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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 06 187 51596 Office: CALIFORNIA SERVICE CENTER Date: SEP 19 2007

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker under Section 101(a)(15)(O)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(O)(i)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner engages in real estate development, general contracting, real estate sales and architectural design. The petitioner seeks O-1 nonimmigrant classification of the beneficiary, as an alien with extraordinary ability under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i), in order to employ him temporarily in the United States as an engineer supervisor for a period of three years at an annual salary of $60,000.

The director denied the petition because the petitioner had failed to file a complete petition, including an O and P Classifications Supplement and a peer group advisory opinion.

On appeal, the petitioner submits a brief from counsel, new documents, and copies of previously submitted materials.

Section 101(a)(15)(O)(i) of the Act provides classification to a qualified alien who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim, whose achievements have been recognized in the field through extensive documentation, and who seeks to enter the United States to continue work in the area of extraordinary ability. 8 U.S.C. § 1101(a)(15)(O)(i).

An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form. 8 C.F.R. § 103.2(b)(1). *See also* 8 C.F.R. § 103.2(a)(1).

The instructions to Form I-129, Petition for a Nonimmigrant Worker, state on page 2 that the petitioner must "Complete the basic form and any relating supplement." The instructions list the various supplements, including the O and P Classifications Supplement. On page 7, the instructions state that an O-1 petition "must be submitted with . . . [a] written consultation from a peer group or labor management organization with expertise in the field. If the above item cannot be obtained, the consultation can be from a person of your (the employer's) choosing with expertise in the alien's area of ability[.]"

The O and P Classifications Supplement (hereafter "Supplement") calls for basic information that is necessary for a proper adjudication of the visa petition, such as, for instance, the nature of the work that the beneficiary is to perform in the United States, and the name of the recognized peer group providing a written advisory consultation regarding the petition. Pursuant to the instructions quoted above, the Supplement is considered an integral part of the I-129 petition form, and a petition submitted without the Supplement is therefore necessarily incomplete.

8 C.F.R. § 214.2(o)(5)(i) reads, in pertinent part:

> (A) Consultation with an appropriate U.S. peer group (which could include a person or persons with expertise in the field), labor and/or management organization regarding the nature of the work to be done and the alien's qualifications is mandatory before a petition for an O-1 or O-2 classification can be approved.

> (B) Except as provided in paragraph (o)(5)(i)(E)[1] of this section, evidence of consultation shall be in the form of a written advisory opinion from a peer group (which could include a person or persons with expertise in the field), labor and/or management organization with expertise in the specific field involved.
>
> (C) Except as provided in paragraph (o)(5)(i)(E) of this section, the petitioner shall obtain a written advisory opinion from a peer group (which could include a person or persons with expertise in the field), labor, and/or management organization with expertise in the specific field involved. The advisory opinion shall be submitted along with the petition when the petition is filed. . . . Advisory opinions must be submitted in writing and must be signed by an authorized official of the group or organization.

The regulation at 8 C.F.R. § 214.2(o)(3)(ii) prescribes the following pertinent definition:

> *Peer group* means a group or organization which is comprised of practitioners of the alien's occupation. If there is a collective bargaining representative of an employer's employees in the occupational classification for which the alien is being sought, such a representative may be considered the appropriate peer group for purposes of consultation.

A cover letter from counsel, submitted at the time of filing, indicated that the initial submission included the Supplement. The record, however, does not contain the Supplement. Counsel's cover letter said nothing about the required U.S. peer group advisory opinion, and nothing in the initial submission identified the U.S. peer group that would provide the advisory opinion. Therefore, pursuant to 8 C.F.R. § 103.2(b)(8), the director issued a request for evidence (RFE) on June 15, 2006, instructing the petitioner to submit, among other things, a completed Supplement and the required evidence of "consultation from the national office [of] an appropriate labor union" or "an appropriate U.S. peer group."

The petitioner, through counsel, responded to the RFE. The RFE response does not include the required Supplement or U.S. peer group advisory opinion, and counsel's five-page cover letter, including a list of materials accompanying the RFE response, does not mention the Supplement or the advisory opinion or the director's instruction to submit those materials. The petitioner did submit, in an unrelated context, background documentation about the [redacted] headquartered in Chantilly, Virginia, with "98 chapters throughout the United States, Canada, Australia and Brazil." The petitioner's initial submission included a letter from [redacted]da Silva, Executive Vice President of [redacted] Brazilian chapter, attesting to the beneficiary's role in various projects that had won [redacted] awards.

