U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: WAC 06 214 53014 Office: CALIFORNIA SERVICE CENTER Date: MAR 03 2008

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California 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 provides professional training, consulting and manpower services and seeks to employ the beneficiary as a computer programmer/analyst. The petitioner, therefore, seeks 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 record includes: (1) the Form I-129 and supporting documents; (2) the director's October 31, 2006 and December 5, 2006 requests for evidence (RFE); (3) the petitioner's responses to the RFEs; (4) the director's decision denying the petition; (5) and the Form I-290B and counsel's brief and other documents in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

In his denial, the director stated that the only issue in this case was whether the petitioner had complied with USCIS and the U.S. Department of Labor (DOL) requirements governing labor condition applications. The director stated that although the petitioner submitted a Form ETA 9035 Labor Condition Application (LCA) for Dunn, North Carolina certified by the DOL, the petitioner did not comply with 20 C.F.R. § 655.730(c)(1) and (2) and 20 C.F.R. § 655.715 because the actual location of employment was Syracuse, New York.

The regulation at 20 C.F.R. § 655.715 defines place of employment as "the worksite or physical location *where the work actually is performed*" and the regulation at 20 C.F.R. § 655.730(c) stipulates the following:

> What should be submitted? Form ETA 9035.
>
> (1) General. One completed and dated original Form ETA 9035 containing the labor condition statements referenced in Secs. 655.731 through 655.734 of this part, bearing the employer's original signature (or that of the employer's authorized agent or representative) and one copy of the completed and dated original Form ETA 9035 shall be submitted to ETA (see paragraph (b) of this section and Sec. 655.760(a)(1) of this part with respect to applications filed by facsimile transmission). Copies of Form ETA 9035 are available at the addresses listed in Sec. 655.720 of this part; photocopies of the form (obtained from any source) also are permitted. Each application shall identify the occupational classification for which the labor condition application is being submitted and shall state:
>
> (i) The occupation, by Dictionary of Occupational Titles (DOT) Three-Digit Occupational Groups code and by the employer's own title for the job;
>
> (ii) The number of H-1B nonimmigrants sought;

(iii) The gross wage rate to be paid to each H-1B nonimmigrant, expressed on an hourly, weekly, biweekly, monthly or annual basis;

(iv) The starting and ending dates of the H-1B nonimmigrants' employment;

(v) The place(s) of intended employment; and

(vi) The prevailing wage for the occupation in the area of intended employment and the specific source (e.g., name of published survey) relied upon by the employer to determine the wage. If the wage is obtained from a SESA, the appropriate box must be checked and the wage provided; wages obtained from a source other than a SESA must be identified along with the wage;

(2) Multiple positions or places of employment. The employer shall file a separate LCA for each occupation in which the employer intends to employ one or more H-1B nonimmigrants. All places of employment covered by the application must be located within the jurisdiction of a single ETA regional office, or, if the nonimmigrant(s) is(are) to be employed sequentially in various places of employment, the application is to be submitted to the regional office having jurisdiction over the initial place of employment;

On appeal, counsel argues that the director abused his discretion and the LCA certified by the DOL on June 12, 2006 for employment in Dunn, North Carolina, was in compliance with the regulations. In his appeal brief, counsel argues that "for all intents and purposes, the place of intended employment is Dunn, North Carolina, and not Syracuse, New York." Counsel goes on to state that the "beneficiary was deployed to Syracuse, New York to resolve some problems pertaining to the programs and software issues of a business establishment being serviced by the appellant in that particular area."

Counsel's argument that Syracuse, New York is not the intended work location for the beneficiary is not persuasive. The Form I-129 and the New York State Department of Labor Prevailing Wage Request list Syracuse, New York as the beneficiary's work site.[1] In its response to the director's December 5, 2006 RFE, the petitioner indicated that the petitioner has been "retained on a long-term basis by its client in Syracuse, New York to provide the services of the beneficiary as a computer programmer/analyst."

The petitioner may place the petitioner at other worksites pursuant to the regulation at 20 C.F.R. § 655.735 which states:

(a) Subject to the conditions specified in this section, an employer may make short-term placements or assignments of H-1B nonimmigrant(s) at worksite(s) (place(s) of employment) in areas not listed on the employer's approved LCA(s) without filing new labor condition application(s) for such area(s).

