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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

PUBLIC COPY

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[redacted]

DATE: DEC 0 1 2011 OFFICE: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner:
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 Vermont Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn, and the case will be remanded for further consideration and action.

As a preliminary matter, it is noted that counsel requested oral argument in his brief accompanying Form I-290B (Notice of Appeal). The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, U.S. Citizenship and Immigration Services (USCIS) has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique facts or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique facts or issues of law to be resolved. The written record of proceeding fully represents the facts and issues in this case. Consequently, the request for oral argument is denied.

The petitioner states that it is a manufacturer and wholesaler of diamonds, precious stones, and fine jewelry with approximately five employees that seeks to employ the beneficiary as an Operations Manager and Marketing Director from May 31, 2009 to May 31, 2010. 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 denied the petition because he found that the petitioner failed to demonstrate that the beneficiary is eligible for an extension beyond the six years permitted under section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), pursuant to the provisions of sections 104(c) or 106 of the American Competitiveness in the Twenty-First Century Act (AC21), as amended by the 21st Century DOJ Appropriations Act (DOJ21).

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's denial; and (3) Form I-290B with counsel's brief and supporting materials. The AAO reviewed the record in its entirety before reaching its decision.

On May 29, 2009, prior to the expiration of the beneficiary's H-1B status on May 31, 2009, the petitioner filed the instant petition, requesting continuation of previously approved H-1B employment without change with the same employer (i.e., a petition extension) and requesting a one year extension of the beneficiary's stay in H-1B status since the beneficiary held this status at the time the petition was filed. The record shows that the beneficiary was present in the United States in H-1B status for nearly five years and ten months on the date this petition was filed. In its brief on appeal, the petitioner claims the beneficiary qualifies for an extension under section 106 of AC21 because an Application for Alien Employment Certification (Form ETA 9089) was filed on behalf of the beneficiary prior to his fifth year in H-1B status. Pub. L. No. 107-273, §11030A, 116 Stat. 1836, 1836-37 (2002).

Evidence submitted by the petitioner in support of this claim includes cover letters addressed to the U.S. Department of Labor (DOL) apparently submitted in connection with an ETA 9089 filing dated July 1, 2006 and September 24, 2007, a copy of the Form ETA 9089 allegedly filed on behalf of the beneficiary, and a FedEx Airbill addressed to the DOL. The record of proceeding does not reflect any

documentation from DOL verifying that Form ETA 9089 was submitted on behalf of the beneficiary. Furthermore, USCIS records do not reflect any information showing that the petitioner ever filed an Immigrant Visa Petition (Form I-140) on behalf of the beneficiary, over three years after Form ETA 9089 was allegedly filed. Because the record is devoid of any evidence that Forms ETA 9089 or I-140 had ever been filed on behalf of the beneficiary, the beneficiary is not exempt from section 214(g)(4) of the Act pursuant to sections 104(c) or 106(a) of AC21 as amended by DOJ21.

The AAO notes that in general section 214(g)(4) of the Act provides that: "[T]he period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years." However, AC21, as amended by 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.[1]

As amended by § 11030A(a) of DOJ21, section 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 section 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—

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[1] While mentioned by the director in the decision denying the petition, it is noted that section 104(c) of AC21 is not at issue here. First, neither counsel nor the petitioner claim eligibility under this provision on appeal. Second, even if they did, there is no evidence or even a claim in the record of proceeding that the beneficiary is eligible for an immigrant visa but for the per country limitations applicable to the beneficiary. *See* Pub. L. No. 106-313, § 104(c)(2) (2000). As such, the foregoing discussion will be limited to the petitioner's claimed eligibility under sections 106(a) and (b) of AC21, as amended.

> *(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) (emphasis added to identify sections amended by DOJ21).

On appeal counsel states that the beneficiary qualifies for an extension based on AC21, section 106(a), which specifies that a labor certification application (Form ETA 9089) or an employment-based immigrant petition (Form I-140) must have been filed at least 365 days prior to the requested date of extension for a beneficiary to qualify for an exemption from the six-year limitation on H-1B classification. However, counsel fails to provide any documentation showing that the beneficiary qualified for an extension under this exception. As discussed above, counsel provided copies of cover letters allegedly attached to Form 9089 filings with handwritten dates of July 1, 2006 and September 24, 2007. The cover letter dated September 24, 2007 was not even signed by the attorney of record.

Additionally, no evidence was submitted showing that the cover letters corresponded to an actual Form ETA 9089 filed on behalf of the beneficiary. A handwritten FedEx Airbill addressed to the U.S. Department of Labor, Employment and Training Administration was also included, but did not include any evidence that it was used to mail Form ETA 9089 to the DOL or that it was ever received by the DOL. Finally, a handwritten Form ETA 9089 was submitted by counsel purporting to be submitted by the petitioner on behalf of the beneficiary. This form was not accompanied by any evidence that it was ever received by DOL, including a case number issued by DOL, any acknowledgement of receipt by DOL, or any final decision reached by DOL documenting a valid, timely submission. These documents do not prove that any Form ETA 9089 was ever filed on behalf of the beneficiary.

