



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF A-N-A-, INC.

DATE: SEPT. 15, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a computer company, seeks to temporarily employ the Beneficiary under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director of the California Service Center denied the Form I-129, Petition for a Nonimmigrant Worker, concluding that the Petitioner filed the petition more than six months before the date of actual need for the Beneficiary's services in violation of 8 C.F.R. § 214.2(h)(9)(i)(B).

On appeal, the Petitioner claims that U.S. Citizenship and Immigration Services (USCIS) should use its discretion not to apply the legal standard in this matter. In the alternative, the Petitioner asserts that it did have qualifying work for the Beneficiary within six months of filing the petition. Upon *de novo* review, we will dismiss the appeal.

## **I. FILING REQUIREMENT**

### **A. Legal Framework**

An H-1B petition may not be filed earlier than six months before the date of actual need for the beneficiary's services. 8 C.F.R. § 214.2(h)(9)(i)(B). A petitioner must demonstrate eligibility for the requested benefit at the time of filing the petition and must continue to be eligible through adjudication. 8 C.F.R. § 103.2(b)(1). 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'r 1998). The agency made clear long ago that speculative employment is not permitted in the H-1B program. *See, e.g.*, 63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998).

## B. Factual Background

The Petitioner filed the petition on April 4, 2016. In the response to the Director's request for evidence, the Petitioner noted that the purchase order from the client for the Beneficiary's services states that it "will be valid from November 1, 2016 until October 31, 2017." This evidence established the date of the Petitioner's need for the Beneficiary's services at November 1, 2016.

After receiving the Director's adverse decision, the Petitioner claims the Beneficiary could have worked prior to November 1, 2016, under a 2014 Agreement it has with [REDACTED]. However, the Petitioner also acknowledges in the appeal brief that the purchase order for the Beneficiary's work "states the start date as November 01, 2016 and the end date as October 31, 2017."

## C. Analysis

### 1. Filing Requirement

On appeal, the Petitioner states that 8 C.F.R. § 214.2(h)(9)(i)(B) precludes a petitioner from filing a petition earlier than six months before the date of actual need for a beneficiary's services.<sup>1</sup> The Petitioner, however, asserts that USCIS should instruct officers to not apply this regulation as a matter of "discretion."

We do not agree with the Petitioner's position, and it has not cited to any statute, regulation, precedent or adopted decision, policy memorandum or other legal or authoritative source in support of its statement. Consequently, we are not persuaded that the Director erred in applying the referenced regulation.

### 2. Employment within Six Months of Filing

In the alternative, the Petitioner claims that work existed for the Beneficiary prior to November 1, 2016. In support of its claim, the Petitioner provided documentation demonstrating an ongoing business relationship with [REDACTED] that existed prior to the petition filing date, specifically a Master Consolidated Services Agreement (2014 Agreement) between itself and [REDACTED]. This agreement indicates a two-year validity period with an effective date starting on May 1, 2014. The record also contains a Statement of Work (2016 SOW) that the Petitioner signed with [REDACTED] in September of 2016, with an effective date of November 1, 2016.

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<sup>1</sup> Further, the USCIS website informs petitioners that no petitions should be filed more than six months before the intended employment start date. See <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-fiscal-year-fy-2018-cap-season#when>, a copy of which is incorporated into the record of proceedings.

First, we observe that the 2014 Agreement had expired five months before the Beneficiary's newly claimed start date.<sup>2</sup> Consequently, the Petitioner has not offered sufficient evidence to corroborate its claim that the Beneficiary would have been employed in October 2016.

Second, the 2014 Agreement (section 6.1) required the Petitioner to provide [REDACTED] with a list of all personnel that would perform work under that agreement at one of the designated sites. However, the Petitioner did not submit evidence to USCIS that when the petition was filed, it had identified the Beneficiary to [REDACTED] as working at a designated site during October 2016.

