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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]

Date: APR 29 2011 Office: CALIFORNIA SERVICE CENTER FILE: WAC 09 169 52591

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: SELF-REPRESENTED

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,

Michael T. Kelly

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a software application development and consulting company. It seeks to employ the beneficiary as a computer software engineer and to classify her 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, finding that the petitioner had been filed more than six months before the intended start date of the beneficiary's employment. On appeal, the petitioner submits Form I-290B accompanied by a brief statement and additional evidence.

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 May 28, 2009, the petitioner averred that it wished to employ the beneficiary as a computer software engineer on a full-time basis. The petitioner listed the dates of intended employment at Part 5, #8 on the H-1B petition as "11/30/2009 – 11/30/2011." In addition, the Labor Condition Application (LCA) submitted with the petition also indicates that the period of employment is from "11/30/09" until "11/30/2011."[1]

On August 17, 2009, 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 November 30, 2009, the petition could not be approved.

On appeal, the petitioner submits documentary evidence previously submitted in support of the petition, and notes that the petition was filed on May 28, 2009. The petitioner argues that since the requested start date for the beneficiary's employment is November 30, 2009, the filing of the petition is very close to the six-month window. Despite acknowledging that "it was aware that the [start] date did not meet the timeline requirements," the petitioner requests that it not be penalized for the difference of a few days.

The regulation at 8 C.F.R. § 214.2(h)(9)(i) states:

> (B) The petition may not be filed . . . earlier than 6 months before the date of actual need for the beneficiary's services or training . . . .

[1] It is noted that the LCA was manually altered, in that the original dates of employment were crossed out and the new dates, discussed above, were hand-written onto the LCA and initialed by someone using the initials of MMS. The AAO, therefore, presumes that these changes were made by [redacted] the petitioner's president and CEO, based on the fact that the initials of [redacted] correspond with his name.

As stated earlier in this decision, the petitioner sought to employ the beneficiary starting on November 30, 2009. Therefore, according to the regulation cited above, the petitioner could not have filed the petition prior to May 30, 2009. Here, however, the petitioner filed the H-1B petition on May 28, 2009. Although the petition is filed a mere two days prior to the end of the six-month period, there is no provision in the regulations permitting a waiver of this timeframe based on an allowance of days as requested by the petitioner. 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.

Beyond the decision of the director, the AAO finds that the petition must also be denied because the LCA contained in the record does not correspond with the petition. The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004), and it was in the exercise of this function that the AAO identified this additional ground for denying the petition.

It should first be noted that the petitioner's Form I-129 petition in this matter was originally received by U.S. Citizenship and Immigration Services (USCIS) on April 2, 2009. That petition requested a start date of August 1, 2009 for the beneficiary. USCIS rejected the petition, noting that it had received sufficient H-1B petitions to reach the numerical limitation for fiscal year 2009. The petitioner re-filed the petition with USCIS on May 15, 2009, requesting a start date of November 30, 2009 for the beneficiary. USCIS again rejected the petition, noting that the petition was incomplete due to missing pages. Ultimately, the instant petition was filed and accepted by USCIS on May 28, 2009.

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from the U.S. 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). As noted briefly in the footnote above, the LCA submitted with the instant petition was manually altered by the petitioner. The LCA lists the start date for employment as 08/01/2009 and the end date as 08/01/2011 in typed format, but these dates are crossed out and replaced with 11/30/09 and 11/30/2011, respectively, in red ink. Despite the petitioner's initialing of these changes, there is no evidence that these date changes were resubmitted to DOL for approval and certification.

The AAO notes that this LCA was certified on February 20, 2009, and notes that Section J on page four of the LCA indicates that the start and end dates remain 08/01/2009 and 08/01/2011. Therefore, it appears that the LCA submitted with this petition was originally obtained in support of the petition filed on April 2, 2009, which requested a start date of August 1, 2009 but was rejected by USCIS based on cap limitations. Rather than obtain another LCA certified for the new start and end dates of employment claimed on the Form I-129 in the instant matter, it appears that the petitioner simply crossed out the dates on the previously-certified LCA on page two, wrote in new dates, and submitted this form in support of the instant petition. This is not acceptable.

Title 20 C.F.R. § 655.705(b) indicates that an LCA must correspond to the petition with which it is submitted. The LCA submitted with the petition is certified for a different period of employment than requested in the instant petition. On appeal, it is noted that the petitioner submits page two of an LCA identifying the start and end dates for the requested employment as 11/30/2009 to 11/30/2011, and these dates are submitted in typed

form. However, the certification page is missing from this submission. Therefore, the AAO cannot accept this one-page excerpt from a four-page document as evidence that the LCA corresponds with the instant petition. Moreover, there was no evidence that this LCA was certified prior to May 28, 2009, the date this petition was received by USCIS. Even if the complete LCA was submitted on appeal showing a certification date prior to filing, it would still not be accepted. The 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). For this additional reason, the petition may not be approved.

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