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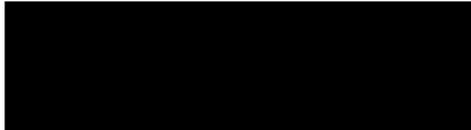
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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DATE:

JAN 03 2012

Office: CALIFORNIA SERVICE CENTER

FILE:



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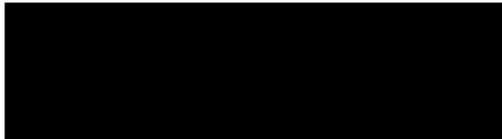
Petitioner:



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, 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 remain denied.

The petitioner is in the construction industry and claims to have been established in 2001 and to employ six personnel. It seeks to extend the employment of the beneficiary in a position titled civil engineer. Accordingly, the petitioner 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, determining that the petitioner had not established that the beneficiary was qualified to perform the duties of a civil engineer as he was not licensed to perform the duties of a civil engineer in the State of Illinois, the location where the work will be performed.

The record of proceeding before the AAO contains: (1) the Form I-129, Petition for Nonimmigrant Worker, and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial letter; and (5) the Form I-290B, Notice of Appeal or Motion, with counsel's supplemental brief. The AAO reviewed the record in its entirety before issuing its decision.

The statutory and regulatory framework that the AAO must apply in its consideration of the evidence of the beneficiary's qualification to serve in a specialty occupation follows below.

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.

In this matter, the petitioner stated on the Form I-129 that the proffered position is a civil engineering position. Similarly, the Labor Condition Application indicated that the proffered position was for a civil engineer to perform work in the State of Illinois. The petitioner stated the beneficiary's duties included:

Analysis of reports, maps, drawing, blueprints, tests, and aerial photographs on soil composition and other geologic data to plan and design projects, calculates cost and determines feasibility of project based on analysis of collected data, prepares or directs preparation and modification of reports, specifications, plans, construction schedules, environmental impact studies, and designs for projects, inspects construction sites to monitor progress and ensure conformance to engineering plans, specifications, and construction and safety standards, directs construction and maintenance activities at project sites.

The initial record did not include the beneficiary's license to perform work as a civil engineer in the State of Illinois.

On August 24, 2009, the director issued a request for evidence requesting that the petitioner provide evidence that the beneficiary is licensed or registered to practice engineering in the State of Illinois.

In response, counsel for the petitioner stated that the beneficiary did not have a valid engineering license because in the proffered position he did not provide his services directly to the public. Counsel also indicated that the beneficiary's duties mainly included preparing, reviewing, modifying construction drawings, maps, and blueprints in the office.

The director observed that the petitioner's initial description of duties included duties wherein the beneficiary would provide his services as a civil engineer to the public and as the petitioner had not submitted the beneficiary's valid license and had not provided evidence from the State of Illinois that a license was not required, the petition must be denied.

On appeal, counsel for the petitioner notes that the petitioner had previously obtained H-1B approval for the beneficiary to work for the petitioner and that a license had not previously been required. Counsel references the Illinois statutes and asserts that because the beneficiary does not practice nor intends to practice engineering as defined in the Illinois statute, a license is not required. Counsel also provides an electronic mail exchange between the beneficiary and [REDACTED] and [REDACTED]. In the initial correspondence, the beneficiary acknowledged that architects and engineers who prepare plans and specifications for construction require licensing but noted that he worked for a construction management firm and oversaw projects and his specific duties included:

- Coordinating and directing individual construction entities during construction
- Quality control, interaction with regulators for code issues
- Cost estimates, budget, purchasing and payment control
- Safety and insurance coordination
- Time schedules and project on-time performance
- Coordinating requirements between clients, designers and construction entities.

In a response from [REDACTED], who has an Illinois government electronic mail address, [REDACTED] noted that the specific activities listed, referring to the beneficiary's description of his duties, did not require a license. Counsel again asserts that the beneficiary's job description does not fall within the professional engineering practice as set out in the Illinois statute and indicates that the beneficiary's duties do not require "extensive knowledge of engineering laws, formulae, materials, practice, and construction methods."

The applicable law regarding the licensing requirements of professional engineers is set out at 225 ILCS 325 which states:

Sec. 1. Declaration of public policy. The practice of professional engineering in the State of Illinois is hereby declared to affect the public health, safety, and welfare and to be subject to regulation and control in the public interest. It is further declared that the practice of professional engineering as defined in this Act merits the confidence of the public, and that only qualified persons shall be

authorized to engage in the practice of professional engineering in the State of Illinois. This Act shall be liberally construed to best carry out this purpose.

Section 4 of the same statute provides the following definitions in pertinent part:

(m) "Professional engineer" means a person licensed under the laws of the State of Illinois to practice professional engineering.

(n) "Professional engineering" means the application of science to the design of engineering systems and facilities using the knowledge, skills, ability and professional judgment developed through professional engineering education, training and experience.

(o) "Professional engineering practice" means the consultation on, conception, investigation, evaluation, planning, and design of, and selection of materials to be used in, administration of construction contracts for, or site observation of, an engineering system or facility, where such consultation, conception, investigation, evaluation, planning, design, selection, administration, or observation requires extensive knowledge of engineering laws, formulae, materials, practice, and construction methods. A person shall be construed to practice or offer to practice professional engineering, within the meaning and intent of this Act, who practices, or who, by verbal claim, sign, advertisement, letterhead, card, or any other way, is represented to be a professional engineer, or through the use of the initials "P.E." or the title "engineer" or any of its derivations or some other title implies licensure as a professional engineer, or holds himself out as able to perform any service which is recognized as professional engineering practice.

Upon review of the petitioner's initial description of the beneficiary's duties, the initial description included elements of the practice of professional engineering as defined in the Illinois statute set out above. The petitioner noted that the beneficiary's duties included "prepar[ing] or direct[ing] preparation and modification of reports, specifications, plans, construction schedules, environmental impact studies, and designs for projects." In response to the director's RFE counsel changed the description of the beneficiary's duties limiting the duties to preparing, reviewing, modifying construction drawings, maps and blueprints in the office. First, it is not clear from counsel's description of duties that the beneficiary would not be involved in preparing plans for projects, a duty that falls within the purview of the Illinois statute's definition of professional engineering practice. Second, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Third, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits

classification as a specialty occupation and that the beneficiary is qualified to perform the duties of the occupation, including full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by counsel for the petitioner in response to the director's RFE only confused the issues regarding the nature of the duties of the proffered position and the licensing requirements necessary to perform the duties.

Similarly, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title or the associated job responsibilities on appeal. Again a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). In this matter, the beneficiary acknowledged on appeal that architects and engineers who prepare plans and specifications for construction require licensing but provided yet a third description of duties and stated that his duties did not involve the proscribed activities.¹

The AAO acknowledges counsel's reference to the prior approval of the beneficiary for H-1B classification. However, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, it would have constituted material and gross error on the part of the director. It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

In this matter, the petitioner's initial description of the duties of the proffered position included duties that required a license to perform in the State of Illinois. The failure of the petitioner to provide the beneficiary's valid license precludes the approval of this petition. The director's decision is affirmed.

¹ We observe, in addition, that the beneficiary is not the "affected party" in this matter; rather affected party means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B). Thus, the beneficiary's rendition of his duties, a version that is inconsistent with the petitioner's initial description, is not probative.

The petition will be denied and the appeal dismissed for the above stated reason. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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