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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

[redacted]

D2

FILE: [redacted] Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

MAR 02 2011

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: SELF-REPRESENTED

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 Michael T. Kelly
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the Vermont 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 software development and IT consulting firm. It seeks to employ the beneficiary as a Network and Computer Systems Administrator 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 obtain a Labor Condition Application (LCA) covering the location where the beneficiary will be employed that was certified on or before the date the petition was filed.

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 first issue before the AAO is whether the petitioner established filing eligibility at the time the Form I-129 was received by U.S. Citizenship and Immigration Services (USCIS) on April 2, 2009.

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):

> 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 matters 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. An application or petition shall be denied where any application or petition upon which it was based was filed subsequently.

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must 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 Department of Labor when submitting the Form I-129.

In the Form I-129, the petitioner stated that the beneficiary would work at the petitioner's office in Piscataway, NJ. The LCA was filed for a Network and Computer Systems Administrator to work in Piscataway, NJ.

In the support letter, the petitioner stated that it offers consulting services and products to its clients and that its consultants are sometimes assigned to work at headquarters on in-house products and other times are assigned to work at client sites. The petitioner described the job duties as follows:

- Interact with managers and end users of software systems to prepare user specifications;
- Analyze, conceptualize and design Graphical User Interfaces (GUIs);
- Use front end software tools;
- Implement software solutions using Relational Database Management Systems (RDBMS) and Agile, Scrum, stream line, and extreme programming;
- Build E-R Models, create tables, write database triggers, stored procedures and functions using software design and development concepts taught in database and computer science and engineering courses;
- Use programming languages to code user specifications and requirements; and
- Create test plans and data, conduct and evaluate unit testing to verify correct implementation of program/module specification, and create user, reference, training materials, and task guides.

The petitioner stated that it requires the person in the proffered position to have at least a bachelor's degree or the equivalent in engineering/computers or a related field plus experience.

The petitioner submitted copies of the beneficiary's foreign degree documents along with a credential evaluation finding that his foreign education is equivalent to a U.S. Bachelor of Science in Electronic and Communications Engineering with a minor in Computer Engineering.

The director issued an RFE on June 3, 2009 requesting information regarding the petitioner's client consulting/staffing services, including a letter from the business with ultimate control and authority over the beneficiary's work. The RFE also requested an itinerary, copies of any contracts relevant to the beneficiary's work assignments and/or description of the beneficiary's in-house projects if the beneficiary will work at the petitioner's offices.

The petitioner responded that the beneficiary will be assigned to its client, [redacted] and [redacted] in Redmond, WA. The petitioner submitted a letter from [redacted] and Video Inc. with a new list of duties the beneficiary would allegedly perform. The petitioner also stated that the Vice President of [redacted] and [redacted] would supervise the beneficiary and have ultimate control and authority over the beneficiary's work. The letter from [redacted]

and Video Inc. states that a contract will not be entered into until the beneficiary has started working for the petitioner.

The petitioner also submitted an itinerary for the beneficiary, which indicates that the beneficiary will work for [redacted] from October 1, 2009 to December 31, 2011 and then would work for the petitioner in [redacted] from January 1, 2012 to September 27, 2012.

The director denied the petition on August 6, 2009. On appeal, the petitioner submits a second LCA that is certified for a [redacted] Administrator to work in Redmond, WA. The LCA was certified on September 1, 2009, a date after the petition was filed.

As referenced above, the regulations require that before filing a Form I-129, a petitioner must obtain a certified-LCA from the DOL and the LCA must include the beneficiary's anticipated employment. The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. In this matter, the petitioner initially failed to provide an LCA covering the beneficiary's primary location of employment, thereby failing to establish that it had complied with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). The non-existence or unavailability of evidence material to an eligibility determination creates a presumption of ineligibility. *See* 8 C.F.R. § 103.2(b)(2)(i).

Although the petitioner submits a copy of an LCA on appeal, the LCA is DOL-certified on September 1, 2009, a date subsequent to the filing of the Form I-129. Thus, the record does not show that, at the time of filing, the petitioner had obtained a certified LCA for the location where the beneficiary will actually work. A petitioner must establish eligibility at the time of filing the 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* [redacted] *Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petitioner has failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). The record establishes that, at the time of filing, the petitioner had not obtained a current certified LCA covering all locations of employment and, therefore, as determined by the director, had failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

For the reason discussed above, the beneficiary is ineligible for classification as an alien employed in a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the AAO finds that the petitioner has failed to establish that it made a bona fide offer of employment to the beneficiary. The evidence, including the petitioner's own statement, establishes that it is [redacted] and not the petitioner, that will have actual control over the beneficiary's work or duties, or the condition and scope of the beneficiary's services. In other words, the petitioner has failed to establish whether it has made a bona fide offer of employment to the beneficiary based on the evidence of record or that the petitioner, or any other company which it may represent, will have and maintain an employer-employee relationship with the beneficiary for the duration of the requested employment period. *See* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States

employer" and requiring the petitioner to engage the beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker). Therefore, the petition must be denied for this additional reason.

The AAO conducts appellate review on a de novo basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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.

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