B). This is a basis for denial distinct from the failure to provide evidence subsequently requested.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). Although this basis formed no part of the director’s decision,² the appeal will be dismissed and the petition will be denied based on the petitioner’s failure to submit, with the petition, initial evidence required by 8 C.F.R. § 214.2(h)(2)(i)(B).

As was noted above, the basis relied upon by the director, dismissal pursuant to 8 C.F.R. § 103.2(b)(14) for failure to produce evidence specifically requested, is an issue separate from the failure to produce initially required evidence. In the RFE the service center requested that the petitioner provide evidence pertinent to its own projects, if the beneficiary would be working on its own projects, and evidence pertinent to its clients’ projects if the beneficiary would be working on the petitioner’s clients’ projects. In response, the petitioner asserted that the beneficiary would be working exclusively at its own location, but provided no evidence pertinent to the projects on which she would work.

Even assuming, *arguendo*, that the submitted LCA listing Tampa, Florida and the employment dates of September 25, 2008 to September 25, 2010 met the requirements of 8 C.F.R. § 214.2(h)(2)(i)(B), the regulations provide the director with broad discretionary authority to request additional evidence in support of a petition. Specifically, pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that “[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation.”

² The director was in no position to deny the petition for the beneficiary’s failure to provide initial required evidence, *i.e.*, the itinerary, because, at that time, the petitioner was continuing to insist that the beneficiary would work at the petitioner’s location throughout the entire period of employment. In such a scenario, of course, no further itinerary would have been required.

Moreover, in addition to 8 C.F.R. § 214.2(h)(9)(i), the regulation at 8 C.F.R. § 103.2(b)(8) provides the director broad discretionary authority to require such evidence as contracts and itineraries to establish that the services to be performed by the beneficiary will be in a specialty occupation during the entire period requested in the petition. A service center director may issue a request 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).

The AAO finds that, in the context of the record of proceedings as it existed at the time the RFE was issued, the request for itinerary and project evidence was appropriate under the above cited regulations, not only on the basis that an itinerary was required initial evidence, but also on the basis that it and the requested project evidence were material to the petitioner's claim that it had H-1B caliber work for the beneficiary for the period of employment requested in the petition. In other words, the documentation requested was material to whether the visa petition could be approved.

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). Here, in addition to being required initial evidence, as the detailed itinerary was material to a determination of whether the work to be performed by the beneficiary would be in a specialty occupation, the petitioner's failure to provide this specifically requested evidence precluded a material line of inquiry. Failure to provide the requested project information similarly precluded a material line of inquiry into whether the work to be performed by the beneficiary would be in a specialty occupation for the duration of the time requested in the petition. As such, the appeal will be dismissed and the petition denied for this additional reason.

The record raises issues that were not addressed in the decision of denial. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also 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.

The petitioner provided a description of the work the beneficiary would allegedly be doing for the petitioner. On appeal, however, the petitioner admitted that during at least some portion of the employment period, the

beneficiary would not be working for the petitioner on the petitioner's still-unidentified projects, but would be working on the projects of other, unidentified, companies at those other unidentified companies' locations. This strongly suggests that the petitioner would not be assigning the beneficiary's duties, but that the other, unidentified, companies would. Because the petitioner would neither assign nor determine the beneficiary's duties, the petitioner's description of her prospective duties is of little evidentiary value. The petitioner has not established the substantive nature of the work the beneficiary would perform if the visa petition were approved.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner's normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. The appeal will be dismissed and the petition denied because the petitioner failed to show that the proffered position qualifies as a position in a specialty occupation pursuant to any of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Also, as was noted above, the petitioner has admitted, on appeal, that the beneficiary would work at locations other than the petitioner's own location. The labor condition application submitted to support the visa petition is only valid for employment in Tampa, Florida. Whether it is valid for employment at all of the unidentified locations where the beneficiary might work is unclear. Therefore, whether it corresponds to the position offered to the beneficiary and whether it may be used to support the instant visa petition are both unclear. See 20 C.F.R. § 655.705(b). The appeal will be dismissed and the petition will be denied for this additional reason.³

Yet further, at a more basic level, the record lacks credible evidence that, when the petitioner filed the petition, the petitioner had secured work of any type for the beneficiary to perform during the requested period of employment. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(i). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). For this reason also, the appeal will be dismissed and the petition denied.

The petition will be denied for each of the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit

³ Again, this basis for denial was unavailable to the director because, at the time the director issued the decision of denial, the petitioner was continuing to insist that the beneficiary would be employed exclusively at the petitioner's own location in Tampa, Florida.

sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The appeal will be dismissed and the petition denied.

ORDER: The appeal is dismissed. The petition is denied.