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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: MAR 04 2013 Office: VERMONT SERVICE CENTER FILE: [redacted]

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 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 petitioner then filed an appeal approximately six months later. Upon review, the director rejected the appeal as untimely and found that the late appeal did not meet the requirements of a motion to reopen or motion to reconsider. Although the director then subsequently reconsidered the matter on his own motion, he once again denied the visa petition, affirming his initial decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The Form I-129 visa petition states that the petitioner is a construction firm. To extend the employment of the beneficiary in a position designated as a construction project specialist, the petitioner endeavors to continue 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 (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director initially denied the visa petition on November 21, 2008, because the petitioner failed to submit a valid Labor Condition Application (LCA) certified prior to the date the visa petition was filed on May 15, 2008. On September 10, 2010, the director rejected an appeal of that decision as untimely, finding that the late appeal also did not meet the requirements of either a motion to reopen or motion to reconsider as codified at 8 C.F.R. § 103.5(a)(2) or (3).

The director then reconsidered the matter on January 20, 2011 pursuant to a Service motion. In the notice of reconsideration, the director offered the petitioner an additional opportunity to submit, as required, a valid LCA certified prior to the submission of the instant visa petition. On March 31, 2011, the director denied the visa petition again, finding that the petitioner had still not submitted an LCA in support of the visa petition that was certified on or before May 15, 2008, the date the instant H-1B extension petition was filed with U.S. Citizenship and Immigration Services (USCIS). With the instant appeal, present counsel submitted a Form I-290B accompanied by a brief and additional evidence.

The record indicates that the petitioner filed the instant visa petition *pro se*, assisted in preparing the form by a person who is not an attorney and was not otherwise qualified to represent the petitioner. Subsequently, in response to the initial denial and rejected appeal, an attorney in Coconut Grove, Florida filed a duly executed Notice of Entry of Appearance as Attorney or Representative (Form G-28). The instant appeal, however, was filed by an attorney in Coral Gables, Florida, who also submitted a properly executed Form G-28. All representations will be considered, but the decision in this matter will be furnished only to the petitioner and its present counsel of record.

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(a)(1) (2008) 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) (2008), 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 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 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) (2008) states in part:

> 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. . . .

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) (2008). 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 the instant case, the petitioner filed the Form I-129 with USCIS on May 15, 2008. The petitioner submitted an ETA Form 9089 Application for Permanent Employment Certification with the visa petition, rather than the required Form ETA Form 9035 LCA.

On August 19, 2008, the service center issued an RFE in this matter. The service center stated, *inter alia*:

> Submit a certification from the Department of Labor that the Labor Condition Application (Form ETA 9035) has been properly filed, completed and endorsed by the Department of Labor. Eligibility for H1B employment must be established as of the date of filing the I-129 petition; therefore, the Labor Condition Application must be certified prior to the filing of the I-129 petition.

In response, the petitioner submitted an additional copy of the previously submitted Form ETA 9089 Application for Permanent Employment Certification. The director denied the visa petition, finding, as was noted above, that the petitioner had failed to submit a certified LCA in support the instant visa petition. As was noted above, the director (1) rejected the initial appeal as untimely; (2) then subsequently reconsidered the matter on Service motion; and (3) denied the visa petition again.

With the untimely appeal, the petitioner provided an LCA that was certified on March 2, 2005. That LCA, however, was certified for employment from March 2, 2005 through March 1, 2008, which does not correspond with the period of employment requested in the instant visa petition. The instant petition was filed as a request to extend the prior H-1B petition (SRC 05 148 52638), valid from October 1, 2005 until October 1, 2008. While the instant extension petition provides the dates of intended employment as being from October 1, 2005 until October 2, 2013, based on the expiration of the petition it seeks to extend, i.e., October 1, 2008, and the three year limit on a single H-1B petition pursuant to 8 C.F.R. § 214.2(h)(9)(iii)(A)(*1*), the requested employment dates must be considered to be from October 2, 2008 until October 1, 2011.

