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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

Date: **FEB 08 2012** Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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 \$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 before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner states that it is a brand manufacturer of furnishings and fashion, and it seeks to employ the beneficiary as a graphic designer. 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, finding that the petitioner had not complied with the requirements for filing a Form I-129, Petition for a Nonimmigrant Worker.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) documentation submitted in response to the RFE; and (4) Form I-290B and supporting documentation.

The issue before the AAO is whether the petitioner established filing eligibility at the time the Form I-129 was received by U.S. Citizenship and Immigration Services (USCIS).

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

Demonstrating eligibility at time of filing. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition.

In matters where evidence related to filing eligibility is provided in response to a director's request for evidence, 8 C.F.R. § 103.2(b)(12) states:

An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed

The regulations require that before filing a Form I-129 petition on behalf of an H-1B employee, a petitioner obtain a certified Labor Condition Application (LCA) from the U.S. Department of Labor (DOL) in the occupational specialty in which the H-1B nonimmigrant will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). The June 12, 2009 version of the instructions that accompanied the Form I-129 filed in this matter also specify that an H-1B petitioner must document the filing of an LCA with the DOL when submitting the Form I-129.

As correctly noted by counsel, USCIS issued correspondence on November 5, 2009 which provided that, in order to accommodate the public in light of ongoing processing delays at DOL, H-1B petitions could be filed with uncertified LCAs for the period from November 5, 2009 through March 4, 2010. This temporary acceptance of uncertified LCAs required petitioners to wait at least seven calendar days from the filing of the LCA before filing the corresponding H-1B petition, and further required petitioners to submit evidence of the filing of the LCA in the form of the e-mail notice from DOL confirming receipt of the LCA on or before the date the H-1B petition was filed.

Moreover, in a subsequently issued question and answer posting, USCIS states in pertinent part the following:

USCIS will not deny an H-1B petition filed during the temporary extension on the basis that the LCA originally filed with [the] petition was certified after the petition was filed, *as long as the case is found to be otherwise eligible.*

* * *

[T]he certified LCA submitted in response to the RFE must be the same LCA that was pending at the time of filing of an H-1B petition receipted under the temporary acceptance procedures. Each LCA has a unique identification number. *Submission of a new certified LCA possessing a different identification number than the LCA referenced upon initial filing will be denied.* The only exception is if the new LCA was certified prior to the filing of the petition.

U.S. Citizenship and Immigration Services, *Questions and Answers: Temporary Acceptance of H-1B Petition Filed without DOL's Certified Labor Condition Applications (LCAs)* (Dec. 8, 2009), <http://www.uscis.gov/portal/site/uscis/template.PRINT/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=bf296bc8a6f65210VgnVCM100000082ca60aRCRD&vgnnextchannel=6abe6d26d17df110VgnVCM1000004718190aRCRD> (accessed Jan. 26, 2012) (emphasis added).

In this case, the petitioner filed the instant petition on Form I-129 with USCIS on November 30, 2009. The petitioner also submitted a copy of an e-mail from DOL confirming that the petitioner had filed an LCA (I-200-09321-720519) on November 18, 2009.

On December 1, 2009, the director issued an RFE and requested a certified copy of the LCA filed on November 18, 2009. In response, counsel submitted a copy of a new LCA (I-200-09332-447528), certified by DOL on December 3, 2009.

On December 14, 2009, the director denied the petition. The director found that the certified LCA (I-200-09332-447528) submitted in response to the RFE differed from the LCA (I-200-09321-720519) submitted with the petition and, consequently, could not be substituted for the original LCA.

On appeal, counsel relies on 5 U.S.C. § 706(2)(A) and asserts that the director's denial was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." Specifically, counsel asserts that the certified LCA submitted in response to the RFE was actually a corrected version of the LCA previously filed on November 18, 2009. Noting that clarification of the petitioner's Federal Employer Identification Number (FEIN) had been the only issue raised by DOL, counsel contends that after such clarification was provided, DOL's system certified the LCA but issued a new LCA number through no fault of its client. In support of this contention, counsel submits copies of various e-mail correspondence between the petitioner and DOL.

A review of the evidence submitted on appeal demonstrates that, contrary to counsel's assertions, the certified LCA submitted in response to the RFE is not a corrected version of the original LCA submitted with the petition. According to DOL's November 24, 2009 e-mail to the petitioner, the [REDACTED], filed on November 18, 2009 and submitted with the petition in this matter, was denied on November 24, 2009. Although the AAO notes that the basis of the denial was an inaccuracy in the petitioner's FEIN number, it is clearly stated in the second paragraph of this e-mail that the petitioner could file a corrected LCA, but that a corrected LCA would be considered a new application. Moreover, DOL's November 30, 2009 e-mail to the petitioner sent at 7:23:35 a.m., which confirms receipt of the petitioner's evidence clarifying its FEIN number, also states that "the employer may now submit a *new* ETA Form 9035E for processing" (emphasis added). Finally, DOL's November 30, 2009 e-mail to the petitioner sent at 10:23:21 a.m., confirming receipt of a new [REDACTED], clearly confirms that this LCA, which is the LCA submitted by the petitioner in response to the RFE, is a new LCA and not simply a correction to the LCA upon which the petition in this matter was based.

