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

(b)(6)

DATE: APR 2 9 2013 OFFICE: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
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:

SELF-REPRESENTED

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting 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 summarily dismissed.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center. On the Form I-129 visa petition, the petitioner describes itself as a software designing, development and consultation business established in 2004. In order to employ the beneficiary in what it designates as a programmer analyst level 2 position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation 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).

The director denied the petition, finding that the petitioner failed to establish that the petition was supported by a certified Labor Condition Application (LCA) in accordance with the applicable statutory and regulatory provisions.

On April 8, 2011, the petitioner submitted a Notice of Appeal or Motion (Form I-290B) and checked Box A in Part 2 of the form to indicate that it was filing an appeal and that a brief and/or additional evidence was attached. The AAO fully and in-detail reviewed the Form I-290B and the petitioner's written statement. The petitioner acknowledges that it failed to submit a certified LCA in support of the initial I-129 petition. The petitioner further acknowledges that the LCA that it submitted in response to the director's request for evidence (RFE) was not certified prior to the date of the submission of the I-129 petition. Furthermore, the petitioner apologizes for the error.

The regulation at 8 C.F.R. § 103.3(a)(1)(v) states, in pertinent part: "An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal." In the instant case, the petitioner has failed to identify an erroneous conclusion of law or a statement of fact as a basis for the appeal and, therefore, the appeal must be summarily dismissed.

The AAO also notes that even if the petitioner had specifically identified an erroneous conclusion of law or statement of fact, which it did not, the AAO would nonetheless dismiss the appeal and deny the petition because the petitioner failed to comply with the applicable statutory and regulatory provisions governing the submission of H-1B petitions.

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

> Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, and such instructions are incorporated into 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), which states in pertinent part:

> An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions.

In addition, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) states, as part of the general requirements for petitions involving a specialty occupation, that:

> 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.

Thus, the regulation requires that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from 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)(1). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of an LCA with DOL when submitting the Form I-129.

In cases 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, in pertinent part, the following:

> Effect where evidence submitted in response to a request does not establish eligibility at the time of filing. A benefit request shall be denied where evidence submitted in response to a request for evidence does not establish filing eligibility at the time the benefit request was filed.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

> For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

(Italics added). The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary.

In the instant case, the petitioner filed the Form I-129 and supporting documentation on July 30, 2010. Included with the petition was an LCA (case number), which was neither signed nor dated, and listed as "in process" under case status. On December 3, 2010, the director sent the petitioner an RFE requesting an endorsed certification from DOL showing that the LCA had been properly filed. In the RFE, the director indicated that the LCA must be certified prior to the filing of the Form I-129. On January 6, 2011, the petitioner submitted a certified LCA. Notably, the LCA was certified after the filing of the Form I-129 petition.

The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. However, the petitioner failed to satisfy these requirements and, instead, provided an LCA that was certified after the petition was submitted to USCIS. As noted above, a petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. *See* 8 C.F.R. § 103.2(b)(1). 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'r 1978). In the instant matter, the petitioner failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). Accordingly, this precludes the approval of the petition.

The petitioner requests that "the request for an extension of the H-1B status *nunc pro tunc*" and references the criteria stated at 8 C.F.R. § 214.1. However, the AAO notes that the petitioner's reliance on this provision of the regulations is misplaced. More specifically, 8 C.F.R. § 214.1 states the following:

> (c) *Extension of stay* –
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> * * *
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> (4) Timely filing and maintenance of status. An *extension of stay* may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of the Service and without separate application, with any extension granted from the date the previously authorized stay expired, where it is demonstrated at the time of filing that:
>
> (i) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances;
>
> (ii) The alien has not otherwise violated his or her nonimmigrant status;
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> (iii) The alien remains a bona fide nonimmigrant; and

(iv) The alien is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act.

The AAO finds that this section of the regulations is not applicable to the case at hand. The petitioner has not demonstrated that when the instant petition was submitted, the beneficiary had "failed to maintain the previously accorded status or . . . such status expired before the application or petition was filed." The submission to extend the beneficiary's stay was timely filed. In the instant case, the beneficiary had previously been granted an extension of stay until July 31, 2010, and the H-1B petition to extend the stay was filed on July 30, 2010.

The issue here is that the petitioner failed to establish eligibility for the benefit sought at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). As previously mentioned, 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.

In the appeal, the petitioner requests the AAO "kindly reconsider the decision due to the reason that it was our mistake and we do not want [the beneficiary] to suffer due to this." The AAO notes that U.S. Citizenship and Immigration Services does not have the discretion to disregard its own regulations, even if it would benefit a petitioner (or beneficiary). *See Reuters Ltd. v. F.C.C.*, 781 F.2d 946 (C.A.D.C. 1986) (an agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned).

In the instant case, as previously stated, the petitioner failed to identify an erroneous conclusion of law or a statement of fact as a basis for the appeal and, therefore, the appeal must be summarily dismissed.

ORDER: The appeal is summarily dismissed.