Subsequently, with submissions seeking to reopen this matter, present counsel provided an LCA certified for the period from October 1, 2008 to October 1, 2011. That LCA, however, was submitted to DOL on September 8, 2009 and certified on September 14, 2009, more than one year after the submission of the instant visa petition on May 15, 2008. On appeal, counsel did provide another LCA certified prior to the filing of the instant petition, but that LCA is valid for dates not requested in this petition. Specifically, that certified LCA was valid from October 1, 2005 to October 1, 2008, while the instant petition seeks to extend the validity of the prior H-1B petition until October 1, 2011.[1] Therefore, none of the LCAs submitted corresponds with and may be used to support the instant visa petition.[2]

---

[1] The AAO notes that an "extension of stay" must be distinguished from an extension of H-1B status, which occurs through a "petition extension." Although those seeking H-1B status are currently permitted to file one form to request a petition extension, extension of stay, and change of status, they are still separate determinations. *See* 56 Fed. Reg. 61201, 61204 (Dec. 2, 1991). In addition, 8 C.F.R. § 214.2(h)(15)(i) specifically states that, "[e]ven though the requests to extend the petition and the alien's stay are combined on the petition, the director shall make a separate determination on each." Thus, 8 C.F.R. § 214.1(c) relates solely to extension of stay requests, 8 C.F.R. § 214.2(h)(14) deals only with H-1B petition extensions, and 8 C.F.R. § 248.3(a) addresses change of status requests to H-1B classification.

Accordingly, counsel's claims regarding the error made by U.S. Customs and Border Protection (CBP) regarding the stay permitted by the beneficiary in H-1B status is not relevant to the instant matter. While it may explain why the petitioner chose to file the extension petition when it did (e.g., to obviate the need for the beneficiary (1) to request CBP to correct the alleged error at a secondary inspection point or (2) to file a separate extension of stay request on Form I-539 to extend his stay from May 26, 2005 until October 1, 2008), the inclusion of a separate extension of stay request on the instant Form I-129 does not explain why initial required evidence, i.e., a certified, corresponding LCA, was not provided, nor does it excuse its submission.

[2] 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

In the instant appeal, present counsel asserted that the failure to provide an LCA in accordance with the salient regulations was occasioned by the negligence of the person who prepared the visa petition for the petitioner, whom the petitioner believed to be an attorney. The person who prepared the visa petition sent a statement in which she acknowledged that she had not provided the required LCA, but stated that she had never held herself out as an attorney.

Unfortunately, there is no remedy available for a petitioner who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on its behalf. *See* 8 C.F.R. § 292.1; *see also Hernandez v. Mukasey,* 524 F.3d 1014 (9th Cir. 2008) ("non-attorney immigration consultants simply lack the expertise and legal and professional duties to their clients that are the necessary preconditions for ineffective assistance of counsel claims"). The AAO only considers complaints based upon ineffective assistance against accredited representatives. *Cf. Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988) (requiring an appellant to meet certain criteria when filing an appeal based on ineffective assistance of counsel).

In any event, the Form I-129 filing requirements imposed by regulation require that the petitioner submit, as initial required evidence, a certified LCA at the time of filing. Even when notified of this evidentiary failure and provided an opportunity to remedy it, the petitioner failed to provide the requested, certified LCA. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In fact, to date, the record still lacks a certified LCA that may be used to support the instant visa petition, and there is no indication in the record that such an LCA existed when the visa petition was filed. The failure of the visa petition to be supported by a corresponding LCA certified on or before the date of filing and covering the employment dates requested is not excused by the petitioner's reliance on an allegedly incompetent document preparer.

Once again, a petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1) (2008). 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). The petitioner failed to demonstrate that it has complied with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B) (2008). The beneficiary is therefore ineligible for classification as an alien employed in a specialty occupation. The appeal will be dismissed and the visa petition denied for this reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the

---

> ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[Italics added]. As 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 and as 8 C.F.R. § 103.2(b)(1) requires eligibility to be established at the time of filing, it is factually impossible for an LCA certified by DOL after the filing of an H-1B petition to establish eligibility and be found to correspond to that petition at the time it was filed.

initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). The denial of the petition due to the petitioner's failure to provide a corresponding LCA certified on or before May 15, 2008, renders any remaining ineligibility issues in this proceeding moot. Therefore, the AAO need not and will not address any other evidentiary deficiencies in this matter.

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.