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FILE: WAC 07 145 53449 Office: CALIFORNIA SERVICE CENTER Date: **AUG 15 2008**

IN RE: Petitioner: [Redacted]  
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:



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, California Service Center, denied the nonimmigrant visa petition. The matter is now before the AAO. The appeal will be dismissed. The petition will be denied.

The petitioner provides software consulting services. It seeks to employ the beneficiary as a systems analyst. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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).

On August 27, 2007, the director denied the petition determining that the petitioner had not complied with the requirements for filing a Form I-129, Petition for a Nonimmigrant Worker with an approved Form ETA 9035E, Labor Condition Application (LCA) for the beneficiary's work location.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's May 3, 2007 request for evidence (RFE); (3) documentation submitted in response to the director's request; (4) the director's August 27, 2007 decision denying the petition; and (5) the Form I-290B and a statement on appeal.

The issue before the AAO is whether the petitioner established filing eligibility at the time the Form I-129 was received by U.S. Citizenship and Immigration Services (CIS).

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 matters 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 regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must obtain a certified labor condition application (LCA) from the 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). The

instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of a labor certification application with the Department of Labor when submitting the Form I-129.

The petitioner filed the Form I-129 on April 16, 2007. At that time the petitioner submitted an LCA certified on April 10, 2007 for work locations at the petitioner's headquarters in Princeton Junction, New Jersey and in Anaheim, California. In response to the director's RFE, the petitioner submitted a letter from Aveeva Inc. dated October 15, 2007 addressed to the petitioner informing the petitioner that the beneficiary had been "selected for our in-house project at Aveeva Inc." and that the beneficiary's reporting manager would be located at an address in Anaheim, California. Aveeva Inc.'s letterhead indicates the company is located in Fremont, California. The letter further indicated that the beneficiary would work at Aveeva's client's location in North Carolina and the duration of the employment would be two years with a possibility of project extension. The petitioner also provided an itinerary of definite employment for a systems analyst at Wells Fargo, North Carolina with a description of the proffered position's proposed duties.

The director denied the petition for failure to submit a certified LCA for the proposed work location.

On appeal, the petitioner submits an LCA certified on April 6, 2007 for the work locations in Princeton Junction, New Jersey and Charlotte, North Carolina. The petitioner asserts that the LCA for Princeton, New Jersey and Charlotte, North Carolina was obtained before the petition was filed and had been included in the response to the RFE. The petitioner contends that it has complied with the requirements for filing the Form I-129 and LCA.

The AAO finds that the petitioner has not provided a fixed location where the beneficiary will work. On the Form I-129, the petitioner indicated (by failing to complete Part 5, Question 5 on the Form I-129) that the beneficiary would work in Princeton Junction, New Jersey and provided an LCA with work locations designated in Princeton Junction, New Jersey and Anaheim, California. In response to the director's RFE, the petitioner provided an October 15, 2007 letter from Aveeva, a third-party company, indicating that the beneficiary would work on an in-house project and also indicating that the beneficiary would work for its client in North Carolina. The petitioner also provided an itinerary for a systems analyst at a work location in Wells Fargo, North Carolina. The itinerary does not identify the beneficiary by name. On appeal, the petitioner provides an LCA for Princeton Junction, New Jersey and Charlotte, North Carolina, indicating that the LCA had been submitted with the response to the RFE. However, the petitioner has not supplied a contract or other evidence substantiating that it has employment for the beneficiary in Charlotte, North Carolina, in Princeton Junction, New Jersey, or in Anaheim, California. It is the imprecision and ambiguity regarding the various work locations of the proffered position identifying where the beneficiary will work that requires the denial of the petition. The petitioner has not established that the beneficiary will work in Charlotte, North Carolina, Anaheim, California, or Princeton Junction, New Jersey, the only locations identified on the certified LCAs in the record. For the reason, the petition will be denied.

Beyond the decision of the director, the petitioner has also failed to establish that the proffered position is a specialty occupation. To determine whether a particular job qualifies as a specialty occupation, CIS does not rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate

employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

In this matter, the record shows that the petitioner is an employment contractor and although the petitioner will be the beneficiary's employer, the record does not contain sufficient evidence establishing where the beneficiary will work and the specific end-user of the beneficiary's services. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000) held that for the purpose of determining whether a proffered position is a specialty occupation, a petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. In this matter, the petitioner initially provided an overview of the beneficiary's proposed duties. In response to the director's RFE, the petitioner submitted a letter from Aveeva, a third-party company apparently located in Fremont, California, that indicated the beneficiary would work on an in-house project while also indicating that the beneficiary would work at a client location in North Carolina. The record does not contain a description of duties the beneficiary would perform for Aveeva or for Aveeva's client in North Carolina. The itinerary, submitted in response to the director's RFE, does not identify the beneficiary by name and does not identify the company providing the description of duties included in the itinerary. Thus, the record does not contain a detailed description of duties and job requirements from the entity or entities for whom the beneficiary would perform the work. Accordingly, CIS is precluded from determining whether the proffered position incorporates the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act. Therefore, the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations. For this additional reason, the petition may not be approved.

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 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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The burden of proof in this proceeding 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.