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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529

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

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FILE: WAC 08 150 52351 OFFICE: CALIFORNIA SERVICE CENTER DATE:

NOV 25 2009

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:

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center 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.

The petitioner avers that it is a software consulting and development business that was established in 1998 and currently has 34 employees. It seeks permission to employ the beneficiary as a computer programmer and, 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 because the petitioner did not submit a Labor Condition Application (LCA) that was valid for all work locations. On appeal, the petitioner submits a letter and an LCA that was certified for the work location of San Jose, California on October 6, 2008.

The record includes: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and (5) the Form I-290B, along with documentation submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

When filing the H-1B petition, the petitioner averred in both the petition and the letter of support that it wished to employ the beneficiary as a computer programmer. In its letter of support, the petitioner submitted a generalized description of the duties that the beneficiary would perform, with a percentage of time that the beneficiary would devote to each generalized duty. The petitioner did not state in its letter whether the beneficiary would be working on a particular project or what his exact work location would be. The LCA that the petitioner had certified showed a work location of Naperville, Illinois.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on July 22, 2008. In the RFE, the director asked the petitioner to submit, among other items, evidence such as contracts, statements of work, work orders or other documentation that could provide a comprehensive description of the beneficiary's proposed duties, as well as evidence regarding its relationship with the beneficiary.

In its response, the petitioner stated that the beneficiary would "be performing the duties of a Computer Programmer at our main location . . . and intermittently to collect business requirements and . . . will be required to work at the client location Fusionize . . ." According to the petitioner, Fusionize is located in San Jose, California. The petitioner also submitted an itinerary that listed the beneficiary's work location at Naperville, Illinois and "intermittently" in San Jose, California. The petitioner also submitted an August 7, 2008 letter from Fusionize that listed the beneficiary's responsibilities.

On September 23, 2008 the director denied the petition. Based upon the evidence in the record, the director concluded that the beneficiary would be working for Fusionize in San Jose, California and noted that the LCA in the record did not cover a work location other than Naperville, Illinois. The director found that the LCA was, therefore, not valid and the petition could not be approved.

On appeal, the petitioner disagrees with the director's findings and attempts to clarify some apparent misunderstandings. According to the petitioner, the beneficiary's "primary work location" will be at the petitioner's offices in Naperville, Illinois. The petitioner states further that the beneficiary "might intermittently have to go to the client location to collect the Business requirements." The petitioner notifies the director that it is aware of its obligations to conform to LCA requirements and also submits a new LCA for the work location of San Jose, California that was certified on October 6, 2008.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

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

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition "[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary." Thus, in order for a petition to be approvable, the LCA must have been certified before the H-1B petition was filed. The submission of an LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). Further, U.S. Citizenship and Immigration Services (USCIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. 8 C.F.R. § 103.2(b)(1).

While the Department of Labor (DOL) is the agency that certifies LCA applications before they are submitted to USCIS, the DOL regulations note that it is within the discretion of the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification. . . .*

[Italics added]

The DOL regulation at 20 C.F.R. § 655.715 states, in pertinent part:

Place of employment means the worksite or physical location where the work actually is performed.

(1) The term does not include any location where either of the following criteria-- paragraph (1)(i) or (ii)--is satisfied:

(i) *Employee developmental activity.* An H-1B worker who is stationed and regularly works at one location may temporarily be at another location for a particular individual or employer-required developmental activity such as a management conference, a staff seminar, or a formal training course (other than "on-the-job-training" at a location where the employee is stationed and regularly works). For the H-1B worker participating in such activities, the location of the activity would not be considered a "place of employment" or "worksite," and that worker's presence at such location--whether owned or controlled by the employer or by a third party--would not invoke H-1B program requirements with regard to that employee at that location. However, if the employer uses H-1B nonimmigrants as instructors or resource or support staff who continuously or regularly perform their duties at such locations, the locations would be "places of employment" or "worksites" for any such employees and, thus, would be subject to H-1B program requirements with regard to those employees.

