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U.S. Citizenship
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FILE: EAC 04 044 51467 Office: VERMONT SERVICE CENTER Date: **AUG 15 2006**

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: Self-represented

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials 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, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a provider of manpower to medical, environmental, and radiology laboratories. It seeks to employ the beneficiary as a system administrator and to extend his classification 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 on the ground that the beneficiary was working for the petitioner's client at a location that was different from the work location indicated in the petitioner's certified labor condition application (LCA).

On appeal the petitioner indicates that the beneficiary continued to work for his previous employer for several months after the instant petition was filed in late 2003, and did not begin working for the petitioner at the work location identified in the LCA until April 2004.

As specified in 8 C.F.R. § 214.2(h)(4)(i)(B)(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.

The record shows that the petitioner filed its Form I-129 petition on December 3, 2003, requesting H-1B classification for the beneficiary in the proffered position for the three-year period of December 8, 2003 through December 7, 2006. The petition identified the beneficiary's work location as Salem, New Hampshire. The petition was accompanied by an LCA, certified by the Department of Labor (DOL) on November 26, 2003, which likewise identified Salem, New Hampshire as the beneficiary's only work location.

In response to the director's request for evidence (RFE), the petitioner's immigration coordinator submitted two letters to the service center. One of the letters, dated June 24, 2004, stated that the beneficiary "has been engaged" with the petitioner in the proffered position since May 1, 2003 and was currently "providing services at Orange Community MRI" in the State of New Jersey. The other letter, dated July 8, 2004, stated that the beneficiary "joined the petitioner [in] April 2004 with its end client Orange Community M.R.I. in New Jersey." The petitioner also submitted a letter from the beneficiary's previous H-1B employer in Edison, New Jersey, dated June 29, 2004, which states that the beneficiary worked for that company from April 2002 to June 2004.

Based on the foregoing information that the beneficiary had not complied with the work location provision of the LCA, the director denied the petition on November 15, 2004.

On appeal the petitioner confirms that the beneficiary did not begin working for the petitioner at the time the instant petition was filed (December 3, 2003), and did not work in Salem, New Hampshire, the work location indicated in the LCA, for several months thereafter while he was finishing up a project for his previous H-1B employer. The petitioner claims that the beneficiary worked part-time in Salem, New Hampshire for the previous H-1B employer from April to July 2004, but acknowledges that he also worked during that time for

the petitioner's client – Orange Community MRI – in New Jersey. As of July 2004 the beneficiary was apparently working full-time for the client in New Jersey, though the petitioner cites a subsequent pay statement for October 2004, identifying the beneficiary's address by that time as Salem, New Hampshire, as evidence of compliance with the LCA.

The foregoing evidence is inconsistent and contradictory. It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92, (BIA 1988). No such competent evidence has been submitted by the petitioner.

Moreover, the foregoing evidence fails to demonstrate compliance with the work location provision of the LCA. CIS regulations 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. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm.). As stated in *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), “[t]he AAO cannot consider facts that come into being only subsequently to the filing of the petition.” Regardless of whether the beneficiary may have started working for the petitioner in Salem, New Hampshire sometime during 2004, that was not the beneficiary's work location at the time the H-1B petition was filed in December 2003 and for at least several months of 2004. Since the petitioner was not in compliance with the work location provision of the LCA at the time the instant petition was filed, the beneficiary is ineligible for H-1B classification pursuant to this petition.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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