The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. Alternatively, the temporary public accommodation implemented by USICS on November 5, 2009 allowed the petitioner to supplement the record with evidence of an approved LCA subsequent to the filing of the petition in accordance with the specific guidelines set forth above. However, the petitioner failed to satisfy these requirements and, instead, attempted to submit an LCA that was both filed and certified after the petition in this matter. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). 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'r 1978). The petitioner failed to comply with the filing requirements

at 8 C.F.R. § 214.2(h)(4)(i)(B), and the appeal must be dismissed and the petition denied for this reason.

Beyond the decision of the director, even if the petitioner had satisfied the temporary acceptance procedures outlined above, the petitioner is not otherwise eligible for the benefit sought in this matter, making this temporary accommodation inapplicable to this case. Specifically, while the graphic designer position offered in this case may qualify as a specialty occupation, the petition may not be approved because the petitioner failed to demonstrate that the beneficiary is qualified to perform the duties of a graphic designer.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that are equivalent to completion of a United States baccalaureate

or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The record indicates that the beneficiary holds a 3-Year Diploma in Hotel and Restaurant Management and a Bachelor of Science Two-Year Pass Examination from the University of Calcutta. An academic credentials evaluation by [REDACTED] equates the beneficiary's "combined" academic achievements to a four-year U.S. bachelor's degree in general science, with a second major in hotel and restaurant management. Consequently, this evaluation does not establish that the beneficiary possesses "a foreign degree determined to be equivalent to a United States baccalaureate or higher degree" as required in part by 8 C.F.R. § 214.2(h)(4)(iii)(C)(2). Therefore, absent (1) an actual U.S. bachelor's or higher degree from an accredited college or university, (2) a foreign degree determined to be equivalent to such a degree, or (3) a pertinent license, the only remaining avenue for the beneficiary to qualify for the proffered position is pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

Under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the petitioner must establish both (1) that the beneficiary's combined education, specialized training, and/or progressively responsible experience are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and (2) that the beneficiary has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

For purposes of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D) require one or more of the following to determine whether a beneficiary has achieved a level of knowledge, competence, and practice in the specialty occupation that is equal to that of an individual who has a baccalaureate or higher degree in the specialty:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;¹
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . . .

In this matter, the petitioner is seeking the beneficiary's services as a graphic designer. While a graphic designer does not categorically qualify as a specialty occupation, based on the information provided in DOL's *Occupational Outlook Handbook (Handbook)*, a specialty occupation-level graphic designer would require a bachelor's or higher degree in graphic design for entry into that position. See U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 Edition, "Graphic Designers," <<http://www.bls.gov/oco/ocos090.htm>> (accessed January 26, 2012). Therefore, the petitioner fails to demonstrate how the beneficiary, by virtue of holding the equivalent of a U.S. bachelor's degree in general science with a second major in hotel and restaurant management, is qualified to perform the duties of a graphic designer. Consequently, the petitioner has failed to satisfy any of the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(1)-(4), and the AAO will next perform a Service evaluation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

When USCIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two

¹ The petitioner should note that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not experience.

recognized authorities in the same specialty occupation²;

- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The record contains the beneficiary's academic transcripts, an academic credentials evaluation, and certificates demonstrating that the beneficiary has completed a course in professional digital photography as well as two courses for Carnival Cruise Lines; namely, English language and photo college. Finally, the record contains two employment verification letters for the beneficiary. The first, from Fifth Avenue Designs, claims that the beneficiary worked remotely from India for its company as a graphic designer from March 1998 to June 2002.³ The second, from Carnival Cruise Lines, confirms that since March 2004, the beneficiary has been working for the company as a photographer.

There is no evidence in the record that the beneficiary has recognition of expertise in the industry, membership in a recognized association in the specialty occupation, or published material by or about the beneficiary. Thus, absent corroborating evidence as outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), the AAO cannot conclude that the beneficiary's past work experience included the theoretical and practical application of a body of highly specialized knowledge in a field related to the proffered position or that the beneficiary has recognition of expertise in the industry.

² *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

³ It is noted that the dates the beneficiary allegedly worked as a graphic designer for Fifth Avenue Designs overlap by approximately two years the beneficiary's post-secondary education program in Hotel and Restaurant Management. There is no explanation to account or otherwise explain how the beneficiary was able to work in this position and attend school full-time. Therefore, provided the letter from Fifth Avenue Designs is even credible, it must be assumed, absent evidence to the contrary, that the beneficiary provided services to this company in a limited, part-time capacity.

The petitioner, therefore, has failed to establish that the beneficiary is qualified to perform the duties of the proffered position. For this additional reason, the petition will be denied.

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).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

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.