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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: WAC 07 064 51806 Office: CALIFORNIA SERVICE CENTER Date: **SEP 12 2008**

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:

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.

Handwritten signature of Robert P. Wiemann in black ink.

Robert P. Wiemann, Chief
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 a computer consulting business that seeks to employ the beneficiary as a programmer analyst at the site of its end-client, [REDACTED], located in Lake Mary, Florida. 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, determining that the petitioner had not established that its labor condition application (LCA) is valid.

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

The record also contains an LCA submitted at the time of filing, which was certified on March 30, 2005, listing the beneficiary's work location in Jacksonville, Florida as a programmer analyst.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. Evidence that the alien qualifies to perform services in the specialty occupation. . . .

In an RFE, the director requested additional information from the petitioner, including a new LCA listing the beneficiary's work location in Lake Mary, Florida.

In response to the RFE, the petitioner's manager asserted that the beneficiary would be working at the site of the petitioner's client, [REDACTED] located in Lake Mary, Florida, and submitted a new LCA, certified on May 18, 2007, listing the beneficiary's work location in Lake Mary, Florida.

The director denied the petition on the basis of her determination that, although the LCA that was submitted in response to the RFE and the petitioner's December 21, 2006 letter both indicate that the beneficiary would be working in Lake Mary, Florida, the petitioner's January 14, 2003 software development and services agreement with [REDACTED] lists the work location as [REDACTED] in Alpharetta, Georgia.

On appeal, the petitioner states, in part, that the beneficiary has been working in Lake Mary, Florida, and at the current time, Lake Mary, Florida is the only intended location where the beneficiary will work. As supporting

documentation, the petitioner submits a third LCA, certified on July 11, 2007, listing the beneficiary's work location in Lake Mary, Florida.

The AAO acknowledges the petitioner's LCA submitted on appeal, certified on July 11, 2007, and the LCA submitted in response to the RFE, certified on May 18, 2007, both listing the beneficiary's work location in Lake Mary, Florida. Nevertheless, both LCAs were certified subsequent to December 27, 2006, the filing date of the visa petition. The petitioner should have obtained the certification from the DOL prior to filing the instant petition. The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) provides that *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. (Emphasis added.) Since this has not occurred, the petition may not be approved.

Beyond the decision of the director, the petitioner has also failed to establish that the proffered position is a specialty occupation. The record does not contain a work order that specifically names the beneficiary to a project for the petitioner's end-client, [REDACTED], in Lake Mary, Florida. Nor does the record contain a comprehensive description of the proposed duties from a representative of [REDACTED] in Lake Mary, Florida. In addition, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of a specialty occupation, as the record does not contain an evaluation of the beneficiary's credentials from a service that specializes in evaluating foreign educational credentials as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). For these additional reasons, the petition may not be approved.

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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.