(ii) *Particular worker's job functions.* The nature and duration of an H-1B nonimmigrant's job functions may necessitate frequent changes of location with little time spent at any one location. For such a worker, a location would not be considered a "place of employment" or "worksite" if the following three requirements (i.e., paragraphs (1)(ii)(A) through (C)) are all met--

(A) The nature and duration of the H-1B worker's job functions mandates his/her short-time presence at the location. For this purpose, either:

(1) The H-1B nonimmigrant's job must be peripatetic in nature, in that the normal duties of the worker's occupation (rather than the nature of the employer's business) requires frequent travel (local or non-local) from location to location;
or

(2) The H-1B worker's duties must require that he/she spend most work time at one location but occasionally travel for short periods to work at other locations;
and

(B) The H-1B worker's presence at the locations to which he/she travels from the "home" worksite is on a casual, short-term basis, which can be recurring but not excessive (i.e., not exceeding five consecutive workdays for any one visit by a peripatetic worker, or 10 consecutive workdays for any one visit by a worker who spends most work time at one location and travels occasionally to other locations);
and

(C) The H-1B nonimmigrant is not at the location as a "strikebreaker" (i.e., the H-1B nonimmigrant is not performing work in an occupation in which workers are on strike or lockout).

(2) Examples of "non-worksite" locations based on worker's job functions: A computer engineer sent out to customer locations to "troubleshoot" complaints regarding software malfunctions; a sales representative making calls on prospective customers or established customers within a "home office" sales territory; a manager monitoring the

performance of out-stationed employees; an auditor providing advice or conducting reviews at customer facilities; a physical therapist providing services to patients in their homes within an area of employment; an individual making a court appearance; an individual lunching with a customer representative at a restaurant; or an individual conducting research at a library.

(3) Examples of "worksites" locations based on worker's job functions: A computer engineer who works on projects or accounts at different locations for weeks or months at a time; a sales representative assigned on a continuing basis in an area away from his/her "home office"; an auditor who works for extended periods at the customer's offices; a physical therapist who "fills in" for full-time employees of health care facilities for extended periods; or a physical therapist who works for a contractor whose business is to provide staffing on an "as needed" basis at hospitals, nursing homes, or clinics.

(4) Whenever an H-1B worker performs work at a location which is not a "worksite" (under the criterion in paragraph (1)(i) or (1)(ii) of this definition), that worker's "place of employment" or "worksite" for purposes of H-1B obligations is the worker's home station or regular work location. The employer's obligations regarding notice, prevailing wage and working conditions are focused on the home station "place of employment" rather than on the above-described location(s) which do not constitute worksite(s) for these purposes. However, whether or not a location is considered to be a "worksite"/"place of employment" for an H-1B nonimmigrant, the employer is required to provide reimbursement to the H-1B nonimmigrant for expenses incurred in traveling to that location on the employer's business, since such expenses are considered to be ordinary business expenses of employers (Sec. Sec. 655.731(c)(7)(iii)(C); 655.731(c)(9)). In determining the worker's "place of employment" or "worksite," the Department will look carefully at situations which appear to be contrived or abusive; the Department would seriously question any situation where the H-1B nonimmigrant's purported "place of employment" is a location other than where the worker spends most of his/her work time, or where the purported "area of employment" does not include the location(s) where the worker spends most of his/her work time.

The petitioner has maintained throughout this proceeding that the beneficiary will be primarily working at its headquarters office and "intermittently" traveling to San Jose, California to meet with the client, Fusionize. The petitioner, however, has never defined what "intermittently" means in relation to the frequency of the beneficiary's travel to and work in San Jose, California during the three-year period of requested employment. Without evidence to clarify what the petitioner meant by declaring that the beneficiary would only be working "intermittently" in California, the petitioner has not established that its office in Naperville, Illinois, not the client's site in San Jose, California, will be the beneficiary's "place of employment," as that term is defined at 20 C.F.R. § 655.715.¹

¹ Further confusing the record is the petitioner's submission of an LCA for the work location of San Jose, California that was certified only after the director notified the petitioner through its denial letter why its filing submission was deficient. The petitioner's action in obtaining a certified LCA for the San Jose, California work location supports the director's conclusion that the beneficiary's primary work location would be in California, not Illinois.

The AAO finds that the LCA filed with the petition does not support the present petition as there is insufficient evidence that Naperville, Illinois is the geographical area of the beneficiary's actual place of employment. Consequently, the director's determination to deny the petition is correct. For this reason, the appeal will be dismissed and the petition will be denied.

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