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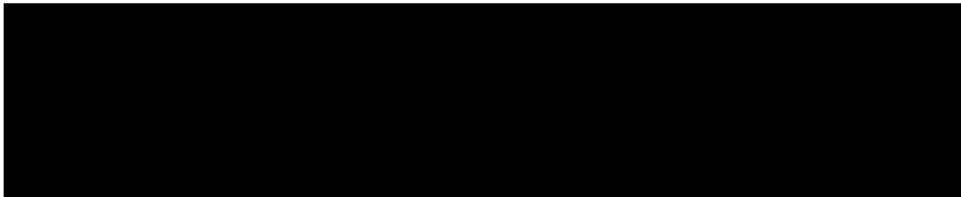
FILE: WAC 05 165 52047 Office: CALIFORNIA SERVICE CENTER Date:

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the California Service Center denied the nonimmigrant visa petition and the matter is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, and the petition will be denied.

The petitioner corporation is engaged in the information technology and consultancy business. In order to employ the beneficiary as a computer software applications engineer, it filed this H-1B petition to classify him as a nonimmigrant temporary worker 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 because he determined (1) that the certified labor condition application (LCA) that was filed with the petition was defective because it stated an employment location that later changed, and (2) that the defect was not remedied by the petitioner's later submission of a certified LCA that stated the location where the beneficiary would be employed.

The director's decision states the following facts, which are not disputed on appeal:

The record indicates that an H-1B petition was filed on May 24, 2005 on behalf of the beneficiary. Submitted with the petition was an approved LCA for one H-1B nonimmigrant with the work location listing Sacramento, CA. On August 22, 2005, USCIS [United States Citizenship and Immigration Services] requested additional evidence from the petitioner to clarify whether the petitioner has contracts with firms requiring computer-programming services of the beneficiary. In response to the Request for Evidence, the petitioner stated that the beneficiary will be working at Nalco's North American headquarters in Chicago, IL and submitted a new LCA dated September 7, 2005 for three H-1B non-immigrants. The LCA was certified subsequent to the filing of the H-1B petition and did not have any attachment for a list of all beneficiary file numbers approved under the LCA submitted.

....

The initial LCA was submitted for Sacramento, CA. The Form I-129 [Petition for Nonimmigrant Worker], filed on May 24, 2005, also stated in Part 5, #5 that the place of employment would be at [REDACTED]. However, in response to the Request for Evidence, the petitioner indicated that the beneficiary will be working at [REDACTED].

In denying the petition on the basis of the facts recited above, the director cited the USCIS regulations at 8 C.F.R. §§ 103.2(b)(12) and 214.2(h)(4)(i)(B)(I),¹ as authorities for the proposition that, notwithstanding a later-filed accurate LCA, an H-1B petition should be denied if during its adjudication the location of the beneficiary's employment changes from the one designated on the certified LCA that was filed with the Form

¹ The director incorrectly cited the latter regulation as section 214.2(h)(4)(B)(I), instead of 214.2(h)(4)(i)(B)(I).

I-129. The director also cited several precedent decisions limiting a petitioner's ability to affect the USCIS adjudication of a petition by submission of evidence of changes in relevant facts that occurred after the petition was filed.

On appeal, counsel contends that the facts recited by the director do not justify denial of the petition.

Counsel notes, and the AAO has no reason to question, that the location that the initial certified LCA identified as the beneficiary's workplace was accurate at the time of the filing of the Form I-129, but that the location had changed by the time the request for evidence was received, months after the submission of the Form I-129 with the initial certified LCA.

Counsel argues in part that that the director's denial "contravenes settled policy," and in support of this argument counsel submits copies of (1) the Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995) (hereinafter, the Aytes Memo); and (2) page 91 from the February 1996 edition of an unidentified periodical that includes the body of what the periodical identifies as "a November 29, 1995 letter from [REDACTED] Chief, Nonimmigrant Branch, Adjudications (INS) to [REDACTED] concerning questions regarding whether an amended H-1B petition should be filed when an employee is transferred from one location to another by the same employer" (hereinafter, the [REDACTED] letter). Counsel contends that, as it was accurate at the time of its filing with the Form I-129, the initially-submitted certified LCA satisfied any LCA-related eligibility requirement. Counsel asserts that, in light of the petitioner's "admirable H-1B compliance record and demonstrated economic success (1,350 employees) in the computer services marketplace," the initial certified LCA satisfied the Aytes Memo's policy objective of protecting against speculative employment. Counsel also asserts that the [REDACTED] letter indicates that "Legacy Central Office INS determined that an H-1B visa worker could be transferred to a new location before the amended petition had been approved."

