



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 18 2013 OFFICE: VERMONT SERVICE CENTER

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on March 5, 2012. In the Form I-129 visa petition, the petitioner describes itself as a retail business established in 2008. In order to continue to employ the beneficiary in what it designates as an accountant position, the petitioner seeks to extend his classification 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 on August 31, 2012, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. Counsel submitted a brief and additional evidence in support of this assertion.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; (5) the Form I-290B and supporting documentation; (6) the AAO's RFE; and (7) the response to the AAO's RFE. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the petitioner established that the proffered position qualifies as a specialty occupation. A review of the record, however, demonstrates a more critical issue pertaining to the petitioner's eligibility for the benefit sought.¹ As will be discussed in more detail below, even if the petitioner were to overcome the ground for the director's denial of the petition, it could not be found eligible for the benefit sought because it failed to establish that it is a business in good standing. Thus, the petition cannot be approved. Accordingly, the AAO need not address the director's basis for denial of the petition as the issue is moot.

To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the nature of the petitioning entity, the exact position offered, the location of employment, the proffered wage, et cetera. For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. 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)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). A petitioner may of course change a material term and condition of employment. However, such a

¹ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

change cannot be made to a petition after it has already been filed with USCIS. Instead, the change must be documented through the filing of an amended or new petition, with fee, for USCIS to consider. *See* 8 C.F.R. § 214.2(h)(2)(i)(E).

The petitioner claims to be a domestic for-profit organization established under the laws of the State of Texas in 2008. During a preliminary review of the record, the AAO was unable to determine that the petitioner is an organization in good standing. The AAO issued a Request for Additional and Missing Evidence on May 1, 2013 to provide the petitioner with an opportunity to submit additional evidence. Specifically, the petitioner was advised that the Texas Comptroller of Public Accounts listed the petitioner as "Not in Good Standing." The AAO provided the petitioner with a printout of the "Franchise Tax Certification of Account Status" that contained information regarding the petitioner's account. In the RFE, the AAO issued the following request for additional documentation:

The AAO hereby requests the petitioner to provide evidence demonstrating the petitioning organization's status. Please send evidence that, when the visa petition was filed, the petitioner was an organization in good standing, as well as evidence that it has remained so during the interim and that it is now an organization in good standing. In addition, submit evidence (such as invoices, bank statements, federal tax returns, etc.) demonstrating that the petitioner has done business since March 5, 2012 and continues to do business in the United States. Furthermore, the petitioner may submit any other documentation that it wishes to provide to establish eligibility for the benefit sought. *See* Section 291 of the Act, 8 U.S.C. § 1361

Counsel for the petitioner responded to the AAO's RFE on May 28, 2013 by providing a letter and additional evidence. Specifically, counsel submitted a letter, dated May 24, 2013, which states, "Please see the attached copies of Invoices indicating the business is still existing and in good standing." In support of this letter, counsel submitted the following documents: (1) an invoice from

[REDACTED] dated April 4, 2013; (6) an invoice from [REDACTED] dated May 22, 2013; and (7) an unsigned copy of the petitioner's 2011 federal tax return.

The issue of whether the petitioner is a business in good standing is material to the petitioner's eligibility for the requested benefit. *See* section 214(c)(1) of the Act, 8 U.S.C. § 1184(c)(1); *see also* 8 C.F.R. §§ 214.2(h)(2)(i)(A), (4)(ii), (11)(ii). The regulation at 8 C.F.R. § 214.2(h)(11)(ii) addresses the grounds for automatic revocation of the approval of a petition and states, in pertinent part, that the "approval of any petition is immediately and automatically revoked if the petitioner goes out of business." It logically flows that a petitioner must be doing and continue to do business for the director to grant the petition. If the petitioner were not in business and the director granted the petition, it would result in the absurd result of the approved petition immediately and automatically being revoked the instant it was approved. *See* 8 C.F.R. § 214.2(h)(11)(ii). Moreover, any concealment of the true status of the organization by the petitioner seriously compromises the credibility of the remaining evidence in the record. *See Matter of Ho*, 19 I&N Dec. 582, 586 (BIA

1988). 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. *Id.*

The AAO notes that in response to the RFE, counsel provided invoices dated from December 2012 through May 2013 and a copy of the petitioner's 2011 federal tax return. The AAO observes that this evidence does not establish that the petitioner (1) is a corporation currently in good standing; (2) was a corporation in good standing on the date the petition was filed (March 5, 2012) and has remained in good standing since that date; or (3) has done business since the date the petition was filed (March 5, 2012).

