identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

D2

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: DEC 29 2010

IN RE: Petitioner:
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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the 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 is a contract testing and research laboratory. It seeks to employ the beneficiary as a scientist. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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).

On December 10, 2008, the director denied the petition determining that the petitioner had not complied with the requirements for filing a Form I-129, Petition for a Nonimmigrant Worker. On appeal, the petitioner asserts the U.S. Department of Labor (DOL) Form ETA-9035E Labor Condition Application (LCA) was improperly completed due to ineffective counsel. On appeal, the petitioner submits an LCA certified by the DOL on January 7, 2009.

The record of proceeding before the AAO contains: (1) the Form I-129 filed June 12, 2007 and supporting documentation; (2) the director's August 10, 2007 request for additional evidence (RFE); (3) the petitioner's submission in response to the RFE; (4) the director's December 10, 2008 denial decision; and (5) the Form I-290B, letter from counsel with supporting documentation, and LCA certified January 7, 2009, in support of the appeal. The AAO has considered the record in its entirety before issuing its decision.

The issue before the AAO is whether the petitioner established filing eligibility at the time the Form I-129 was received by U.S. Citizenship and Immigration Services (USCIS) on June 12, 2007.

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. § 103.2(a)(1) as follows:

> [E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission . . . .

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

> An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

In matters where evidence related to filing eligibility is provided in response to a director's request for evidence, 8 C.F.R. § 103.2(b)(12) states:

> An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed. An application or petition shall be denied where any application or petition upon which it was based was filed subsequently.

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must obtain a certified LCA from the DOL in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of a labor certification application with the Department of Labor when submitting the Form I-129.

In the instant matter, the petitioner already had an H-1B petition approved on behalf of the beneficiary with validity dates of April 23, 2005 to July 17, 2007. When the petitioner filed the instant petition, a number of mistakes were made as follows: (1) the petitioner listed the dates of intended employment in this H-1B petition and request for extension as being the same as the dates already approved for the prior H-1B; (2) on the Form I-129 Supplement H form, the petitioner did not list that the beneficiary had already been in the U.S. in H-1B status since July 19, 2001; and (3) the petitioner submitted an LCA to cover the prior employment period of April 23, 2005 to July 18, 2007, which was not certified by the DOL.

In response to the director's RFE issued July 24, 2008, which requested evidence of the petitioner's certified LCA along with other documentation regarding the petitioner and the beneficiary, the petitioner submitted a certified, but expired, LCA with a validity period of April 22, 2002 to April 22, 2005. The petitioner also submitted a copy of a certified permanent labor certification application approved on behalf the beneficiary that had been filed as of March 26, 2005.[1]

As no certified LCA was submitted (indeed, the LCA was not even filed with the DOL until after the denial was issued), the director denied the petition.

As referenced above, the regulations require that before filing a Form I-129, a petitioner must obtain a certified LCA from the DOL, and the LCA must include the beneficiary's anticipated employment and must otherwise correspond to the H-1B petition. *See also* 20 C.F.R. § 655.705(b). The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. In this matter, the petitioner initially failed to provide a certified LCA and, further, in response to the director's RFE, did not submit a certified LCA to establish that it had complied with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). The non-existence or unavailability of evidence material to an eligibility determination creates a presumption of ineligibility. *See* 8 C.F.R. § 103.2(b)(2)(i).

Although counsel asserts on appeal that the LCA was not properly submitted due to ineffective counsel, the record does not demonstrate that the petitioner was represented by counsel prior to this appeal. There is no prior Form G-28 on file and the Form I-129 is signed only by the petitioner. It

[1] Despite its irrelevance to the pertinent issue in this matter, it is further noted that there is no evidence in the record that the submitted labor certification is still valid.

does not appear that the documentation was prepared by anyone other than the petitioner and counsel does not provide any evidence regarding the existence of a prior representative in the preparation and filing of this petition. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard; (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond; and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Such documentation was not submitted by counsel. Consequently, the AAO does not find that the error was due to ineffective assistance of counsel. However, even if counsel were to demonstrate that the LCA was not submitted properly due to an alleged prior counsel's error or ineffectiveness, the regulations do not permit USCIS to approve an H-1B petition where the petitioner did not establish eligibility at the time of filing.

Although the petitioner submits a copy of an LCA on appeal, the LCA is DOL-certified on January 7, 2009, a date subsequent to the filing of the Form I-129, and covers a validity period of January 7, 2009 to July 7, 2009, which is a completely different period of time than that requested in the petition. Thus, the record does not show that, at the time of filing, the petitioner had obtained a certified LCA in the occupational specialty covering the period of time requested in the petition. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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). The petitioner has failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). The record establishes that, at the time of filing, the petitioner had not obtained a current certified LCA in the occupational specialty and, therefore, as determined by the director, had failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

For the reason discussed above, the beneficiary is ineligible for classification as an alien employed in a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in this proceeding 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.