

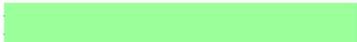


U.S. Citizenship
and Immigration
Services

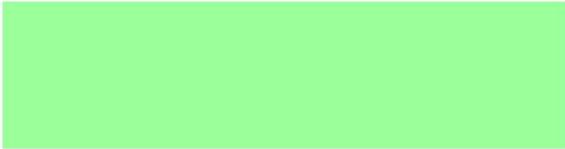
(b)(6)



DATE: JAN 30 2014 OFFICE: CALIFORNIA SERVICE CENTER

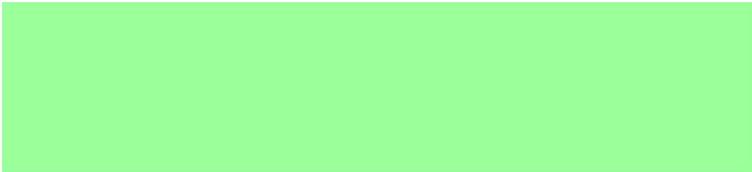


IN RE: Petitioner:
Beneficiary:



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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director (hereinafter, the director) 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 visa petition, the petitioner describes itself as an "Information Technology" firm. In order to employ the beneficiary in what it designates as a computer systems analyst 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 (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on May 17, 2013, finding that the petition was filed more than six months prior to the date of the petitioner's actual need for the beneficiary's services. On appeal, counsel stated that the petitioner erroneously provided the wrong starting date for the beneficiary's employment, and requested that the petition be amended on appeal to reflect a new commencement date that falls within the prescribed period set forth by the regulations.

As will be discussed below, the AAO has determined that the director did not err in her decision to deny the petition on the ground that the visa petition was impermissibly filed more than six months before the date of actual need for the beneficiary's services.

The regulation at 8 C.F.R. § 214.2(h)(9) addresses the approval and validity of H-1B petitions. Specifically, the regulation at 8 C.F.R. § 214.2(h)(9)(i)(B) states:

The petition may not be filed or approved earlier than 6 months before the date of actual need for the beneficiary's services and training

The petitioner filed the instant visa petition on April 2, 2013. That Form I-129, Petition for a Nonimmigrant Worker, states that the period of requested employment would commence on February 10, 2014. That date is approximately ten months after the filing of the visa petition. Noting that the requested start date was more than six months after the filing date, the director denied the petition based on the petitioner's failure to comply with the regulation at 8 C.F.R. § 214.2(h)(9)(i)(B).

On appeal, counsel asserts that the February 10, 2014 start date was placed on the visa petition as the result of a typographical error, and that the actual start date for the beneficiary would be October 1, 2013, a date within the required six-month period permitted by 8 C.F.R. § 214.2(h)(9)(i)(B).

As will now be discussed, the AAO concurs with the director's decision. Under 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 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 [U.S. Citizenship and Immigration Services (USCIS)] instructions.

Any evidence submitted in connection with a benefit request is incorporated into and considered part of the request.

The start date provided on the visa petition may not be amended on appeal. The regulation at 8 C.F.R. § 214.2(h)(2)(E) states:

Amended or new petition. The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

A change in the requested starting date for the beneficiary's services or training is clearly a material change in the terms and conditions of employment. On appeal, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The petitioner's attempt to remedy the deficiency by changing the intended employment dates of the beneficiary is ineffective. A petitioner must establish eligibility at the time of filing a 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).

It is noted that the record in the instant case contains a copy of the beneficiary's Employment Authorization Card, which is valid from September 10, 2012 to February 9, 2014. That the petitioner filed for a period of H-1B employment to commence immediately upon the expiration of that employment authorization does not appear to have been the result of a typographical error, but of a conscious decision to file for a period of employment to commence on February 10, 2014.¹

The visa petition was filed contrary to the provision of 8 C.F.R. § 214.2(h)(9)(i)(B). In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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

¹ It is also noted that the employment agreement submitted by the petitioner indicates a start date of October 1, 2013. However, that employment agreement does not state that the employment start date is for H-1B employment and only indicates that the petitioner intended to employ the beneficiary on October 1, 2013. Therefore, that start date is not H-1B specific, and furthermore, it is inconsistent with the other dates in the petition filing.