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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: VERMONT SERVICE CENTER Date: **NOV 05 2010**

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:
[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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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. 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 corporation that provides information technology (IT) solutions to both public and private organizations. The petitioner 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 on the basis that the petitioner failed to establish the proffered position as a specialty occupation as that term is defined by section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and the implementing regulations at 8 C.F.R. § 214.2(h)(4). In discussing the overall evidentiary deficiency of the record, the director also cited a separate basis for denying the petition, namely, the petitioner's failure to submit, within a single and timely response to the service center's request for additional evidence (RFE), RFE-requested evidence that is material to a line of inquiry necessary for the proper disposition of the petition.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). At the outset, in the exercise of its *de novo* function, the AAO finds that the appeal must be dismissed, and the petition must be denied, on a basis which, though not addressed by the director, precludes approval of this petition.

Regardless of the merits of the issues raised on appeal, the AAO is compelled to dismiss this appeal because the Labor Condition Application (LCA) filed with the Form I-129 does not correspond to the petition. The certified LCA cited in the Form I-129 and submitted to support the petition bears the U.S. Department of Labor (DOL) Employment and Training Administration (ETA) number [REDACTED]. This LCA was filed and certified for a "Network and Systems Administrator," not for the "Computer Programmer/Analyst" position specified in the Form I-129. Consequently, as the petition was filed without an LCA that corresponds to it, the petition must be denied. Thus, the issues on appeal are moot, because, regardless of their disposition on appeal, the petition is not approvable.

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 [(DOL)] 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 regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1).

While 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.)

Thus, in order for a petition to be approvable, it must be filed with a corresponding LCA that was certified before the H-1B petition was filed. Such is not the case with the present petition.

The LCA submitted in support of this petition actually relates to a position that is both nominally and materially different than the position for which the petition was filed. In this regard, the AAO finds that the relevant sections of the DOL's *Occupational Outlook Handbook* and in its *O*NET Online* revealed that the type of position identified on the Form I-129 and the type of position identified as the subject of the LCA have been assigned different Occupational Employment Survey (OES) Standard Occupational Classification (SOC) codes. Moreover, review of these two DOL resources reveals that the duties comprising a network and system administrator position (the subject of the LCA) are materially different than those comprising a programmer or programmer analyst position (the subject of the Form I-129).

There is no provision in the regulations for discretionary relief from the LCA requirements; and, short of filing a new petition with new and corresponding LCA, with the required fees, there is no remedy for filing an H-1B petition without a corresponding LCA. *See* 8 C.F.R. § 103.2(b)(1) (on the requirement to establish eligibility at the time of filing) and 8 C.F.R. § 214.2(h)(2)(i)(E) (indicating that a material defect in an H-1B petition's documentation can only be remedied by filing a new petition with a corresponding LCA and appropriate fees).

Aside from the mootness of the appeal because the petition was filed without a corresponding LCA, the AAO notes that, even if there were no LCA issue regarding this petition, the outcome of the appeal would be the same. This is because the record of proceeding supports the director's decision to deny the petition on the grounds that he cited.

First, as noted by the director, the petition must be denied because the petitioner failed to produce RFE-requested evidence that was material to the proper adjudication of the petition. See 8 C.F.R. § 103.2(b)(14). In this regard, it should be noted that RFE-requested evidence submitted after a petitioner's response to the RFE - such as the contract-related documents first submitted in this appeal - will not be considered. As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the RFE. Moreover, the USCIS regulations governing the RFE process preclude the consideration of evidence requested in an RFE but not submitted as part of a timely response to the RFE. See 8 C.F.R. §§ 103.2(b)(11) and (b)(14).

Second, the AAO concurs with the director's analysis and determination on the specialty occupation issue. His decision accurately assesses the evidence before the director, and it correctly applies the relevant regulations governing the specialty occupation aspect of the H-1B program. Additionally, the grounds for denial cited in the director's decision are not overcome by any evidence properly before the AAO on appeal. In short, the record of proceeding does not establish that the work to which the beneficiary would be assigned would require the theoretical and practical application of at least a U.S. bachelor's degree level of highly specialized knowledge in a particular IT-related specialty, as required by section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and the implementing regulations at 8 C.F.R. § 214.2(h)(4).

The petition will be denied and the appeal dismissed for the above stated reasons. 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.

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