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FILE: WAC 07 093 50769 Office: CALIFORNIA SERVICE CENTER Date: **SEP 03 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.

for Michael T. Kelly
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 software development and consulting business that seeks to employ the beneficiary as a programmer analyst. 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 had not shown that the beneficiary would work only at the location reflected on the certified labor condition application (LCA), and thus the LCA cannot be considered to be 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.

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. . . .

At the time of the petition's February 8, 2007 filing, the petitioner submitted an LCA certified by the Department of Labor (DOL) on February 1, 2007, listing the beneficiary's work location in South Burlington, Vermont as a programmer analyst for a period of employment beginning on February 12, 2007, and ending on February 11, 2010.

In an RFE, the director requested additional information from the petitioner, including an itinerary and copies of contracts between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work/work orders, and/or service agreements for the beneficiary.

In response to the RFE, the petitioner stated, in part, that the beneficiary was working at Compass Bank, located at 710 32nd St. S, Birmingham, Alabama. The petitioner submitted a new LCA, certified by the DOL on March 5, 2007, reflecting the beneficiary's work location as Birmingham, Alabama, for a period of employment beginning on March 5, 2007, and ending on March 4, 2010. As part of the supporting documentation, the petitioner submitted: a letter dated May 9, 2007, from the Applications Manager of Compass Bank, located at P.O. Box 10566, Birmingham, Alabama, confirming that the beneficiary is working at Compass Bank in a contractor capacity as a programmer analyst; five earnings statements for the beneficiary from the petitioner for the pay

periods beginning April 8, 2007 through June 3, 2007, reflecting the beneficiary's address as: [REDACTED] Austin, Texas; an Employee Directed Salary Referral 401(k) Plan Enrollment Form, signed by the beneficiary on March 5, 2007, reflecting the beneficiary's address as: [REDACTED], Austin, Texas; and a letter, dated April 2, 2007, from the Benefit Administrative Systems, LLC (BAS), addressed to the beneficiary, regarding the beneficiary's medical coverage, reflecting an effective date of March 5, 2007, and the beneficiary's address as: [REDACTED], Austin, Texas.

The director found that although the petitioner's certified LCA reflects the beneficiary's work location as South Burlington, Vermont, the petitioner indicated in its response to the director's RFE that the beneficiary was working as a programmer analyst at Compass Bank, located in Birmingham, Alabama. The director therefore denied the petition because the petitioner had not shown that the beneficiary would work only at the location reflected on the certified LCA, and thus the LCA could not be considered to be valid.

On appeal, the petitioner asserts, in part, that on February 25, 2007, the beneficiary commenced employment with the petitioner and was subsequently transferred to a new worksite location pursuant to a valid LCA certified on March 5, 2007, in accordance with CIS policy and guidance. The petitioner also states that both LCAs in the evidence of record are valid, and that leaving one location to go to another does not invalidate the LCA, as the petitioner is permitted to have multiple LCAs for multiple locations. As supporting documentation, the petitioner submits: copies of CIS policy and guidance letters and/or memoranda; an unpublished AAO decision; and information related to the petitioner's business and growth.

The AAO agrees with the director's finding that the petitioner's LCA certified on February 1, 2007 is not valid for all work locations. Although the petitioner asserts that the beneficiary commenced employment with the petitioner on February 25, 2007, and was subsequently transferred to a new worksite location pursuant to a valid LCA certified on March 5, 2007, the record contains no evidence in support of this assertion. Rather, it appears that the beneficiary commenced employment with the petitioner on March 5, 2007, as the letter noted above from the BAS indicates that the effective date of the beneficiary's medical coverage is March 5, 2007, and the beneficiary signed the Employee Directed Salary Referral 401(k) Plan Enrollment Form on March 5, 2007. The date of employment listed on the petitioner's LCA submitted in response to the RFE also reflects an employment period beginning on March 5, 2007. As the beneficiary's employment commencement date remains unclear, the petitioner has not demonstrated that it has complied with the terms and conditions of the LCA submitted at the time of filing. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In addition, the March 5, 2007 LCA certification date is subsequent to the February 8, 2007 filing date of the visa petition. The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(I) provides that *before filing a petition for H-1B classification in a specialty occupation*, the petitioner shall obtain a certification from the DOL that it has filed a labor condition application (Emphasis added). 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). Moreover, although the

LCA that was certified on March 5, 2007 reflects the beneficiary's work location as Birmingham, Alabama, the evidence of record listed above indicates that the beneficiary lives in Austin, Texas, not in Birmingham, Alabama. Thus, it is not clear that the beneficiary will be working in Birmingham, Alabama. The record contains no explanation for this inconsistency. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. *Matter of Ho*, 19 I&N Dec. at 591. It is also noted that, without contracts and work orders from the ultimate end-client for whom the beneficiary will provide his services, the name and location of the beneficiary's employment site is unclear, and thus the petitioner has not demonstrated compliance with the certified LCA. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. As the beneficiary's ultimate worksite remains unclear, it has not been shown that the work would be covered by the locations on the certified LCAs. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not established that the proffered position is a specialty occupation. As the ultimate work location of the beneficiary remains unclear, the record does not contain substantive evidence that the duties of the proffered position incorporate the theoretical and practical application of a body of highly specialized knowledge that requires the attainment of a bachelor's or higher degree in the specific specialty or its equivalent as a minimum for entry into the occupation in the United States. Only a detailed job description from the entity that requires the alien's services will suffice to meet the burden of proof in these proceedings. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). For this additional reason, 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.