The director's decision to deny the petition on the grounds stated in his denial was correct. The AAO bases this determination upon its review of all the evidence of record pertaining to the LCA issue, including counsel's brief on appeal and the documents submitted with it.

The AAO will first address why it finds unpersuasive the two documents submitted with the appellate brief.

The Aytes Memo is not relevant: it addresses not LCA filing requirements but rather satisfaction of the requirement at 8 C.F.R. § 214.2(h)(2)(i)(B) for an itinerary when a beneficiary will be working at multiple locations. The memo comments only on the purpose of that regulation, and not on any USCIS regulations on LCA requirements. The memo's only mention of an LCA does not relate to standards of LCA validity: "[T]he locations listed by the United States employer on the supporting labor condition application may, in some cases, suffice as an itinerary."

The LaFleur letter does not support counsel's arguments. First, the letter references the need for the filing of a new ("amended") petition when, as here, a new LCA is required due to a change in the beneficiary's employment location:

This office has previously provided guidance to both the field and to Immigration practitioners that an amended petition should be filed in the situation where an employer transfers an H-1B nonimmigrant alien from one location to another and where the employer must obtain a new LCA from the Department of Labor.

The letter also deals with an issue not on appeal, namely, the acceptability of a beneficiary transferring to a new employer while an amended H-1B petition that reflects the change of employer is pending adjudication. Further, the [REDACTED] letter does not have precedential weight. Letters written by the Office of Adjudications do not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any CIS officer as they merely indicate the writer's analysis of an issue. *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000). *See also* 8 C.F.R. § 103.3(c).

Counsel provides no evidence of USCIS policy contrary to the director's decision. Therefore, counsel's statement that the director's denial "contravenes settled policy" is unsubstantiated and consequently merits no weight. As counsel cites no supporting legal or regulatory authority, the AAO also discounts his statement that the change of the beneficiary's employment location is "not a new eligibility fact." As it is not substantiated by evidence in this record of proceeding, counsel's characterization of the petitioner's "H-1B compliance record" as "admirable" has no weight. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, as noted above, whether or not a petitioner has complied with the itinerary requirement is a separate question from, and is governed by different regulations than, the determination of the validity of the LCA. The Aytes Memo referenced above considers an employer's H-1B compliance record when determining whether it has complied with the itinerary requirement, not the LCA requirement.

The AAO shall disregard counsel's reference to the petitioner's H-1B compliance record as that record is not part of the record of proceeding. Each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

A number of USCIS regulations are relevant to the issue at hand.

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

An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form

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:

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 LCA is a necessary and material part of determining eligibility under the H-1B nonimmigrant worker visa petition. The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(I) includes a certified LCA among the documents that a petitioner "shall submit" with an H-1B petition, and the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) states:

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 occupation specialty in which the alien(s) will be employed.

The regulation at 8 CFR § 214.2(h)(4)(iii)(B)(2) provides that the petitioner must state "that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay."

At the time of filing the petition the petitioner must file a certified LCA valid for the work location specified in part E of the LCA, and part F for an additional or subsequent work location. The work location is critical in determining the prevailing wage for the occupation in the area of intended employment. See 20 CFR §§ 655.730(c)(4) and (d)(1). The AAO notes that the prevailing wage for Sacramento, CA is \$82,763.00, and the rate of pay noted on the first LCA is \$82,763.00. The prevailing wage and rate of pay for Chicago, IL is \$60,000. If the petitioner wishes to reduce the beneficiary's pay from \$82,763/year to \$60,000, it must file an amended petition, with fee.

In light of the above, the AAO finds that a necessary condition for approval of an H-1B visa petition is an LCA, certified prior to the filing of the petition, with accurate information about where the beneficiary would actually be employed. That condition was not satisfied in this proceeding. The petitioner's attempt to remedy the deficiency by submitting an LCA certified after the filing of the petition 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).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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