



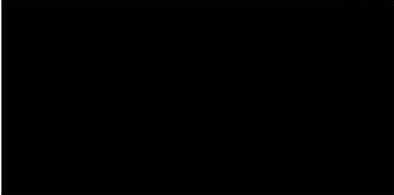
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MAR 23 2004



FILE: WAC 01 071 54742 Office: CALIFORNIA SERVICE CENTER Date:

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:

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.

*Robert P. Wiemann*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The service center director 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 newspaper company that seeks to employ the beneficiary as a programmer. The petitioner 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 labor condition application (LCA) is not valid for the intended location of employment. On appeal, counsel submits a statement.

The labor condition application was submitted for Detroit, Michigan. The Form I-129, filed January 29, 2001, also stated that the place of employment would be Detroit. The director issued a request for evidence on April 14, 2001 requesting that the petitioner provide the location of each work site where the beneficiary would perform services. The petitioner responded on July 5, 2001, stating that the petitioner's operations have been consolidated in the corporate headquarters at Fremont, California. No information was provided as to when that consolidation occurred or whether the petitioner previously had operations in Detroit. On June 17, 2002, the director requested additional evidence, including a labor condition application for the actual worksite. Counsel replied, stating:

The previous attorney in this matter inadvertently filed the application in this matter using a Labor Condition Application for the Programmer Analyst position to be performed in Detroit, Michigan. I have attached an approved Labor Condition Application for Fremont, California for the position of Programmer Analyst, which is the appropriate location for this application.

On appeal, counsel re-states the above position, and also states that the response to the first request for evidence included an explanation regarding the incorrect labor condition application. The AAO notes that there is no previous G-28 on file, and so there is no attorney of record prior to current counsel. In addition, the only explanation included in the response to the first request for evidence was that the petitioner had consolidated its operations in Fremont, California, but it does not reference the LCA, or an error having been made on the Form I-129 or the original LCA.

It is not clear whether the original intention was for the beneficiary to work in Detroit. As noted, both the Form I-129 and the LCA state the place of employment as being Detroit. The employment contract specifies the work site to be Fremont, California, but it is undated and, therefore, provides no insight as to the original intent.

Counsel states on appeal and in response to the second request for evidence that designating Detroit as the job location was an error.

Regardless of whether the LCA was correct or incorrect at the time of filing, by the time the petitioner replied to the first request for evidence, just over five months later, the worksite was designated at Fremont, California. At that time, a new LCA for the different location should have been filed. The correct LCA was only filed in response to the second request for evidence, and was dated July 15, 2002, more than 17 months after the initial petition was filed, and one year after the response to the first request for evidence, which indicated that the worksite would be Fremont, California.

The regulations state, "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." 8 C.F.R. § 214.2(h)(4)(B)(1).

The petitioner obtained certification 17 months after the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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).

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.