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

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: EAC 08 154 51732 Office: VERMONT SERVICE CENTER Date: JAN 0 8 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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont 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.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it provides information technology solutions, that it was established in 2002, and that it employs 85 persons. It seeks to employ the beneficiary as a systems analyst from October 1, 2008 to September 27, 2011. Accordingly, the petitioner 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).

On August 26, 2008, the director denied the petition, determining that the petitioner failed to comply with the requirement at 8 C.F.R. 214.2(h)(4)(i)(B)(1) because it did not submit a Department of Labor Form ETA 9035E, Labor Condition Application (LCA) for the correct work location of intended employment.

On appeal, counsel for the petitioner asserts that the initial LCA submitted contained an inadvertent error identifying the beneficiary's work location as in the State of California, not in the State of Texas. Counsel contends that his office's clerical error should be excused as it is *de minimis*, places undue hardship on the petitioner through no fault of the petitioner, and because the preponderance of evidence standard shows the petitioner's attempt to comply with the regulation.

The record includes: (1) the Form I-129 and supporting documentation filed with U. S. Citizenship and Immigration Services (USCIS) on April 1, 2008; (2) the director's RFE; (3) the petitioner's response to the director's RFE, including an LCA certified by the Department of Labor on July 16, 2008; (4) the director's denial decision; and, (5) the Form I-290B and counsel's brief and documentation submitted in support of the appeal. The AAO reviewed 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 USCIS.

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

> Demonstrating eligibility at time of filing. 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. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition.

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 evidence does not establish filing eligibility at the time the application or petition was filed . . . .

The regulation requires that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must obtain a certified LCA from the Department of Labor (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 an LCA with the Department of Labor when submitting the Form I-129.

In the instant matter, the petitioner filed the Form I-129 with USCIS on April 1, 2008. The LCA provided at the time of filing indicated the beneficiary's work location would be in Irving, California and was dated March 27, 2008. In response to the director's RFE, the petitioner submitted a Form ETA 9035E, certified by the Department of Labor on July 16, 2008 for the requested employment period of October 1, 2008 to September 27, 2011 for a work location in Irving, Texas. Thus, the record establishes that, at the time of filing, the petitioner had not obtained a certified LCA in the occupational specialty for the requested employment period in the beneficiary's actual work location. Therefore, as determined by the director, the petitioner had failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(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. The certified LCA must be for the beneficiary's actual work location. 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 failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). The AAO acknowledges counsel's claim that the certified LCA submitted at the time of filing included a clerical error regarding the beneficiary's work location; nevertheless, the petitioner is responsible for providing a certified LCA for the beneficiary's actual work location when the petition is filed. The AAO does not find that an integral part of the completed petition for H-1B status may be excused.

Therefore, for the reasons already discussed, 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 petition will be denied and the appeal dismissed for the above stated reason. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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