The AAO further notes that the website for the Texas Comptroller of Public Accounts indicates that the petitioner is not currently authorized to transact business in the State of Texas.² Notably, the petitioner's "right to transact business in Texas," as determined by the Texas Comptroller of Public Accounts, is listed as "Franchise Tax Involuntarily Ended."³ The website further indicates that this status means that the petitioner's "registration or certificate was ended as a result of a tax forfeiture

² The Texas Comptroller of Public Accounts uses an online Franchise Tax Account Status search in lieu of issuing certificates of good standing. The Texas Comptroller of Public Accounts website provides the following explanation:

"Certificates of Account Status," sometimes called "Certificates of Good Standing," will no longer be available from the Comptroller's office. Instead, website users may print a taxpayer's Franchise Tax Account Status page to accomplish the same purposes.

The Comptroller historically issued Certificates of Account Status in response to inquiries about the status of an entity's franchise tax account. As of May 5, 2013, the Comptroller will respond to such inquiries by providing the status of an entity's right to transact business in Texas from our online search. Search results reflect the information in the Comptroller's records at the time the query is made.

The Comptroller is required by law to forfeit a company's right to transact business in Texas if the company has not filed a franchise tax report or paid a franchise tax required under Chapter 171. The law also requires the Comptroller to give at least 45 days after the notice of pending forfeiture is mailed before the actual forfeiture. Any franchise tax deficiencies must be cured during that period to avoid the forfeiture of the right to transact business in Texas.

Use the Franchise Tax Account Status search to determine whether a taxable entity's right to transact business in Texas is intact. Franchise Tax Account Status may be required in order to conduct real estate or financial transactions.

(Emphasis added.) Window on State Government, Texas Comptroller of Public Accounts, on the Internet at <http://www.window.state.tx.us/taxinfo/coasintr.html> (last visited June 5, 2013).

³ Taxable Entity Search is available on the Internet at <https://ourcpa.cpa.state.tx.us/coa/Index.html> (search for petitioner last conducted on June 5, 2013).

or an administrative forfeiture by Texas Secretary of State." See Right to Transact Business in Texas, Texas Comptroller of Public Accounts, available on the Internet at <https://ourcpa.cpa.state.tx.us/coa/righttotransactbusinesshelp.html> (last visited June 5, 2013). According to the Texas Comptroller of Public Accounts, the "Comptroller is required by law to forfeit a company's right to transact business in Texas if the company has not filed a franchise tax report or paid a franchise tax required under [the applicable statute]." See Window on State Government, Texas Comptroller of Public Accounts, on the Internet at <http://www.window.state.tx.us/taxinfo/coasintr.html> (last visited June 5, 2013).

As previously mentioned, the 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 record does not contain evidence that the petitioner was active and in good standing at the time of filing the petition on March 5, 2012, and has remained in good standing since that date. In his letter dated May 24, 2013, counsel claims that the petitioner "is still existing and [in] good standing." However, the petitioner failed to submit probative evidence to establish that it was in good standing and permitted to transact business in Texas (the designated place of employment for the beneficiary) at the time of filing the H-1B petition, and continues to be in good standing. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). As the petitioner has not established that it was in good standing (and "in business") on the date it filed the application, and has further not established that it has remained in good standing (and permitted to transact business in Texas) since that date, a credible offer of employment between the petitioner and the beneficiary cannot be demonstrated. Accordingly, the AAO finds that the petition cannot be approved and the appeal must be dismissed.

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, (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.

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.