U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE: WAC 08 149 52376 Office: CALIFORNIA SERVICE CENTER Date: JAN 06 2010

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
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 residential care facility that was established in 1998.[1] It seeks to employ the beneficiary as an accountant and, 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 failed to submit a valid Labor Condition Application (LCA) and because the proffered position is not a specialty occupation. On appeal, counsel submits an addendum to the Form I-290B and indicates that a brief or additional evidence will be submitted to the AAO within 30 days. Counsel signed the Form I-290B on October 31, 2008, and as of this date, no additional evidence has been submitted. The AAO, therefore, considers the record complete and ready for adjudication.[2]

The record of proceeding before the AAO contains (1) the 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) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

As a preliminary matter, the AAO notes that counsel's addendum to the Form I-290B only includes arguments in rebuttal to the director's determination that the petitioner failed to submit a certified LCA for the place of intended employment. Counsel failed to provide any arguments regarding the director's determination that the proffered position is not a specialty occupation. Accordingly, the AAO affirms, but shall not discuss, the director's determination of the specialty occupation issue, as counsel has failed to identify specifically any erroneous conclusion of law or statement of fact for the appeal on this issue.

The instant petition was received at the service center on April 14, 2008. On the H-1B petition, the petitioner indicated that the beneficiary would work as an accountant at its office in Petaluma, California. Along with the H-1B petition, the petitioner submitted an LCA that was certified on March 12, 2008. The work location, however, was listed as Union City, California, not Petaluma, California. When denying the petition on October 2, 2008, the director noted that the work location listed on the certified LCA was not the same work location that the petitioner

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[1] There is inconsistent information in the record regarding the petitioner's number of employees. On the H-1B petition and the initial letter of support, the petitioner claimed to have three employees. In response to the director's request for evidence, the petitioner claimed 14 employees.

[2] The regulation at 8 C.F.R. § 103.3(a)(2)(viii) and the instructions to Form I-290B require the affected party to submit the brief or evidence directly to the AAO, not to the service center or any other federal office. Even if counsel were to submit evidence that a brief was filed with an office other than the AAO, the AAO would not consider the brief on appeal because counsel failed to follow the regulations or the instructions for the proper filing location.

listed on the H-1B petition. The director concluded that, without a certified LCA for the proper work location, the petition could not be approved.

On appeal, counsel states that the examiner was incorrect in stating that the work location would be in Union City, California, as the petitioner is located in Petaluma, California. Counsel submits an LCA that was also certified on March 12, 2008, with the same LCA case number that lists a work location of Petaluma, California.

The AAO has reviewed both LCAs submitted by the petitioner. The LCA that was originally submitted, and which has an original signature and date by the petitioner, clearly lists Union City, California as the work location. The LCA that counsel submits on appeal appears to be a fraudulent submission in order to correct an error in the first LCA. Had the petitioner possessed this LCA when it filed the petition, there would have been no reason to submit an LCA for a work location other than the petitioner's business address. Accordingly, the AAO will not accept the LCA that counsel submits on appeal as evidence that it had obtained a certified LCA for the beneficiary's proper work location prior to filing the H-1B petition.

While the Department of Labor (DOL) is the agency that certifies LCA applications before they are submitted to USCIS, the DOL regulations note that it is within the discretion of the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

> For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification. . . .
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> [Italics added]

The regulation at 20 C.F.R. § 755.715, defines *Area of intended employment* for the purpose of an LCA as: "the area within normal commuting distance of the place (address) of employment where the H-1B nonimmigrant is or will be employed." Union City and Petaluma, California are approximately 65 miles from each other and would not be considered within the same normal commuting area. Accordingly, although the LCA that the petitioner initially submitted was certified before it filed the instant H-1B petition, such certification was not proper because it did not contain the correct work location of the beneficiary. For this reason, the petition may not be approved. *See* 8 C.F.R. §§ 214.2(h)(4)(i)(B)(1) and 214.2(h)(4) (iii)(B)(1). 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.