The regulations governing applications and petitions filed with USCIS require that eligibility for an immigration benefit be established at the time of filing. Specifically, 8 C.F.R. § 103.2(b)(1) provides in pertinent part:

> An applicant or petitioner must establish eligibility that he or she is eligible for the requested benefit at the time of filing the application or petition.

This regulation has general applicability to all applications and petitions before USCIS and is merely a codification of long-standing, precedent case law. The principle is clear. A visa petition may not be approved at a later date based on a set of facts not present at the time of filing. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978); see also *Matter of Katigbak*, 14 I&N 45, 49 (Comm. 1971). Congress is presumed to be familiar with existing law pertinent to the legislation it

enacts. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979); *Valansi v. Ashcroft*, 278 F.3d 203, 212 (3rd Cir. 2002); *Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 961 n. 3 (BIA 1995).

In the case at bar the petition for extension of stay in H-1B status beyond the sixth year was filed on May 29, 2009, but it did not include any evidence that the beneficiary qualified for an extension at the time of filing. Additionally, the petitioner failed to provide any documentation on appeal showing that the beneficiary qualified for the requested benefit at the time of filing. Therefore, the beneficiary was not eligible for an exemption from the six-year limitation on his H-1B classification under AC21 section 106(a) and an extension of his stay in H-1B status for a seventh year under AC21 section 106(b) at the time his extension petition was filed. In accordance with section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), limiting the authorized period of admission for an H-1B nonimmigrant to six years, the request for a one year extension petition pursuant to AC21 must be denied.

Beyond the decision of the director, to prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).[2]

In this matter, the petitioner claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree and does not require a specific field of study. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation, and the petition cannot be approved for that reason.

Additionally, it is noted that the LCA provided in support of the instant petition lists a Level I prevailing wage level for Managers, All Other in New York, New York. This indicates that the LCA, which is certified for an entry-level position, is inconsistent with the petitioner's claimed

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[2] Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

> [t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: elsewise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

requirements of a bachelor's degree and the beneficiary's "highly refined knowledge of the industry" and six years of experience. Referencing the DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), for example, a position requiring a solid understanding of the occupation would appear to indicate at least a Level III wage level ("experienced") or more likely a Level IV position ("fully competent").

Moreover and as noted above, the prevailing wage Level I listed on the LCA is for Managers, All Other, OES/SOC code: 11-9199. The Operations Manager and Marketing Manager position described in the petition, however, is indicative of either: OES/SOC Code: 11-1021, General and Operations Managers, or OES/SOC code: 11-2021, Marketing Managers, which required $23,421 and $9,277, respectively, more per year more for a Level I wage at the time the LCA was filed.

Given that the LCA submitted in support of the petition is for a Level I wage and the occupational classification selected by the petitioner on the LCA is not in accord with the proffered job duties, it must therefore be concluded that the LCA does not correspond to the petition. In other words, even if it were determined that the proffered position requires at least a bachelor's degree in a specific specialty or its equivalent, such that it would qualify as a specialty occupation, the petition could still not be approved due to the petitioner's failure to submit an LCA that corresponds to that Level III or IV position and that is certified for the proper job classification.

While DOL is the agency that certifies LCA applications 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 that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed Level III or IV position and that has been certified for the proper occupational classification, and the petition cannot be approved for this additional reason.

Finally, in the Form ETA 9089 that was submitted on behalf of the beneficiary reflecting a position that he has held with the petitioner in H-1B status since August 2003, the petitioner indicated that the proffered position was not a professional occupation requiring a bachelor's degree. This is in direct contradiction to the petitioner's assertions that the proffered position in the instant case is a specialty occupation. Therefore, the petition cannot be approved for this additional reason.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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 met that burden in part. Accordingly, the director's decision will be withdrawn, and the matter will be remanded for entry of a new decision. However, as noted above, the evidence of record indicates that the beneficiary had not spent the maximum six years permitted in the United States in H-1B status as of the expiration of the immediately prior petition, which was valid until May 31, 2009. As the beneficiary did not change status to H-1B classification until August 12, 2003, the beneficiary still had approximately two and a half months remaining for which the instant petition could have been approved. That said, even though the director's sole basis for denial is hereby withdrawn, the petition cannot be approved for the reasons discussed *supra*.

ORDER: The decision of the director is withdrawn. The matter is remanded to the director for further action consistent with the above and entry of a new decision.