The director denied the petition on July 19, 2006, citing the petitioner's failure to submit the mandatory peer group consultation and the required Supplement. On appeal, counsel asserts that the petitioner had already submitted the Supplement and evidence of consultation with the initial filing. As we have already noted, the

[1] Paragraph (o)(5)(i)(E) does not apply in this proceeding; the cited paragraph applies only "where the alien will be employed in the field of arts, entertainment, or athletics, and the Service has determined that a petition merits expeditious handling."

record does not show that any Supplement was included with the initial filing. The petitioner submits, on appeal, a photocopy of a Form I-129, including the Supplement, which identifies the "Recognized Peer Group" as [redacted].

Counsel acknowledges that no Supplement accompanied the RFE response. Where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). We must, therefore, examine counsel's assertion that the petitioner had included the Supplement in its initial filing. If there were credible evidence that the petitioner did, indeed, submit the Supplement with the initial filing, then we could properly consider the newly-submitted Supplement as a replacement for a document previously filed. If, on the other hand, doubt were to arise as to the provenance of the newly-submitted Supplement, this would in turn cast doubt on counsel's claim that the petitioner submitted the form previously.

The appeal does not include any objective evidence that the Supplement reproduced on appeal was ever previously submitted. In fact, the record suggests the opposite. The original Form I-129 petition, stamped as having been received on May 22, 2006, used the October 26, 2005 revision of the petition form. At the bottom right corner of every page is the legend "Form I-129 (Rev. 10/26/05)Y." Pages 3 and 4 of the photocopied Form I-129 submitted on appeal, however, show a different revision date: "(Rev. 04/01/06)." Therefore, the photocopy does not match the original from which it was supposedly made. The Supplement submitted on appeal also shows a revision date of April 1, 2006, which matches the newly-submitted copy of pages 3 and 4, but does not match the petition as originally filed.

Beyond the revision dates, some information that appeared on the original Form I-129, both handwritten and computer printed, is either different in appearance or missing from the new copy. For example, telephone numbers shown on under Parts 6 and 7 of the original Form I-129 are provided without spaces between the digits (*e.g.*, "0050"). On the copy submitted on appeal, there are spaces between every digit (*e.g.*, "0 0 5 0"). As another example, under "Type of Business" on Part 5, line 10, the original Form I-129 includes a handwritten description. On the copy, the line is blank. There are other differences as well.

The variations between the original and photocopied Forms I-129 prove beyond any doubt that the copies of pages 3 and 4 submitted on appeal were not photocopied from the corresponding pages of the petitioner's original Form I-129. Rather, the copies were re-created.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Because it is a demonstrable fact that at least some of the petition documents reproduced on appeal were not photocopied from the previously submitted originals, we have no confidence that the photocopied Supplement submitted on appeal was, in fact, copied from an original that was duly submitted but that somehow disappeared from the record. We conclude that the petitioner has not credibly demonstrated that the initial filing included the required Supplement.

As for the advisory opinion, counsel maintains that such a document has been in the record all along, although it was not until the appeal that counsel actually identified it as such. As noted above, the Supplement submitted on appeal identifies [redacted] as the beneficiary's "Recognized Peer Group." The original submission included a letter from an official of [redacted] Brazilian chapter.

8 C.F.R. § 214.2(o)(5)(i)(A) requires consultation with an appropriate *U.S.* peer group. Counsel argues, on appeal, that [redacted]s international headquarters is in the United States and therefore SMACNA is a "U.S. peer group" even if some of its offices are overseas. A letter from a Brazilian organization, however, is not from "a U.S. peer group," even if it is affiliated with an organization in the United States.

The petitioner submits, on appeal, a letter from [redacted]Executive Director of Market Sectors, who states: "As a matter of policy, [redacted] does not attest to or offer comments/objections with regard to individuals in the industry since [redacted]members are employers. Therefore, [redacted] takes no position with regard to [the beneficiary's] qualifications." This letter indicates that [redacted] has, in effect, refused to provide a peer group consultation. We note that [redacted] letter is dated July 26, 2006, a week after the denial of the petition, and therefore the letter represents an attempt to obtain required initial evidence at an unacceptably late stage in the proceedings.