As a result, the Petitioner has not demonstrated that it had secured work for the Beneficiary to perform under the 2014 Agreement as it claims on appeal.<sup>3</sup>

We further note that it is not sufficient for the Petitioner to provide evidence of its ongoing business activities. Rather, the Petitioner must establish that at the time of filing the petition, it had non-speculative work for the Beneficiary. The 2016 SOW is the evidence that the Petitioner filed the petition more than six months before needing the Beneficiary's services. For the reasons discussed, the Petitioner's attempt to "cure" its noncompliance with the filing requirement is ineffective.

## II. LABOR CONDITION APPLICATION

### A. Legal Framework

Although not discussed by the Director, we will now briefly address another issue. The Petitioner was required to submit a certified labor condition application (LCA) to USCIS to demonstrate that it would pay the Beneficiary the higher of either the prevailing wage for the occupational classification in the "area of employment" or the actual wage paid by the employer to other employees with similar experience and qualifications who are performing the same services. *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 545-546 (AAO 2015). See also 8 C.F.R. § 214.2(h)(4)(i)(B). To meet its burden of proof, a petitioner must also demonstrate the geographic area in which a beneficiary will work corresponds with the certified LCA.

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<sup>2</sup> The 2014 Agreement contained the option for [REDACTED] to renew the Agreement for successive one year terms. However, the Petitioner did not provide documentation establishing that [REDACTED] exercised this option.

<sup>3</sup> We further note that the Petitioner did not establish it had sufficient work during the requested validity period for the Beneficiary to perform when it filed the petition. The 2016 SOW, which postdates the petition filing date, specifies the Petitioner will provide services for approximately 12 months, or ending approximately in November 2017. However, in the petition, the Petitioner requested a validity period through August 31, 2019. The record contains insufficient evidence that the project was extended beyond the November 2017 timeframe. This lack of evidence precludes USCIS from evaluating whether the Petitioner had sufficient work for him to perform for the duration of the petition.

## B. Analysis

On the Form I-129 and LCA, the Petitioner listed the Beneficiary's place of employment as [REDACTED] in [REDACTED] California. The 2016 SOW (for work beginning in November 2016), specified a work location that corresponded with the information on the Form I-129 and LCA. The 2014 Agreement, however, does not contain such information. Consequently, assuming *arguendo* that the 2014 Agreement represented work available to the Beneficiary in October 2016 - which as discussed, has not been established - the Petitioner has not demonstrated that the place of employment for such work would be located within the geographical area corresponding to the LCA. Thus, for this reason also, the Petitioner has not demonstrated eligibility.

## III. BENEFICIARY'S DUTIES

The Petitioner indicated that Beneficiary will perform work for the end-client [REDACTED] and that he will work offsite at the end-client's location. As evidence of the Beneficiary's duties, it initially provided a bullet list of tasks for the position; however, the record does not reflect that the end-client provided or approved this list of duties.

Responding to the Director's request for evidence, the Petitioner also submitted a Statement of Work between itself and the end-client. The Statement of Work does not reveal the duties that the proffered position will encompass. Consequently, the record lacks sufficient substantive documentation from the end-client regarding not only the specific job duties to be performed by the Beneficiary, but also information regarding whatever the client may or may not have specified with regard to the educational credentials of persons to be assigned to its project. The record does not contain sufficient probative documentation on this issue from (or endorsed by) the end client, the company that will actually be utilizing the Beneficiary's services, that establishes any particular academic requirements for the proffered position. Since the Petitioner did not provide the end-client's requirements, we must question how the Petitioner made such a determination, and the accuracy of the statements. A petitioner's preference for high-caliber employees is not sufficient to establish a position as a specialty occupation.

As a result, the Petitioner has not established the substantive nature of the work that the Beneficiary will perform. This precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines: (1) the normal minimum educational requirement for the particular position, which is the focus of criterion one; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion two; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion two; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion three; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion four.

## IV. CONCLUSION

For the reasons discussed above, the Petitioner has not established eligibility for the benefit sought.

*Matter of A-N-A-, Inc.*

**ORDER:** The appeal is dismissed.

Cite as *Matter of A-N-A-, Inc.*, ID# 513090 (AAO Sept. 15, 2017)