

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

[Redacted]

Date: **MAY 06 2013** Office: CALIFORNIA SERVICE CENTER FILE: [Redacted]

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 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 petitioner appealed this denial to the Administrative Appeals Office (AAO), and on October 7, 2011, the AAO dismissed the appeal. The matter is again before the AAO on a motion to reconsider. The motion will be dismissed.

On the Form I-129 visa petition, the petitioner stated that it is a "Comprehensive ocular (eye) medical practice." To employ the beneficiary in what it designates as an "Ophthalmic Associate" position, the petitioner endeavors to classify her 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 beneficiary is qualified to perform the services of a specialty occupation. On appeal, counsel asserted that the director's basis for denial was erroneous and contended that the petitioner satisfied all evidentiary requirements. The AAO affirmed the director's decision, and also found that the visa petition was not accompanied by a corresponding Labor Condition Application (LCA) as required by 8 C.F.R. § 214.2(h)(4)(i)(B). The instant motion was filed from that decision.

The issue on motion is whether the AAO's previous decision was correct. In that decision, the AAO concluded that the beneficiary will be performing the services of an optometrist, and that a person performing the duties of an optometrist must possess a state license in addition to passing the National Board examination. The AAO further found that based on the lack of evidence that the beneficiary possesses the appropriate license, the petitioner failed to establish that the beneficiary is qualified to perform the duties of the proffered position. The AAO also concluded that the petitioner did not submit an LCA certified for the proper occupational category.

8 C.F.R. § 103.5(a)(3) states, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

For the reasons discussed below, the petitioner has not established that the AAO's decision was incorrect; therefore, the motion will be dismissed.

In a letter dated March 23, 2009, the petitioner's owner stated that the beneficiary's duties will include:

[O]btaining patient histories and identifying chief complaints, determination of refractive states and best-corrected visual acuities, fit and dispense spectacles,

determine contact lens prescription, fit, and educate contact lens insertion and removal, measure intraocular pressures, conduct fundamental ocular neurologic screenings, measure corneal curvature, perform retinal photography including the use of telemedicine image transfer devices, propose and present to [the petitioner's owner] management and treatment options, schedule and educate patients on surgical procedures, assist [the petitioner's owner] in the operating room and beyond; thereby, helping patients throughout their pre-op, intra-op, and post-operative periods.

The AAO recognizes the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>1</sup>

In the "Optometrists" chapter, the *Handbook* provides the following description of the duties of those positions:

Optometrists typically do the following:

- Perform vision tests to check for sight problems, such as nearsightedness or farsightedness
- Check for eye diseases, such as glaucoma
- Prescribe eyeglasses, contact lenses, and medications
- Provide other treatments, such as vision therapy or low-vision rehabilitation
- Provide pre- and postoperative care to patients undergoing eye surgery—for example, examining a patient's eyes the day after surgery
- Evaluate patients for the presence of diseases such as diabetes and refer them to other health care providers as needed
- Promote eye health by counseling patients, including explaining how to clean and wear contact lenses

Some optometrists spend much of their time providing specialized care, particularly if they are working in a group practice with other optometrists or doctors. For example, some optometrists mostly treat patients with only partial or no sight, a condition known as low vision. Others may focus on pre- or postoperative care if they work in a facility that does many eye surgeries. Optometrists may also teach or do research in optometry colleges or work as consultants in the eye care industry. Those who teach are classified as

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<sup>1</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

postsecondary school teachers. For more information, see the profile on postsecondary teachers.

Many optometrists own their practice and may spend more time on general business activities such as hiring employees and ordering supplies. Optometrists should not be confused with ophthalmologists and with dispensing opticians. Ophthalmologists are physicians who perform eye surgery and treat eye disease in addition to examining eyes and prescribing eyeglasses and contact lenses. Dispensing opticians fit and adjust eyeglasses and in some states fill contact lens prescriptions that an optometrist or ophthalmologist has written. For more information, see the profile on dispensing opticians.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Optometrists," <http://www.bls.gov/ooh/healthcare/optometrists.htm#tab-2> (last visited April 12, 2013).

The duties described by the petitioner's owner are entirely consistent with the duties of an optometrist as described in the *Handbook*.

Further, in an affidavit dated August 20, 2009, [REDACTED] an employee of the petitioner, states that he works for the petitioner, and that "an optometrist is not required to be licensed in order to be employed in the State of Nevada. Such a person would be deemed an 'Ophthalmic Associate.'" He further stated:

Unlicensed optometrists (sometimes referred to as Ophthalmic Associate) cannot independently practice optometry and commonly work under an ophthalmologist. A licensed optometrist is permitted to write prescriptions for patients' eyeglasses and contact lenses.

He further stated:

I am not a licensed optometrist in the state of Nevada and therefore I work under [the petitioner's owner], a medical doctor specializing in ophthalmology. My job title is Ophthalmic Associate.

Yet further, he stated:

Licensed and unlicensed optometrists have identical job duties. Both are able to refract on patients, examine patients, measure intraocular pressures, conduct fundamental neurologic screenings, measure corneal curvature, and perform retinal photography. These are the duties I currently perform and that the beneficiary . . . will perform upon approval of this petition.

The *Handbook* strongly suggests that the proffered position is an optometrist position, and the petitioner's own employee and witness confirm that the proffered position is a position for an unlicensed optometrist.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states, in pertinent part, 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."

