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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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[REDACTED]

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: NOV 08 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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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,

*for Michael T. Kelly*  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition and a subsequent motion to reopen and reconsider. 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 a "Management Consulting, Product Lifecycle Management Technology, Product Commercialization, Intellectual Property, and Capital/Venture [sic] firm." To employ the beneficiary in a position designated as a software developer position, the petitioner endeavors to classify him 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 establish that the petitioner has standing to submit the application as either a U.S. employer or a U.S. agent, and failed to demonstrate that the Labor Condition Application submitted to support the visa application is valid for employment in the area where the beneficiary would work. On appeal, counsel asserted that the director's bases for denial were erroneous, and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submitted a brief.

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; (5) the petitioner's Form I-290B motion to reopen/reconsider and counsel's brief in its support; (6) the decision on the motion; and (7) the Form I-290B appeal and counsel's brief and attached exhibits in support of the appeal.

For the reasons discussed below, the AAO will dismiss the appeal and deny the petition, as the record of proceeding does not establish that the director erred in denying the petition and affirming that denial on motion.

The director based her denial of the petition, in part, on her determination that the petitioner had not established that it was qualified to file an H-1B petition, in that the evidence of record did not establish the petitioner as either (a) a U.S. employer as defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F).

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), defines an H-1B nonimmigrant as an alien:

(i) who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 1184(i)(1) . . . , who meets the requirements of the occupation specified in section 1184(i)(2) . . . , and with respect to whom the Secretary of Labor determines . . . that the intending employer has filed with the Secretary an application under 1182(n)(1).

The regulation at 8 C.F.R. § 214.2(h)(1)(i) states:

(h) Temporary employees--(1) Admission of temporary employees--(i) General. Under section 101(a)(15)(H) of the Act, an alien may be authorized to come to the United States temporarily to perform services or labor for, or to receive training from, an employer, if petitioned for by that employer. . . .

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(A) identifies a “United States employer” as authorized to file an H-1B petition. “United States employer” is defined at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

*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 regulation at 8 C.F.R. § 214.2(h)(2)(i)(F) allows a “United States agent” to file a petition “in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf.”

The LCA submitted to support the instant visa petition is valid for employment in Cleveland, Ohio, where the beneficiary indicated, on that form, the beneficiary would work. On the visa petition, the petitioner stated that the beneficiary would work at the petitioner’s office at [REDACTED]. The AAO notes that the Beachwood, Ohio address is roughly 20 miles from Cleveland. Why the petitioner gave different locations for the site of the beneficiary’s prospective employment is unknown to the AAO. The petitioner also stated, on the visa petition, that the beneficiary then lived in Houston, Texas.

With the visa petition counsel provided a letter, dated May 26, 2009, from [REDACTED] who identified himself as the petitioner’s principal. That letter stated that the beneficiary would work in the petitioner’s headquarters at Beachwood, Ohio.

On June 4, 2009 the service center issued an RFE in this matter. The service center requested, *inter alia*, a copy of the employment contract between the beneficiary and the petitioner, a copy of the petitioner’s lease agreement, a floor plan of the petitioner’s business premises, and photographs of the petitioner’s business premises.

In response, counsel submitted a job offer dated May 21, 2009 from the petitioner to the beneficiary, signed by the beneficiary to indicate his acceptance. That agreement indicates that the beneficiary

will be paid \$84,500 annually, on a bi-weekly basis. That agreement also states that, to the contrary, "Pay-checks [sic] are distributed monthly on the last working day of each month." The AAO is unable to reconcile those obviously dissonant statements.

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).

Counsel provided copies of what purport to be rent invoices issued to the petitioner by the [REDACTED] and payable to [REDACTED]. The petitioner's address as shown on those invoices is [REDACTED].

Counsel also submitted what purport to be floor plans of the petitioner's premises. One of those floor plans is for [REDACTED], which comprises 7,167 square feet of rentable space. The other is for [REDACTED] in the same building, which comprises 4,206 square feet of rentable space. Taken together, those two office suites comprise 11,373 square feet, which the petitioner apparently represents that it rents, without a lease, for \$500 per month, which is equal to approximately \$.53 per square foot per year.<sup>1</sup> The AAO notes that the petitioner claims to be renting a commercial office space larger than four full-sized tennis courts for \$500 per month. The AAO finds that such an arrangement is not credible, and the petitioner has provided no corroborating evidence.

