



U.S. Citizenship
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[REDACTED]

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date FEB 02 2011

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, with a fee of \$630. 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
for 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.

On the Form I-129 visa petition, the petitioner stated, in answer to Part 5, Item 10, "Type of Business, "See support letter." In a letter dated April 6, 2009 and submitted with the visa petition, the petitioner's manager stated that the petitioner is an information technology services company. To employ the beneficiary, from April 7, 2009 to April 6, 2010, in a position designated as a systems analyst position the petitioner endeavored 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 submit a valid Labor Condition Application (LCA) to support the visa petition as required by 8 C.F.R. § 214.2(h)(4)(i)(B) and that the petitioner had failed to demonstrate that it would employ the beneficiary in a specialty occupation. On appeal, counsel for the petitioner submitted a Form I-290B accompanied by a brief and additional evidence.

For the reasons to be discussed below, the AAO finds that the director was correct to deny the petition on each of the two grounds that he cited as separate bases for the denial. Accordingly, the appeal will be dismissed, and the petition will be denied.

The AAO will first address the LCA issue.

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), which states in pertinent part:

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

In cases 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 visa petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from the 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 DOL when submitting the Form I-129.

In the instant case, counsel filed the Form I-129 visa petition with USCIS on April 8, 2009. With the petition, counsel submitted an LCA that was certified on April 6, 2009. That LCA is valid for employment in Middlesex County, New Jersey and in New York, New York. With the petition, counsel also provided a letter, dated April 6, 2009. That letter indicates that the petitioner is in the business of providing its employees to other companies to work on their projects.

On May 18, 2009, the service center issued an RFE in this matter. The service center noted that the evidence submitted asserted that the beneficiary would work in Middlesex County, New Jersey and in New York, New York, but did not establish any more precisely where the work would be performed, the entity for which the beneficiary would perform his work, or for how long that entity would require the beneficiary's services.

The service center requested, *inter alia*, that the petitioner (1) provide an itinerary of the beneficiary's projected employment, as required by 8 C.F.R. § 214.2(h)(2)(i)(B), including specific dates and locations pertinent to the beneficiary's projected work, (2) submit a letter from each of the end-users of the petitioner's services identifying the job title and duties of the petitioner's work for them, their minimum educational requirement for working in that position, and the name and title of the person who would supervise the beneficiary's work, and stating the name of the vendor who provided the beneficiary to them and whether they are permitted to assign the beneficiary to a different end-user, (3) identify the succession of consulting or staffing businesses through which the beneficiary's services would be provided to each of the work sites identified, and (4) provide copies of all of the contracts and work orders pursuant to which the beneficiary would be employed, tracing the beneficiary's business relationship from the petitioner, through each of the intervening consulting or staffing companies, to the end-user of the beneficiary's services.

In response, the counsel submitted numerous contracts and work orders between various consulting and staffing companies, including the petitioner. Each of those documents shows that the petitioner's responsibility under them is limited to providing its employees to work on other companies' projects, generally through an intermediary. Some of those documents are with companies in New Jersey and New York and may evince prospective employment there. Many others are with corporations in other states with no apparent connection to New Jersey or New York; those contracts appear to have no relevance to any material issue in this case.

In a letter dated September 3, 2009, and submitted in response to the RFE, the petitioner's manager stated:

[The beneficiary's] complete itinerary is Middlesex County, NJ, since he will be employed with us and working in Middlesex County, NJ or within commuting distance. We also included New York City, NY on the LCA from an abundance of caution since we have clients in New York City and there is a probability that he might work there. Enclosed is evidence of that consisting of our agreement with Code X, Inc. ("CXI," supporting Owens & Minor and working remotely.)

Counsel did provide a copy of a contract between it and [REDACTED]. Counsel provided information showing that [REDACTED] is a distributor of medical and surgical supplies, whose home office is at [REDACTED] Virginia.

Counsel did not, however, (1) identify the specific locations where the beneficiary would work and the dates during which he would work at those locations, or (2) submit a letter from each of the end-users of the petitioner's services identifying the job title and duties of the petitioner's work for them, their minimum educational requirement for performing in that position, and the name and title of the person who would supervise the beneficiary's work, and stating the name of the vendor who provided the beneficiary to them and whether they are permitted to assign the beneficiary to a different end-user. Further, the contracts provided do not trace a clear succession from the petitioner, through the intermediate consultant or staffing firms, to the end-users of the beneficiary's services. As such, counsel's response to the RFE was imperfectly responsive.

Further, only one of the documents submitted pertained directly to the beneficiary. That document is a Statement of Work (SOW) dated August 20, 2009. It indicates that the beneficiary would be provided to [REDACTED] to work for two months beginning on August 24, 2009.

The AAO notes that the period of requested employment in this matter is from April 7, 2009 to April 6, 2010. August 24, 2009 and the two months following fall within that period of requested employment. The SOW submitted shows that, although the LCA submitted to support the visa petition is not valid for employment in [REDACTED] Virginia, the petitioner has agreed to provide him to work there during the period of requested employment, which agreement is contrary to the terms and conditions of the requested H-1B employment.

One of the director's bases for denying the visa petition, as was noted above, was his finding that the petitioner intended to employ the beneficiary in at least one location for which the LCA was not valid, and that, therefore, the petitioner had failed to submit an LCA that may validly be used to support the instant visa petition.

