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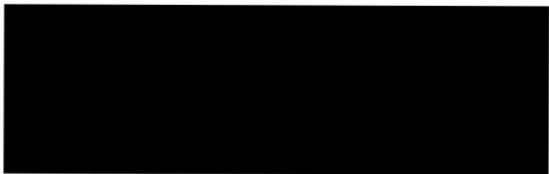
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529-2090



U.S. Citizenship
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Services

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FILE: WAC 07 146 50776 Office: CALIFORNIA SERVICE CENTER Date: FEB 02 2009

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:

SELF-REPRESENTED

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The director of the service center 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.

The petitioner is a software development and consulting provider that seeks to employ the beneficiary as a computer programmer/programmer analyst.¹ The petitioner, therefore, endeavors to classify the beneficiary 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, concluding that the petitioner had not established that its labor condition application (LCA) is valid.

On appeal, the petitioner states that if the Form I-129 is approved, the beneficiary would first undergo two weeks of training at the head office. The petitioner states that the identity of the end client is yet unknown and that the location where the beneficiary would ultimately be employed is therefore also unknown as of yet. The petitioner states that it will apply to amend the condition of employment to reflect the end client and location where the beneficiary will be employed.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number

The primary issue in this proceeding is whether the petitioner provided a valid labor condition application (LCA) in support of the Form I-129, which was filed on April 2, 2007.

¹ The AAO notes that the petitioner uses these position titles interchangeably, referring to the beneficiary as a computer programmer in the Form I-129 and as a programmer analyst in other supporting documents.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

- (1) A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
- (2) A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
- (3) Evidence that the alien qualifies to perform services in the specialty occupation. . . .

In the present matter, the LCA submitted at the time of filing lists the petitioner as the beneficiary's employer with the work location in San Jose, California. The LCA also indicates that the beneficiary would be employed as a computer programmer. Supporting documentation also included: (1) a job offer letter dated February 15, 2007; (2) the beneficiary's acceptance of the job offer dated February 18, 2007; and (3) evidence of the beneficiary's education credentials.

On May 7, 2007, U.S. Citizenship and Immigration Services (USCIS) issued a request for additional evidence (RFE) instructing the petitioner to clarify its employer/employee relationship with the beneficiary. The RFE stated that such clarification should include the specific location of the prospective employment with the date and conditions of any employment that would take place outside of the petitioner's worksite. Lastly, the RFE stated that if the petitioner is an agent, it must provide documentation showing that it meets certain regulatory requirements as well as an itinerary and copies of contracts between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work/work orders, and/or service agreements for the beneficiary.

In response, the petitioner provided a letter dated July 17, 2007, stating that the beneficiary's employment will be off-site. The petitioner provided four invoices showing that it billed four clients for consulting services that were provided in May and June 2007. The petitioner also provided three contracts dated March 1, 2007, April 3, 2007, and May 4, 2007, respectively, where the petitioner agreed to provide its personnel to three different clients. It is noted that none of the contracts specified the employee(s) who would actually provide the service(s) requested by the client, nor was there any information as to the specific date(s) that the service(s) would be provided.

In a decision dated August 9, 2007, the director denied the petition, noting that at least one of the contracts between the petitioner and its client was signed after the Form I-129 was filed and therefore would not be considered. This finding is based on case law precedent, which established that the petitioner must be eligible at the time of filing the 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 AAO adds that a total of two of the contracts submitted by the petitioner were actually signed after

the petition was filed. Therefore neither will be considered for the purpose of reaching a decision as to the petitioner's eligibility at the time of filing.

The director also discussed the three consulting agreements the petitioner submitted in response to the RFE, noting that two out of the three companies named in the agreements identified locations that were not covered in the LCA that was initially submitted. The director ultimately concluded that the LCA that was submitted earlier could not be deemed valid, as the beneficiary's employment would not be limited to the location named in that LCA.

On appeal, the petitioner asserts that it has contracts with multiple clients in various different states and argues that it is impossible to submit an LCA to cover each of the different locations. However, the petitioner states that it will apply for an amendment to change the condition of the beneficiary's employment to show changing worksites as the changes occur and further states that it will provide statements of work orders from the ultimate client. The petitioner also provided two new LCAs showing three additional locations where the beneficiary would purportedly be employed during a three-year time period. However, both LCAs were signed after the petition was filed. Therefore, based on the above noted precedent decision, neither LCA will be considered in determining the petitioner's eligibility in the present matter. *See id.*

Upon review of the petitioner's statements and the evidence on record, the AAO finds that the petitioner has not established a basis upon which to overturn the director's decision. The petitioner's statements indicate that the petitioner has not established which of its clients will be the recipient of the beneficiary's services. Based on the petitioner's statement on appeal, the beneficiary will undergo two weeks of training at the worksite listed in the previously submitted LCA. However, that LCA is misleading in that it indicates that the beneficiary will be employed at the stated location for three years in the position of computer programmer. In fact, the petitioner has no knowledge of the specific location(s) of the beneficiary's worksite(s) for the duration of the three-year period and only intends to employ the beneficiary for two weeks as a trainee at the worksite that is actually listed in the LCA. The specific locations where the beneficiary may be employed in the position of computer programmer are as of yet unknown. Therefore, the director properly determined that the information relayed in the LCA is not accurate and rejected the LCA as being invalid. The petitioner's arguments on appeal do not overcome the director's sound reasoning. Accordingly, the director's denial will not be withdrawn.

In light of the director's findings, the AAO finds that there is at least one additional basis for denial that was not addressed in the director's decision. Specifically, the petitioner has not established that the beneficiary would be employed in a specialty occupation. Pursuant to the definition provided in 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties,

accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Despite the fact that the petitioner provided a description of the beneficiary's prospective employment as a computer programmer, the statements on appeal indicate that the only employment that has been determined with any certainty is the beneficiary's two-week period as a trainee. However, this position is not covered in the LCA, nor has the petitioner established that the time spent in training fits the above definition of specialty occupation. That being said, the petitioner's failure to identify specific worksites where the beneficiary's employment will take place during the specified three-year period precludes the petitioner from providing a valid job description for the beneficiary. The petitioner cannot expect USCIS to presume employment that has not yet been established and to assume that the beneficiary will perform the job duties specified when the petitioner has not yet secured a worksite where the beneficiary will be employed.

While the petitioner is not expected to secure employment for the entire three-year period that is specified in the initial Form I-129, the petitioner must at the very least provide an LCA for the specific job cite where the beneficiary will be employed upon his initial arrival to the United States. Even then, assuming that there are no other grounds of ineligibility, the petition may only be approved for the period during which eligible employment has been clearly identified and established. In the present matter, the only certainty about the beneficiary's prospective employment is a two-week training period that will take place upon arrival. The petitioner has not provided an itinerary as to where the beneficiary will actually perform the work of a computer programmer after the two-week training period is over. 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)). 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 petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.

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.