Counsel provided copies of the beneficiary's 2008 Form W-2 Wage and Tax Statement. That form shows that the beneficiary worked for the petitioner during that year. The petitioner's address as shown on that document was in Boerne, Texas. The beneficiary's address as shown on that form was in Houston, Texas.

Counsel did not provide the requested photographs of the petitioner's business premises and provided no explanation of that omission.

The director issued a decision denying the visa petition on August 20, 2009. In that decision the director expressed doubt that a landlord would lease commercial office space without a lease, and noted that the rent the petitioner pays for its space is abnormally low. The director noted that other enterprises: [REDACTED], among others, list the petitioner's putative address as their own. Web searches<sup>2</sup> confirm that [REDACTED].

<sup>1</sup> The AAO notes that the cost of commercial real estate rental is typically expressed as a cost per square foot per year. A 1,000 square foot space for which a tenant is paying \$1,250 per month, for instance, would be said to be leased for "\$15 per foot."

<sup>2</sup> The Google web searches were for [REDACTED]

[REDACTED] - US, and numerous other ostensible companies claim to occupy the premises at [REDACTED] at [REDACTED] Center; [REDACTED]; and numerous other ostensible companies claim to occupy the premises at [REDACTED]

The director also noted that, although the beneficiary now lives in Texas, and works for the petitioner in Texas, the visa petition states that he would work for the petitioner in Ohio.

The director surmised that the petitioner is renting a virtual office at [REDACTED] location and has not shown that it has an office in Ohio in which the beneficiary could work as the petitioner claimed, on the visa petition, that he would. The director found that the petitioner has not demonstrated, therefore, where the beneficiary would be employed, what company he would work on the premises of, what company's projects he would work on, who would assign his work to him, or who would oversee his work. The director therefore found that the petitioner had not demonstrated that it would be the beneficiary's actual employer or that the LCA submitted is valid for employment at the location where the beneficiary would work.

On motion, counsel reiterated the petitioner's claims that the beneficiary would work at its offices on its own projects. Counsel stated that the beneficiary had been working in Texas pursuant to his current status, which permits it, but would move to Ohio to work if the instant visa petition were approved.

Counsel did not, however, address the unusual circumstances of the contradictory statements in the beneficiary's employment contract pertinent to when the beneficiary would be paid for his work, the absence of a lease for the petitioner's premises, the remarkably low rent the petitioner ostensibly pays for its business premises, or the numerous other companies that claim to occupy the same business premises that the petitioner claims to occupy. Counsel also did not provide the photographs of the petitioner's business premises that the service center requested in the RFE.

On October 1, 2009 the director reopened the matter and denied the visa petition again, finding that counsel had not explained, and the petitioner had not overcome, the evidence casting doubt on the petitioner's claim that it would employ the beneficiary at its purported premises at [REDACTED]

On appeal, counsel again reiterated the petitioner's claim that it would employ the beneficiary at its own offices, assigning and overseeing his work there. Counsel again stated that, upon approval of the visa petition, the beneficiary would move to Ohio to work for the petitioner there. As to the amount of the petitioner's rent, counsel stated:

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900, and were performed on August 10, 2010.

The Beachwood premises is [sic] over 7,000 square feet. So the petitioner pays \$500 a month. But a software developer does not occupy too much work area in the nature of its work. It is all on computer, desk-top, and corresponding hardware, a phone, and copier. It does not occupy [a] substantial area.

Counsel's argument misses the mark. The monthly amount of the petitioner's rent, compared to the size of the premises the petitioner claims to occupy; the number of other companies that all claim to occupy that same area; and the absence of a lease, taken together, cast considerable doubt on the petitioner's claim that it rents an office of that size, or an office of any substantial size, or, for that matter, any office at all at the Beachwood location, and, therefore, casts doubt on whether the beneficiary could possibly work there. That the petitioner is unable to demonstrate that it has business premises at the Beachwood location necessarily raises the issue of whether it would employ the beneficiary there, as it claimed on the visa petition that it would. The observation that a software developer can work in a small area does not address that concern.

Counsel argued that the decision of the director should be overturned because it failed to consider the petitioner's company website, its Federal and State tax returns, quarterly wage reports, organizational chart, and a June 29, 2009 letter the petitioner's president provided in response to the RFE. The AAO notes that although those items of evidence are relevant to various material facts, and would be worthy of consideration if those facts were disputed, none of them offer any explanation for the dissonant facts listed above, upon which the decision of denial relied, and counsel has not even asserted that they reconcile those facts. The AAO finds that they do not.

