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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: WAC 08 144 50389 OFFICE: CALIFORNIA SERVICE CENTER DATE: NOV 2 5 2009

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, 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 avers that it is an importer and exporter of wholesale window blinds that was established in 1987 and currently has 35 employees. It seeks permission 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 filed it more than six months before the intended start date of the beneficiary's employment. On appeal, counsel submits the Form I-290B and a copy of a Labor Condition Application (LCA) that is already included in the record.

The record includes: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and (5) the Form I-290B, along with documentation submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

When filing the H-1B petition on April 14, 2008, the petitioner averred that it wished to employ the beneficiary as an accountant on a full-time basis. The petitioner listed the dates of intended employment at Part 5, #8 on the H-1B petition as "01/06/2009 – 01/05/2012."[1] Subsequent to the filing of the H-1B petition on the beneficiary's behalf, the petitioner submitted an LCA that was certified by the Department of Labor (DOL) on April 4, 2008, and that listed the dates of intended employment as "10/01/08 – 09/30/2011."

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 10, 2008. In the RFE, the director informed the petitioner of the discrepancy in the dates of intended employment between the H-1B petition and the LCA. The director noted that the latest date that the petition could be approved would be September 30, 2011, and asked the petitioner to "[p]lease verify the requested dates of employment and/or provide appropriate dates."

In response to the RFE, counsel stated in a cover letter: "Labor Condition Application lists the certified dates as 12/27/2008 to 12/26/2011." Counsel noted that two LCAs were attached; one was a copy of the original LCA and the other was an LCA that the petitioner had certified on June 27, 2008 that listed the dates of employment as "12/27/08 – 12/26/2011."

On September 3, 2008 the director denied the petition. The director noted the regulation at 8 C.F.R. § 214.2(h)(9)(i)(B) and concluded that, because the petition was filed more than six months prior to the intended start date of January 6, 2009, the petition could not be approved.

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[1] The AAO notes that the petitioner's letter in support of the petition did not include the specific dates of the beneficiary's intended employment.

On appeal, counsel notes that the petition was filed on April 14, 2008 and states that the petitioner filed an LCA with employment dates from October 1, 2008 through September 30, 2011. Counsel submits another copy of the certified LCA.

Counsel's evidence on appeal does not address the director's findings in both the RFE and the denial letter that the petitioner introduced inconsistent dates of the beneficiary's intended employment into the record. On the H-1B petition, the petitioner indicated clearly that it intended to employ the beneficiary from January 6, 2009 until January 5, 2012; however, the LCA that it submitted to support the H-1B petition filing showed the dates of employment as October 1, 2008 through September 30, 2011. When the director specifically asked the petitioner to clarify the intended dates of employment through the issuance of her RFE, the petitioner again entered inconsistent information into the record by submitting an LCA that was certified on June 27, 2008 for the intended dates of employment of December 27, 2008 through December 26, 2011.[2]

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). On appeal, counsel claims that the correct dates of intended employment are those dates on the first LCA – October 1, 2008 through September 30, 2011. Other than the statements of counsel, however, no evidence is submitted to show that the director was incorrect to use the dates of intended employment that were listed on the H-1B petition rather than the employment dates that were listed on the initial LCA. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, the AAO deems the intended dates of employment on the H-1B petition to be the dates for which the petitioner was seeking to employ the beneficiary.

The regulation at 8 C.F.R. § 214.2(h) states, in pertinent part:

(9) Approval and validity of petition--

> (i) Approval . The director shall consider all the evidence submitted and such other evidence as he or she may independently require to assist his or her adjudication. The director shall notify the petitioner of the approval of the petition on Form I-797, Notice of Action. The approval shall be as follows:
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> * * *
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> (B) The petition may not be filed . . . earlier than 6 months before the date of actual need for the beneficiary's services or training . . . .

[2] The AAO notes that the second LCA was certified more than two months after the H-1B petition was filed. The regulations require a petitioner to submit an LCA that was certified prior to the filing of the petition. 8 C.F.R. § 214.2(h)(4)(i)(B)(1).

As stated earlier in this decision, the petitioner sought to employ the beneficiary starting on January 6, 2009. Therefore, according to the regulation cited above, the petitioner could not have filed the petition anytime before July 6, 2008. Here, however, the petitioner filed the H-1B petition on April 14, 2008. Consequently, the director's determination to deny the petition is correct because the regulation at 8 C.F.R. § 214.2(h)(9)(i)(B) precludes its approval. For this reason, the appeal will be dismissed and the petition will be denied.

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