We find that the petitioner, prior to the denial, failed to submit the required advisory opinion from a *United States* peer group, and that on appeal, the petitioner has simply identified an organization that refuses to act as a United States peer group.

With regard to the petitioner's failure to submit the required evidence in response to the RFE, counsel states:

> the RFE demanded . . . the previously submitted advisory opinion and "O" form in bold and eight-point type set . . .physically below the main ten-point heading of "comparable evidence." Because the other two items had been previously submitted . . . and because the demand was placed ostensibly under the heading of "comparable evidence" – and since these documents are otherwise "initial evidence" and preliminary processing had already begun, Petitioner deemed this demand redundant and/or "optional."

After the denial but prior to filing the appeal, counsel sent an inquiry by electronic mail to the California Service Center. The petitioner incorporates this message into the record by submitting a copy on appeal. In that message, counsel stated that the placement within the RFE of the requests for the Supplement and advisory opinion amounted to "stealth." In that message, counsel again alleged that the relevant portion of the RFE was in a smaller typeface. Counsel did not claim that the typeface was illegibly small, nor did counsel cite any authority that would lead counsel to believe that specific evidentiary requests in a small typeface are inherently "optional" in relation to other requests in a larger typeface.

Because part of counsel's appellate argument rests on the assertion that the format of the RFE was confusing or misleading, we will examine the RFE here. Most of the RFE is devoted to the detailed evidentiary requirements set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B). The director first listed eight types of evidence, corresponding to the eight subsections of the aforementioned regulation, followed by these concluding passages:

9) Comparable Evidence.

If the preceding criteria do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

Additional Evidence:

[NOTE: Only one advisory opinion from a labor organization is required for aliens of extraordinary ability in the fields of science, education, business, and athletics. However, if an appropriate labor organization does not exist then an advisory opinion from a peer group is sufficient.][2]

Consultation: Provide a consultation from the national office [of] an appropriate labor union.

Consultation: Provide a consultation from an appropriate U.S. peer group.

Contracts: Provide a copy of any written contracts between the petitioner and the beneficiary or, if there is no written contract, a summary of the terms of the oral agreement under which the alien will be employed.

Submit a completed "O and P Classifications Supplement to Form I-129.["]

We note that the instructions in the RFE to "Provide a consultation from an appropriate U.S. peer group" and "Submit a completed 'O and P Classifications Supplement to Form I-129" are in the same size font as the other evidentiary descriptions listed in the RFE (some section headings use a bold font for emphasis). These instructions appear at the end of a four-page RFE, but the director never stated or implied that the various instructions had been ranked in order of importance or that any of the instructions were "optional." Citizenship and Immigration Services cannot be responsible for counsel's unwarranted presumption that the last instructions listed in the RFE were somehow less important or mandatory than those preceding them.

The bold-face heading "Comparable Evidence" does appear half a page above the references to the Supplement and the advisory opinion, but that heading refers to the "comparable evidence" clause at 8 C.F.R. § 214.2(o)(3)(iii)(C), which permits the submission of comparable evidence when the eight listed evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B) are not applicable to the beneficiary's occupation. The requirements relating to submitting an advisory opinion and a complete petition form are contained in different sections of the regulations. Counsel's purported confusion as to the format of the RFE does not relieve the petitioner of its burden of proof.

[2] The brackets around this paragraph are the director's. The other brackets in the quoted passage denote the AAO's inserted grammatical or typographical corrections.

Counsel notes, on appeal, that the director's denial did not discuss the regulatory criteria related to a finding of extraordinary ability. Counsel therefore concludes that the director has conceded the beneficiary's eligibility in this regard. We disagree with this assessment. The burden of proof is on the petitioner to establish eligibility, not on the director to rebut any supposed presumption of eligibility. Therefore, the director's silence on the issue should not be construed as an implicit finding of eligibility. Because the petitioner never properly filed the petition, there was no basis to proceed with adjudication on the merits. The AAO will not make an initial finding on the merits at this late stage. Even a favorable determination, were the AAO so inclined, would still not negate or overcome the director's stated grounds for denial.

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 appeal will be dismissed.

ORDER: The appeal is dismissed.