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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

D2

[redacted]

Date: JUN 01 2011 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[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
Chief, Administrative Appeals Office

DISCUSSION: The director of the California Service Center 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 is a computer engineering/software development business. It seeks to employ the beneficiary 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, concluding that the petitioner failed to establish that the petitioner qualifies as a United States employer or agent, that it submitted a valid Labor Condition Application (LCA), and that it complied with the terms and conditions of employment.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE) and the petitioner's response to the RFE; (3) the director's denial letter; and (4) Form I-290B with supporting materials. The AAO reviewed the record in its entirety before reaching its decision.

The Form I-129 stated that the beneficiary would work at an address in [redacted] at an annual salary of $48,000 per year, and the requested validity dates for the petition are October 1, 2009 to October 1, 2012.

The submitted Labor Condition Application (LCA) was filed for a software engineer to work in [redacted]

The petitioner also submitted a copy of its 2008 lease, indicating that the petitioner has an office at an address in [redacted]

Additionally, the petitioner submitted a summary of an oral contract it has with the beneficiary.

On August 5, 2009, the director issued an RFE advising the petitioner to submit copies of any contracts it has with the beneficiary as well as with its clients regarding the work the beneficiary will perform as well as an itinerary. The RFE also requested a clarification regarding the business address where the beneficiary will actually work along with evidence of the location where the beneficiary will work and copies of its tax returns and wage statements.

In response to the RFE, the petitioner stated that the beneficiary will work at the address in Glenview, IL along with three other employees. Therefore, the beneficiary will not work at the [redacted] address as was initially claimed.

The petitioner submitted copies of its 2009 lease for the [redacted] location along with photographs and rent invoices for that location, an organization chart, and copies of the petitioner's wage reports.

The director denied the petition on October 27, 2009.

On appeal, counsel argues that the petitioner will be the beneficiary's employer and that it does not contract out its employees. Counsel has submitted copies of the petitioner's 2009 quarterly

federal tax returns and its 2008 U.S. income tax return, which states that the petitioner is a software development business. The petitioner also submitted a copy of an H-1B approval notice for one of its workers along with a copy of that worker's Form W-2.

Additionally, counsel submitted a copy of a SESA issued by the Illinois Department of Employment Security on which it based the prevailing wage for the LCA submitted with the petition. The SESA is for a software engineer to work in [redacted], even though the petitioner stated in response to the RFE that the beneficiary would work in Glenview, IL, which is in Cook County.

First, the AAO will consider whether the petitioner qualifies as a U.S. employer or agent. Upon review, the record establishes that the petitioner will be the employer of the beneficiary for the duration of the petition, and the director's decision to the contrary shall be withdrawn. The petitioner is a software development firm that, with regard to the beneficiary in this matter, will more likely than not employ the beneficiary to develop its own software products rather than outsourcing the beneficiary. At all times, therefore, the petitioner would be responsible for and control all aspects of employment of the beneficiary. The petitioner will hire the beneficiary, will pay the beneficiary, has the right to fire the beneficiary and will otherwise control the beneficiary's work, as evidenced by the fact that: (1) it will have and maintain direct control over the beneficiary's work; (2) the beneficiary will use the tools and facilities of the petitioner in performing his duties; (3) the location of the work is at an office for which the petitioner has a lease; and (4) there exists intent of both the petitioner and the beneficiary to enter into an employer-employee relationship. The petitioner therefore qualifies as a United States employer with regard to the beneficiary in this instance and the director's finding to the contrary is withdrawn.

Next, the AAO will concurrently examine the issues of whether the petitioner submitted a valid LCA covering the location of intended employment and whether it is likely to comply with the terms and conditions of employment. In the Form I-129, the petitioner states that it is located at [redacted] and that the beneficiary will work at this location. The LCA was also filed for the beneficiary to work in [redacted] and the SESA submitted by the petitioner on which the LCA was based is also for a position in [redacted] located in Lake County. However, the petitioner has stated that the beneficiary will work in [redacted] and the copies of the leases submitted by the petitioner as well as the copies of the office photographs submitted are for an office in [redacted] which is located in Cook County.

The AAO notes that, according to the U.S. Department of Labor's Foreign Labor Certification Data Center [redacted], found at [redacted], is not considered to be in the same geographical metropolitan region as [redacted] as the prevailing wages for the proffered position differ in those two counties.

Therefore, the AAO finds that the petitioner failed to establish that the LCA corresponds to the petition and that the petitioner is unlikely to comply with the terms and conditions of employment. For this reason, the petition cannot be approved.

In pertinent part, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B) states:

> The petitioner shall submit the following with an H-1B petition involving a specialty occupation: (1) A certification from the Secretary of Labor that the petitioner has filed a labor condition application . . . .

The regulation at 8 C.F.R. § 103.2(b)(1) 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 addition, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1), states, as part of the general requirements for petitions involving a specialty occupation, that:

> 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.

Further, the regulation at 8 C.F.R. § 214.2(h)(2)(E) states:

> *Amended or new petition.* The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

It is self-evident that a change in the location of a beneficiary's work to a geographical area not covered by the LCA filed with the Form I-129 is a material change in the terms and conditions of employment. Because work location is critical to the petitioner's wage rate obligations, the change deprives the petition of an LCA supporting the period of work to be performed at the new location as of the time the petition was filed with USCIS.[1]

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[1] To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. If a petitioner's intent changes with regard to a material term and condition of employment or the beneficiary's eligibility, an amended or new petition must be filed. To allow a petition to be amended in any other way would be contrary to the regulations. Taken to the extreme, a petitioner could then simply claim to offer what is essentially speculative employment when filing the petition only to "change its intent" after the fact, either before or after the H-1B petition has been adjudicated. The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

Moreover, 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].

The LCA and Form I-129 in this matter, which indicate the proffered position as being in [redacted], do not correspond with the information provided in response to the RFE or with the information provided on appeal, both of which indicate that the beneficiary will work in [redacted]. In light of the fact that the record of proceeding indicates that the beneficiary will likely work in a location not identified in the Form I-129 and the LCA filed with it, USCIS cannot conclude that this LCA actually supports and fully corresponds to the H-1B petition. Moreover, the petitioner is unlikely to comply with the terms and conditions of employment as the petitioner has not established and properly attested that it will pay the beneficiary the prevailing wage for the proffered position covering the location where the beneficiary will actually work. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the

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> Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

petitioner or beneficiary becomes eligible under a new set of facts. *Matter of* [redacted] *Corp.*, 17 I&N Dec. at 248. For these reasons, the appeal will be dismissed and the petition denied.

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.