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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



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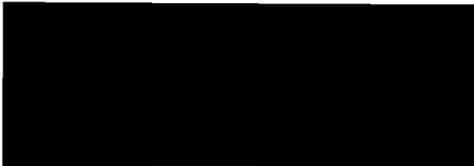
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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **JUL 07 2011**

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:



**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,

*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, submitted on 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 November 10, 2008 to November 9, 2011, in a position designated as a systems analyst position the petitioner endeavored to classify her 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). On appeal, counsel for the petitioner submitted a Form I-290B accompanied by a brief and additional evidence.

Upon review of the entire record of proceeding, including all of the submissions on appeal, the AAO finds that the evidence in the record of proceeding supports the director's decision to deny the petition on the basis specified by the director. Accordingly, the appeal will be dismissed and the petition will be denied.

Additionally, the AAO will address other grounds, not identified by the director, which require that this petition be denied. The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004), and it was in the exercise of this function that the AAO identified these additional grounds for denying the petition.

The AAO will first address the basis for denial that the director specified in his decision, namely, the absence of an LCA that corresponds with the petition as filed.

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.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) expressly includes a certified LCA among the documents that a petitioner "shall submit" with an H-1B petition, and the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) states:

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

Accordingly, a necessary condition for approval of an H-1B visa application is a certified LCA, with accurate information about the pertinent occupation and the location(s) of employment, that was certified prior to the filing of the petition. That condition was not satisfied in this proceeding. The petitioner's attempt to remedy the deficiency by submitting an LCA certified after the filing of the petition is ineffective. A petitioner must establish eligibility at the time of filing a 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). For this additional reason, the petition may not be approved.

In the instant case, counsel filed the Form I-129 visa petition with USCIS on November 19, 2008. With the petition, counsel submitted an LCA that was certified on November 6, 2008. That LCA is valid for employment in Middlesex County, New Jersey and in New York, New York. That April 6, 2009 letter indicates that the petitioner is in the business of providing its employees to other companies to work on their projects.

On May 19, 2009, the service center issued a 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 her 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; (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 the signed 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 a letter dated September 3, 2009, and submitted in response to the RFE, the petitioner's manager stated:

[The beneficiary's] complete itinerary upon filing the petitioner was to have been Middlesex County, NJ, since she was to work remotely on the project. We had also provided an LCA for NYC, NY, since there was a possibility that she would work there. However, since then her itinerary has changed and her complete itinerary is Columbia, SC since she is employed with us and is now working in Columbia, SC,

Counsel provided a new LCA approved for employment in Columbia, South Carolina. That new LCA, submitted in support of the instant visa petition, was certified on June 15, 2009, a date subsequent to the November 19, 2009 submission of the instant visa petition. Other deficiencies in the documents provided will be addressed below.

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. One group of documents pertains to employment in Columbia, South Carolina. Many others are with corporations in other states with no apparent connection to South Carolina, New Jersey or New York; those contracts appear to have no relevance to any material issue in this case. The majority of the contracts and work orders provided are signed by a representative of the beneficiary, but not signed by a representative of the company they purport to show entered into a business agreement with the petitioner.

One group of the documents submitted pertains to employment at or for Comsys, a Delaware Corporation located in Houston, Texas. One of those documents is a contract between the petitioner and Comsys detailing the terms pursuant to which the petitioner might supply personnel to Comsys,

which personnel [REDACTED] would subsequently reassign to work for its clients. The first page of that computer-generated document indicates that the document was ratified on March 23, 2007. That year was subsequently amended, in pen, to 2008. The last page of that document, however, indicates that it was signed by the petitioner's representative on March 27, 2007. It was not signed by a representative of Comsys. That document identifies three of [REDACTED], located in Edison, New Jersey, El Segundo, California, and Shorewood, Wisconsin. It does not identify the beneficiary by name or the location where work pursuant to that agreement would be performed.

One page among those documents states:

Address:

[REDACTED]

Another page states:

#### Manager Details

Manager Name: [REDACTED]  
Manager Designation: - [REDACTED]  
Phone number: - [REDACTED]  
Fax: [REDACTED]

Whether those two pages are part of any of the other documents provided is unclear. What business relationship the petitioner is positing between Palmetto GBA and the petitioner and/or the beneficiary is unclear. Another document is a description [REDACTED] of South Carolina. Who produced that document and for what purpose is unknown.

