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

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

D2

[redacted]

FILE: EAC 08 006 54027 Office: VERMONT SERVICE CENTER Date: OCT 14 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, 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 software development and consulting company that seeks to employ the beneficiary as a systems 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 failed to submit a valid Labor Condition Application (LCA).

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.

The instant petition was received at the service center on October 5, 2007. It was submitted on behalf of a beneficiary who was already working in Memphis, Tennessee for a different employer in H-1B status. When filing the H-1B petition, the petitioner submitted an LCA that was certified on May 15, 2007 for employment in Plainfield, New Jersey. The petitioner claimed that the beneficiary would be working at its corporate premises in New Jersey upon approval of the petition.

In response to the director's RFE, the petitioner further elaborated on the beneficiary's proposed work for its company by claiming that the beneficiary's proposed project in Memphis "is along [sic] term project for intended period employment." The petitioner noted in its RFE response that: "A contract between [client] and [petitioner] specifying place of work . . . Memphis, TN, Job duties and person name '[beneficiary]' to provide services is enclosed herewith."

In the denial letter, the director stated that the record only contained an LCA that was properly certified for Plainfield, New Jersey and noted the petitioner's claims that the beneficiary would be working in Memphis, Tennessee. The director concluded that, because the record did not contain an LCA that was properly certified for the work location of Memphis, Tennessee, the petition could not be approved.

On appeal, counsel for the petitioner claims that, when it filed the petition, the petitioner intended to have the beneficiary work in Plainfield, New Jersey but that it obtained a contract for work in Memphis, Tennessee while the petition was pending and decided to assign the beneficiary to such a project because she was already living in Tennessee. Counsel asserts that because the beneficiary is being paid more than the prevailing rate in either Plainfield, New Jersey or Memphis, Tennessee, there is no violation of the Department of Labor rules. With counsel's brief, the petitioner submits an LCA for the work location of Memphis, Tennessee that was certified on July 13, 2008, more than nine months after the H-1B petition was initially filed.

As a preliminary matter, the AAO notes that the evidence of record does not support counsel's assertion that it did not file an LCA for the Memphis, Tennessee work location when filing the H-1B petition because it had not secured a contract for the beneficiary to work in Memphis, Tennessee until after the petition was filed. In response to the RFE, the petitioner submitted a "3rd Party Work Order" to which it referred in its RFE response letter. This Work Order was signed by the petitioner and the client on September 28, 2007, seven days prior to its filing of the H-1B petition. It listed the beneficiary by name as the person to be assigned to the project as well as her proposed duties. Therefore, counsel's claim on appeal that the beneficiary "was supposed to work at the petitioner's office . . . [b]ut in the meantime Petitioner received a project of [its client]" is disingenuous. The evidence in the record shows that the petitioner was aware that the beneficiary would be working in Memphis, Tennessee as of late September 2007; yet, it failed to procure a properly certified LCA for that location prior to filing the petition in October 2007.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

> 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.

Counsel's claims on appeal that the petitioner has satisfied its burden because it will pay the beneficiary a higher wage than the prevailing wage rates in Plainfield, New Jersey or Memphis, Tennessee are unpersuasive. 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." Thus, in order for a petition to be approvable, the LCA must have been certified before the H-1B petition was filed. The submission of a certified 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). Further, United States Citizenship and Immigration Services 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).

The petitioner's failure to procure a certified LCA for the Memphis, Tennessee work location prior to filing the H-1B petition precludes its approval, and the regulations contain no provision for the AAO to provide discretionary relief from the LCA requirements. Accordingly, the AAO cannot disturb the director's denial of the petition. 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.