[1] The ETA Form 9089, Application for Permanent Employment Certification, also lists Syracuse, New York as the intended place where the beneficiary will work.

(b) The following conditions must be fully satisfied by an employer during all short-term placement(s) or assignment(s) of H-1B nonimmigrant(s) at worksite(s) (place(s) of employment) in areas not listed on the employer's approved LCA(s):

(1) The employer has fully satisfied the requirements of Sec. Sec. 655.730 through 655.734 with regard to worksite(s) located within the area(s) of intended employment listed on the employer's LCA(s).

(2) The employer shall not place, assign, lease, or otherwise contract out any H-1B nonimmigrant(s) to any worksite where there is a strike or lockout in the course of a labor dispute in the same occupational classification(s) as that of the H-1B nonimmigrant(s).

(3) For every day the H-1B nonimmigrant(s) is placed or assigned outside the area(s) of employment listed on the approved LCA(s) for such worker(s), the employer shall:

(i) Continue to pay such worker(s) the required wage (based on the prevailing wage at such worker's(s') permanent worksite, or the employer's actual wage, whichever is higher);

(ii) Pay such worker(s) the actual cost of lodging (for both workdays and non-workdays); and

(iii) Pay such worker(s) the actual cost of travel, meals and incidental or miscellaneous expenses (for both workdays and non-workdays).

(c) An employer's short-term placement(s) or assignment(s) of H-1B nonimmigrant(s) at any worksite(s) in an area of employment not listed on the employer's approved LCA(s) shall not exceed a total of 30 workdays in a one-year period for any H-1B nonimmigrant at any worksite or combination of worksites in the area, except that such placement or assignment of an H-1B nonimmigrant may be for longer than 30 workdays but for no more than a total of 60 workdays in a one-year period where the employer is able to show the following:

(1) The H-1B nonimmigrant continues to maintain an office or work station at his/her permanent worksite (e.g., the worker has a dedicated workstation and telephone line(s) at the permanent worksite);

(2) The H-1B nonimmigrant spends a substantial amount of time at the permanent worksite in a one-year period; and

(3) The H-1B nonimmigrant's U.S. residence or place of abode is located in the area of the permanent worksite and not in the area of the short-term worksite(s) (e.g., the worker's personal mailing address; the worker's lease for an apartment or other home; the

> worker's bank accounts; the worker's automobile driver's license; the residence of the worker's dependents).

Neither counsel nor the petitioner has stated the number of days that the beneficiary has or will work in Syracuse, New York. Pursuant to 20 C.F.R. § 655.735(b)(3) the petitioner is required to pay the beneficiary's wages as well as travel, lodging, meals, and incidental costs for each day that she is in Syracuse, New York. The petitioner has not provided evidence that it has covered the costs incurred by the beneficiary in relation to her assignment in Syracuse, New York. Pursuant to 20 C.F.R. § 655.735(c), the beneficiary can spend up to 60 workdays in one year in a location that is not listed on the LCA. Although the petitioner has not provided the number of days that the beneficiary is to spend in New York, the petitioner has not met the requirements of 20 C.F.R. § 655.735(c)(3) which requires that the beneficiary's place of abode be in the area of the permanent work location and not in the area of the short-term worksite. The address provided for the beneficiary on the Form I-129 is in Dover, New Jersey which is not generally considered a commuting area for Dunn, North Carolina.

Although counsel argues that Syracuse, New York is not the intended workplace, he submits an LCA certified on October 6, 2006 listing Syracuse, New York as an additional or subsequent work location. However, the Form I-129 was filed on June 27, 2006. The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition "[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary." Therefore, in order for a petition to be approvable, the LCA must have been certified *before* the H-1B petition was filed. The submission of an LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time that the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). As such, the AAO finds that the director's denial of the petition was proper.

Beyond the decision of the director, although the petitioner will act as the beneficiary's employer, the evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at work locations to perform services established by contractual agreements for third-party companies. Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), the petitioner must submit an itinerary with the dates and locations of employment in such situations. The petitioner has not complied with the requirements of 8 C.F.R. § 214.2(h)(2)(i)(B) and for this additional reason, the petition may not be approved.

Pursuant to 8 C.F.R. § 214.2(h)(4)(i)(B)(1) and 8 C.F.R. § 214.2(h)(4)(iii)(B)(1), there is no provision for discretionary relief from the LCA requirements.

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.