None of the documents submitted mentions the beneficiary. The AAO is unable to determine whether they trace the assignment by the petitioner of the beneficiary, or any other employee, through identified intermediaries to the end-user of the services of the beneficiary or its other employees. None of the documents indicates how long the beneficiary would be assigned to any project or at what location the beneficiary would work, or that she would work at all.

Counsel also submitted what purports to be an E-mail from [REDACTED] to the beneficiary, relaying a typewritten message praising the beneficiary's work. The E-mail represents that the typewritten message was produced by the beneficiary's [REDACTED] whom it does not identify. Various other E-mails provided purport to show communication between the beneficiary and others pertinent to the beneficiary's current project. One of those E-mails is from [REDACTED] whom it identifies as the budget and timekeeping [REDACTED]. The beneficiary is shown to have a Blue Cross Blue Shield E-mail address in those communications.

Although those E-mails suggest some business relationship involving the petitioner, the beneficiary, the exact nature of that relationship is unclear.

In the decision of denial, the director correctly found that the LCA certified on June 15, 2009 may not be used to support the visa petition, which was submitted on November 19, 2008, and that the previous LCA is not valid for employment in Columbia, South Carolina, where the petitioner now claims the beneficiary would work. Because the petitioner had not submitted an LCA that corresponds to the instant visa petition and may be used to support it as required by the visa petition instructions and 8 C.F.R. § 214.2(h)(4)(i)(B), the director correctly determined that the visa petition may not be approved. The director denied the visa petition on June 30, 2009.

On appeal, counsel reviewed the chronology of the case and stated that the petitioner had satisfied the requirements of 8 C.F.R. § 214.2(h)(4)(i)(B). Whether counsel meant that those requirements were satisfied by the first LCA submitted, or the second, or by the combination, was not made clear.

In the instant case, the petitioner now proposes that the beneficiary will work, pursuant to the instant petition, in Columbia, South Carolina. The petitioner is obliged, therefore, to provide a corresponding LCA to support the visa petition. The visa petition that the petitioner has submitted to support employment in Columbia, South Carolina, however, had not been certified when the visa petition was filed. submitted.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining 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 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary, this regulation inherently necessitates the filing of an amended H-1B petition to permit USCIS to perform its regulatory duty to ensure that the new LCA actually supports the H-1B petition filed on behalf of the beneficiary. In addition, as 8 C.F.R. § 103.2(b)(1) requires eligibility to be established at the time of filing, it is factually impossible for an LCA approved by DOL after the filing of an initial H-1B petition to establish eligibility at the time the initial petition was filed. Therefore, in order for a petitioner to comply with 8 C.F.R. § 103.2(b)(1) and USCIS to perform its regulatory duties under 20 C.F.R. § 655.705(b), a petitioner must file an amended petition whenever a beneficiary's job location changes such that a new LCA is required to be filed with DOL.

Again, USCIS regulations 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), and 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). As the record of proceeding indicates that the beneficiary would work in Columbia, South Carolina, but did not have an LCA valid for employment in Columbia, South Carolina with which to support the visa petition when it was filed, the visa petition may not be approved. The appeal will be dismissed and the visa petition will be denied on this basis.

The record suggests additional issues, which, though not addressed in the decision of denial, also require that the petition be denied.

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 beneficiary's work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The court found 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, in the particular factual context of this petition, the petitioner cannot establish the existence of H-1B caliber work for the beneficiary.

Further, although counsel asserted that the beneficiary would work in Columbia, South Carolina throughout the period of requested employment, the evidence submitted does not demonstrate that the petitioner has obtained work for her to perform in that location throughout the period of requested employment. In addition to having failed to demonstrate that the beneficiary would be employed in a specialty occupation in Columbia, South Carolina, the petitioner has not demonstrated that the beneficiary would be employed in a specialty occupation in other locations to which she might be assigned when her work in Columbia, South Carolina, if any, is completed.

On each of these separate and independent grounds, the visa petition must be denied.

Further still, as was noted above, the service center requested, in the May 19, 2009 RFE, that the petitioner (1) submit a letter from each of the end-users of the petitioner's services identifying the job title and duties of the beneficiary's work for them, their minimum educational requirement for performing in that position, and, as was noted above, the name and title of the person who would supervise the beneficiary's work; and (2) 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, both of which are material to the

determination of the nature and extent of any work that the petitioner had secured for the beneficiary at the time the petition was filed and whether such work would qualify as specialty occupation work.

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.

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.