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U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529



**U.S. Citizenship
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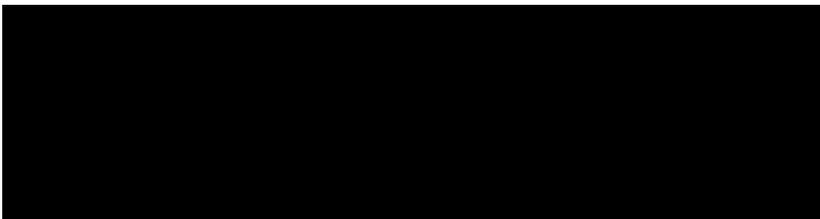
FILE: WAC 01 013 51667 Office: CALIFORNIA SERVICE CENTER Date: **MAR 02 2005**

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)

SELF-REPRESENTED:



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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the 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 be denied.

The petitioner is engaged in the business of staffing medical facilities, company offices and firms at its client's facility or job site. It seeks to employ the beneficiary as a medical record administrator. 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 because the petitioner did not have an approved labor certification for the proffered position at the time of filing. On appeal, the petitioner submits a letter.

The AAO will discuss the director's determination that the petitioner did not have an approved labor certification for the proffered position at the time of filing.

When a petition is filed under this section the petitioner must provide evidence of an approved Labor Certification Application for H-1B Nonimmigrant (ETA Form 9035). Pursuant to 8 C.F.R. § 214.2(h)(4)(i)(B) petitions involving a specialty occupation require the following:

- (1) 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.

Additionally, the regulations pursuant to 8 C.F.R. § 214.2(h)(4)(iv) provide the general documentary requirements for H-1B classification in a specialty occupation. An H-1B petition involving a specialty occupation shall be accompanied by:

- (B) Copies of any written contracts between the petitioner and beneficiary, or a summary of the terms of the oral agreement under which the beneficiary will be employed, if there is no written contract.

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

On or about October 10, 2000, the petitioner submitted the instant H-1B petition. The petitioner included an approved labor condition application with an ETA case number, [REDACTED] which indicated that the city of employment was Riverside, California. Additionally, the period of employment was indicated as September 1, 2000 to September 1, 2003. This labor condition application was approved August 17, 2000.

On or about June 19, 2002, the director issued a request for additional information. In response to the request for information, the petitioner provided an employment contract between the petitioner and the beneficiary as well as a staffing agreement between the petitioner and its client. The petitioner stated that it was submitting a new LCA with new dates of employment and a new place of employment. The second LCA has an ETA case number of [REDACTED] and indicates the dates of employment as September 5, 2002 until September 5, 2005 and the work location as Buena Park, CA.

The director determined that the petitioner did not have an approved labor certification for the proffered position at the time of filing.

On appeal, the petitioner contends "there was an approved Labor Condition Application for the proffered position when the I-129 petition was filed." Additionally, the petitioner explains that it subsequently submitted a second approved labor condition application with a new location and dates of employment because the lengthy adjudication process resulted in the client's cancellation of the staffing request.

Upon review of the record, the petitioner has not established that it had an approved labor condition application for the proffered position at the time the I-129 H-1B petition was filed.

In response to the request for evidence, counsel submitted a new approved labor condition application. 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 or its associated job responsibilities. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 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. Because the petitioner sought to materially change the position's place of employment and dates of employment, the AAO will not consider the second approved labor condition application.

Additionally, Citizenship and Immigration Services (CIS) 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)(12). 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. 1978). In response to the director's request, the petitioner submitted a staffing contract with a different employment location and a labor condition application with the new employment location. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The petitioner admits that original proffered position place of employment has changed from Riverside, CA to Buena Park, CA. The petitioner submitted a new staffing contract between the petitioner and Hana Medical Group for the proffered position of medical record administrator. This staffing agreement was entered into on July 17, 2002 more than a year after the initial petition was filed. It is not clear from the record if the petitioner's client remained the same from the time the initial petition was filed until the response to the

request for evidence. The petitioner did not provide a staffing agreement or contract of employment with the initial filing of the petition. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Upon review of the record, the petitioner has not established that it had an approved labor condition application for the proffered position when it submitted the instant petition. The petitioner admits the petition was based on a staffing request that was later canceled. The petitioner states that the place of employment for the current position is located in Buena Park, California. The approved labor condition application that was submitted with the instant petition states a workplace of Riverside, California. Accordingly, the AAO shall not disturb the director's denial of the petition on this ground.

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.

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