Section 636.025 of the Nevada Revised Statutes provides the following:

**NRS 636.025 Acts constituting practice in optometry.**

1. The acts set forth in this section, or any of them, whether done severally, collectively or in combination with other acts that are not set forth in this section constitute practice in optometry within the purview of this chapter:

(a) Advertisement or representation as an optometrist.

(b) Adapting, or prescribing or dispensing, without prescription by a practitioner of optometry or medicine licensed in this State, any ophthalmic lens, frame or mounting, or any part thereof, for correction, relief or remedy of any abnormal condition or insufficiency of the eye or any appendage or visual process. The provisions of this paragraph do not prevent an optical mechanic from doing the mere mechanical work of replacement or duplication of the ophthalmic lens or prevent a licensed dispensing optician from engaging in the practice of ophthalmic dispensing.

(c) The examination of the human eye and its appendages, the measurement of the powers or range of human vision, the determination of the accommodative and refractive states of the eye or the scope of its function in general, or the diagnosis or determination of any visual, muscular, neurological, interpretative or anatomic anomalies or deficiencies of the eye or its appendages or visual processes.

(d) Prescribing, directing the use of or using any optical device in connection with ocular exercises, orthoptics or visual training.

(e) The prescribing of contact lenses.

(f) The measurement, fitting or adaptation of contact lenses to the human eye except under the direction and supervision of a physician, surgeon or optometrist licensed in the State of Nevada.

(g) The topical use of diagnostic pharmaceutical agents to determine any visual, muscular, neurological, interpretative or anatomic anomalies or deficiencies of the eye or its appendages or visual processes.

(h) Prescribing, directing the use of or using a therapeutic pharmaceutical agent to treat an abnormality of the eye or its appendages.

(i) Removing a foreign object from the surface or epithelium of the eye.

(j) The ordering of laboratory tests to assist in the diagnosis of an abnormality of the eye or its appendages.

2. The provisions of this section do not authorize an optometrist to engage in any practice which includes:

(a) The incision or suturing of the eye or its appendages; or

(b) The use of lasers for surgical purposes.  
[2:208:1955]—(NRS A 1961, 758; 1979, 952; 1995, 1033; 1999, 1914)

Further, section 636.145 of the Nevada Revised Statutes provides:

**Unlawful practice of optometry.** No person shall engage in the practice of optometry in this State unless:

1. The person has obtained a license pursuant to the provisions of this chapter; and
2. Except for the year in which such license was issued, the person holds a current renewal card for the license.

The evidence in the record establishes that the proffered position is an optometrist position, but does not establish that the beneficiary has the license required by the state of Nevada, which is the state of intended employment, to practice in that profession. The petitioner has not submitted evidence, such as a letter from the Nevada authority responsible for licensing optometrists, demonstrating that a license is not required for the beneficiary to perform the duties claimed by the petitioner. For this reason, the AAO finds that the decision of the director denying the visa petition on this basis, and the AAO's decision dismissing the appeal and denying the visa petition on the same basis, were not in error.

Furthermore, as noted above, [REDACTED] states in his affidavit that he works for the petitioner as an unlicensed optometrist performing duties "identical" to licensed optometrists with the exception of writing prescriptions for patients' eyeglasses and contact lenses. However, the fact that Mr. [REDACTED] is performing the duties of an optometrist without a license in Nevada is not evidence that the State of Nevada permits the performance of such duties without a license.

The remaining issue is the previous finding of the AAO that the visa petition may not be approved because it is not supported by a corresponding LCA. Regarding this finding, counsel asserts, "the petitioner seeks to employ the beneficiary as an ophthalmic associate, not an 'unlicensed' optometrist as the AAO [found]." As noted above, this assertion contradicts [REDACTED] assertion that the beneficiary will be performing duties of an unlicensed optometrist. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

According to the proffered position the title of "ophthalmic associate" in the LCA does not mask the fact that the duties of the proffered position are identical to the duties of an optometrist, other than that the beneficiary will not, herself, issue eyeglass prescriptions.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(I) stipulates the following:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

While the U.S. Department of Labor (DOL) is the agency that certifies LCAs before they are submitted to USCIS, the DOL regulations note that it is within the discretion of the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine 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. . . .*

(emphasis 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 certified LCA that corresponds to the claimed duties of the proffered position. In the instant case, the position proffered is an optometrist position; however, the LCA is certified for an "Ophthalmic Associate," under occupational code 079, with a prevailing wage of \$25,549, and a wage rate of \$27,000. Even if had been shown that the proffered position does not require a license, the petition cannot be approved because it is not supported by an LCA certified for an optometrist position.<sup>2</sup> Therefore, the AAO's previous decision denying the visa petition on this additional basis was also not in error.

"A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision." 8 C.F.R. § 103.5(a)(3). Further, the regulation at 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." As explained above, the instant motion does not establish that either the decision of the director or the previous decision of the AAO was based on an incorrect application of law or USCIS policy. Accordingly, the motion to reconsider will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

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<sup>2</sup> It is further noted that a search of the Online Wage Library indicates that at the time the LCA was filed in this matter, the prevailing wage for an optometrist at a Level I wage was \$52,021, which is significantly higher than the \$27,000 wage offered to the beneficiary.

Finally, the motion shall also be dismissed for failing to meet another applicable filing requirement. The regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion did not meet the applicable filing requirement listed at 8 C.F.R. § 103.5(a)(1)(iii)(C), it must be dismissed for this additional reason.

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 not sustained that burden. Accordingly, the motion will be dismissed, the proceeding will not be reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

**ORDER:**                   The motion is dismissed.