On appeal, counsel submitted a brief and a revised LCA. The revised LCA was certified on September 10, 2009, five months after the instant visa petition was submitted, and is valid for

employment in [REDACTED] In the brief, counsel argued that the amended LCA satisfies the requirements of 8 C.F.R. § 214.2(h)(4)(i)(B)(1).

In the instant case, the petitioner proposes that the beneficiary will work, pursuant to the instant petition, in [REDACTED] Virginia. The petitioner was obliged, therefore, to submit with the petition a corresponding, certified LCA, encompassing that location, when the petition was filed. The LCA that the petitioner eventually submitted to support employment in [REDACTED] Virginia, however, had not been certified when the visa petition was filed.

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 (USCIS) 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 certified LCA that was submitted in support of this petition did not encompass work to be performed in Virginia. 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).

The AAO is, therefore, compelled to dismiss this appeal because the certified LCA filed with the Form I-129 does not correspond to the petition. Consequently, as the petition was filed without a certified LCA that corresponds to it, the petition must be denied.

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 ground that the petitioner failed to establish the proffered position as a specialty occupation.

The petitioner's business involves placing its employees with other companies to work for those other companies. As recognized by the court in *Defensor v. Meissner*, 201 F. 3d 384, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. 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. Such evidence must be sufficiently detailed and explained as to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. The record of proceedings lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. In short, without such end-user evidence pertinent to the nature of the beneficiary's prospective duties, the petitioner cannot establish the existence of H-1B caliber work for the beneficiary.

Further, although counsel asserted that the beneficiary would work in [REDACTED] throughout the period of requested employment, the only evidence that employment is available for the beneficiary in that town is the August 20, 2009 SOW, which only shows that work was available there for two months commencing August 24, 2009. The record contains no evidence that the petitioner has any other work for the beneficiary to perform, in that or any other location or, if it has such work, that the requirements of the end-user of the beneficiary's services qualify the work as work in a specialty occupation.

For both reasons, the petitioner has not demonstrated that the work to which the beneficiary would be assigned would qualify as work in a specialty occupation position. The appeal will be dismissed and the visa petition will be denied for this additional reason.

The record suggests an additional issue that was not discussed in the decision of denial.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(A) identifies a "United States employer" as authorized to file an H-1B petition. "United States employer" is defined at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

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 regulation at 8 C.F.R. § 214.2(h)(2)(i)(F) allows a "United States agent" to file a petition "in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf."

The regulation does not accord standing to file an H-1B visa petition to anyone other than a beneficiary's prospective U.S. employer or agent.

In the instant case, the petitioner and counsel have never asserted that the petitioner is the beneficiary's agent. To the contrary, they have steadfastly asserted that, notwithstanding that the beneficiary would work at remote locations, the petitioner would be the beneficiary's actual employer. The AAO agrees that the evidence submitted does not demonstrate that the petitioner is the beneficiary's agent.

However, notwithstanding that the service center requested, in the May 18, 2009 RFE, that the petitioner provide evidence pertinent to the identity of the person who would supervise the beneficiary's work at remote end-user locations, that evidence is not in the record. The record does not demonstrate who would assign the beneficiary's duties when the beneficiary works at the [REDACTED] Virginia location or at any other location where the beneficiary might work. The nature of the petitioner's business, however, is assigning its workers to work at other companies' locations on those other companies' projects. That business model suggests that the beneficiary will likely not be supervised by an employee of the petitioner. Further, the August 20, 2009 SOW stated that that the beneficiary would be assigned to the [REDACTED] Virginia location, but not that any other employees of the petitioner would accompany him. This suggests that no employee of the petitioner would be at that job site to supervise the beneficiary's work.

That the petitioner would apparently not supervise the beneficiary's work suggests that the petitioner and the beneficiary would not have the employer/employee relationship required by 8 C.F.R. § 214.2(h)(4)(ii)(2). Because the petitioner has not demonstrated that it is the beneficiary's prospective employer within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(A) and 8 C.F.R.

§ 214.2(h)(4)(ii) it has not demonstrated that it has standing to file the instant visa petition. For this additional reason, the appeal will be dismissed and the visa petition will be denied.

Further still, as was noted above, the service center requested, in the May 18, 2009 RFE, that the petitioner (1) identify the specific locations where the beneficiary would work and the dates during which he would work at those locations, (2) submit a letter from each of the end-users of the petitioner's services identifying the job title and duties of the petitioner's work for them, their minimum educational requirement for performing in that position, and the name and title of the person who would supervise the beneficiary's work, and stating the name of the vendor who provided the beneficiary to them and whether they are permitted to assign the beneficiary to a different end-user, and (3) provide contracts that trace a clear succession from the petitioner, through the intermediate consultant or staffing firms, to the end-users of the beneficiary's services. The petitioner did not comply with those requests, all of which are material to the determination of whether the petitioner has any work for the beneficiary to perform, whether any work that it has may qualify as specialty occupation work, and whether that work is in locations for which the LCA is approved.

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). For this additional reason, the appeal will be dismissed and the visa petition will be denied.

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 for all of the above stated reasons, with each considered as an independent and alternative basis for denial. 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.