The petitioner has not demonstrated that it would employ the beneficiary at [REDACTED], as it claimed. The location at which it would employ the beneficiary is unknown to the AAO. It has not, therefore, shown that the LCA submitted corresponds with the visa petition and may be used to support it.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition "[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary."

In order for a petition to be approvable, the LCA submitted for an H-1B petition must correspond to the location where the beneficiary would work, as that location determines the prevailing wage threshold that sets the minimum wage or salary that the petitioner must pay. As the LCA submitted for this petition has not been shown to correspond to the location where the beneficiary would work, it does not satisfy the regulatory requirements that the petition be filed with a corresponding LCA.

While DOL is the agency that certifies LCAs before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.*

[Italics added].

The regulation at 20 C.F.R. § 655.705(b) requires USCIS to determine whether the LCA submitted corresponds to, and may be used to support, the visa petition with which it was submitted. Pursuant to 20 C.F.R. § 655.705(b), the instant visa petition may not be approved. The appeal will be dismissed and the petition will be denied on this basis.

Another issue upon which the decision of denial was based is whether the petitioner qualifies as either a U.S. employer or agent with respect to the beneficiary.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(A) identifies a "United States employer" as authorized to file an H-1B petition. "United States employer" is defined at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

*United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (2) 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 regulation at 8 C.F.R. § 214.2(h)(2)(i)(F) allows a "United States agent" to file a petition "in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf."

The decision of denial found that the facts of the instant case show that the petitioner is an agent, rather than the beneficiary's actual employer. The AAO respectfully disagrees. The evidence in the instant case demonstrates neither.

Because it has not demonstrated where the beneficiary would work, at what company's offices, on what company's projects, or any other circumstances of his contemplated employment, the petitioner has not demonstrated that the petitioner, rather than some other company, or no company at all,

would be assigning tasks to the beneficiary and overseeing his employment. The petitioner has not, therefore, demonstrated that it would be the beneficiary's employer.

The petitioner has not shown that software developers are traditionally self-employed or use agents to arrange short-term employment on their behalf with numerous employers, nor has it shown that a foreign employer authorized the petitioner to act on its behalf. The petitioner has not shown that it has contracts with end-users for the beneficiary's services. Further, on appeal, counsel flatly denied that the petitioner is an agent with respect to the beneficiary's employment. The petitioner has not, therefore, demonstrated that it would be an agent with respect to the beneficiary's employment within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(F).

The evidence in the instant case does not demonstrate that the petitioner is either a U.S. employer or agent. For this additional reason, the visa petition may not be approved. The appeal will be dismissed and the visa petition will be denied on this additional basis.

The record suggests additional issues that were not addressed in the decision of denial.

Because the petitioner has not demonstrated that it actually maintains business premises at the address where it stated the beneficiary will work, it has not demonstrated where the beneficiary will work, at what company's location, or on what company's projects, as was discussed above. It has therefore not demonstrated the nature of the work the beneficiary would perform.

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 petitioner did not demonstrate that it would employ the beneficiary in a specialty occupation. The appeal will be dismissed and the petition will be denied on this additional basis.

Further, the June 4, 2009 RFE contains the following request,

Photographs of the Business Premises: Submit color photos of the [petitioner's] business premises. Color photos should show both the inside and outside of all office spaces with equipment, products and employees clearly visible. Also, include any company logos, emblems or signs displayed on and in buildings and on products.

The petitioner did not provide any photographs in response to that request. The requested photographs were relevant to the material issue of whether the petitioner maintains business

premises as it claimed, at which premises it claimed the beneficiary would work. 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). The appeal will be dismissed and the petition will be denied on this additional basis.

Further, that RFE also requested that the petitioner provide a copy of its lease and a copy of the floor plan of its business premises. The petitioner provided floor plans, but did not provide the requested lease. Further, the absence of that lease, the remarkably low rent for the square footage the petitioner claims to occupy, and the fact that numerous companies claim to occupy those same premises, considered together, undermine the credibility of the petitioner's assertions that the floor plans provided are of the petitioner's own premises. The request for a copy of the petitioner's lease and for the floor plan of its premises was material to whether the petitioner actually maintains business premises where it indicated, on the Form I-129, that the beneficiary would work. Again, 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). The appeal will be dismissed and the petition will be denied on this additional basis.

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).

The appeal will be dismissed and the petition will be denied for each of 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, and the petition is denied.