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



U.S. Citizenship  
and Immigration  
Services

D2

[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted] Date: JUN 01 2010  
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:

[Redacted]

**INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 purports to be a software consulting firm. To employ the beneficiary in a position designated as a software engineer, the petitioner endeavors to classify him 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, finding that the petitioner failed to establish that a *bona fide* job offer exists and that the beneficiary has been maintaining his H-1B status. On appeal, counsel asserted that the petitioner and beneficiary are qualified, and provided some evidence previously requested, as well as an explanation from the petitioner's president for its tardiness.

The AAO notes that the record suggests an issue that was not raised in the decision of denial. The Labor Condition Application (LCA) in the record, as certified by the Department of Labor (DOL) is valid for employment in Livonia, Michigan. The Form I-129 nonimmigrant visa petition in the record indicates that, if it were approved, the beneficiary would be employed in both Livonia, Michigan and Columbus, Ohio.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The AAO will first address the issue of the validity of the LCA as support for the visa petition.

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.

While the DOL is the agency that certifies LCAs before they are submitted to the U.S. Citizenship and Immigration Services (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]

As was noted above, the visa petition states that the beneficiary would be employed in Livonia, Michigan and Columbus, Ohio, and the LCA is valid only for employment in Livonia, Michigan. The AAO finds that the LCA does not support the present petition as the LCA was not certified for all of the geographical areas where the beneficiary would be employed. *See* § 212(n)(1)(A)(i)(II) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i)(II) (requiring that the prevailing wage be met for the "area of employment"; *see also* 20 C.F.R. § 655.715 (defining "Area of intended employment"). The appeal will therefore be dismissed, and the petition will be denied on this additional basis.

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 issue upon which the denial was based is whether the petitioner has provided evidence sufficient to establish that a *bona fide* job offer exists and that the beneficiary has been maintaining his H-1B visa status.

The AAO notes that, in a request for evidence dated August 27, 2008, the California Service Center requested that the petitioner provide, *inter alia*, copies of the petitioner's business licenses; a copy of the floor plan of the petitioner's premises; photographs of the interior and exterior of the petitioner's business; 2006 and 2007 tax returns; Form 941 Quarterly Wage Reports for the previous four quarters; copies of the beneficiary's payroll summaries, Form W-2 Wage and Tax Statements and Form W-3 transmittals covering the period since he began working in the United States; and copies of the beneficiary's pay records or pay stubs for the previous four pay periods.

In response, counsel submitted the petitioner's 2007 Form 941 reports, but not the reports for the first two quarters of 2008. Counsel provided photographs of the interior of the petitioner's premises, but no exterior photographs. Counsel provided a floor plan, although the space shown on that floor plan clearly does not correspond to the interior photographs provided.

Counsel also submitted a letter in which he stated "[The petitioner] must have had some kind of emergency and was unable to provide us with all the requested documents . . . ." Counsel did not provide the requested business licenses, payroll summaries, W-2 and W-3 forms, pay records, or pay

stubs. The director found that the evidence submitted did not demonstrate that the job offer is *bona fide* or that the beneficiary has maintained his H-1B status.

Subsequently, on appeal, counsel provided a letter from the petitioner's president stating that had been out of the country when the request for evidence was received, and that his employees were then unable to provide all of the documents required. With that letter, counsel provided 2008 Forms 941, and additional photographs including exterior photographs.

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. Where, as here, a petitioner has been previously put on notice of a deficiency in the evidence and afforded an opportunity to cure that deficiency, this office will not accept evidence relevant to that deficiency that is offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764(BIA 1988). The Administrative Appeals Office will not consider the tardily submitted evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the evidence that was made available to the director.

The AAO finds that the director correctly determined that the evidence submitted did not demonstrate that the job offer in this matter is *bona fide* and did not demonstrate that the beneficiary had been maintaining, or had otherwise complied with the terms and conditions of his H-1B visa status. The visa petition was correctly denied on those bases. As those bases for denial have not been overcome on appeal, the appeal will be dismissed and the visa petition will be denied.

Further, even on appeal, the petitioner has not provided the requested business licenses, payroll summaries, W-2 and W-3 forms, pay records, or pay stubs. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The appeal will be dismissed and the petition denied on this additional 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 appeal will be dismissed and the petition denied.

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