U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

[redacted]

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DATE: FEB 06 2012 OFFICE: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiaries:

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 Vermont Service Center denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will affirm the decision of the director. The petition will be denied.

As a preliminary matter, the issues in this case involve two distinct questions: (1) the petitioner's eligibility for the visa classification requested in the petition and (2) the beneficiary's eligibility for a change of status to that nonimmigrant classification. The denial of an application to change status, however, is not subject to appeal, and the AAO would normally reject or, in some cases, remand such questions to the director. 8 C.F.R. § 248.3(g). But, given the novel issues in this case, and the potential for further delay that would be caused by a remand, the AAO will certify the matter to itself for review. 8 C.F.R. § 103.4(a).

The petitioner is an "outsourcing company specializing in financial and administrative processes for the health care industry" that seeks to employ the beneficiary as a product development engineer. The petitioner, therefore, 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 petitioner indicates in part 2 of the Petition for Nonimmigrant Worker (Form I-129) that it requests a change of nonimmigrant status for the beneficiary, specifically from F-1 nonimmigrant student status to H-1B classification.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's two requests for additional evidence (RFE); (3) the petitioner's responses to both of the director's RFEs; (4) the director's denial letter; and (5) the Form I-290B appeal notice and supporting documentation. The AAO has reviewed the record in its entirety.

The director denied the combined H-1B petition and change of status application on the following grounds: (1) the validity dates of the Labor Condition Application (LCA) expired and the petitioner failed to submit a new LCA with current dates of employment that had been certified prior to the date of filing; and (2) the beneficiary has not maintained a valid nonimmigrant status through the filing of the current petition.

I. Dates of the Labor Condition Application

First, the AAO will withdraw the director's finding that the petitioner did not submit a new LCA, certified prior to the filing of the instant petition, with current dates of employment.

The petitioner filed the instant Form I-129 on June 29, 2005, requesting H-1B employment of the beneficiary from October 1, 2005 until October 1, 2008. At the time of filing, the petitioner submitted a certified LCA that corresponded to the requested period of employment. The petition was ultimately denied on June 15, 2010. Given the June 29, 2005 filing date of this petition, however, it would have been impossible for the petitioner to have obtained an LCA certified on or before that date for an employment period beyond December 29, 2008. *See* 20 C.F.R. §§ 655.730(b) and 655.750(a). Thus, the AAO will withdraw this portion of the decision.

However, the regulation at 8 C.F.R. § 214.2(h)(9)(i)(C) states the following:

> If the period of services or training requested by the petitioner exceeds the limit specified in paragraph (h)(9)(iii) of this section, the petition shall be approved only up to the limit specified in that paragraph.

Moreover, the regulation at 8 C.F.R. § 214.2(h)(9)(iii)(A)(*1*) states:

> *H-1B petition in a specialty occupation.* An approved petition classified under section 101(a)(15)(H)(i)(b) of the Act for an alien in a specialty occupation shall be valid for a period of up to three years but may not exceed the validity period of the labor condition application.

Since the Form I-129 requested employment dates from October 1, 2005 until October 1, 2008, it is impossible to provide the petitioner with an approval notice for the dates requested, as the dates have passed. Thus, the petition is moot due to the fact that the employment dates have expired.[1]

II. Nonimmigrant Status and Change of Nonimmigrant Classification

Second, the director also denied the petition and related change of status application finding that "[t]he beneficiary has not remained in a valid legal nonimmigrant status."

Upon review, the AAO concludes that the beneficiary violated his nonimmigrant status by working without authorization prior to the filing of this petition and thus, the beneficiary did not maintain his nonimmigrant status prior to filing the Form I-129. The application for change of status to H-1B nonimmigrant status must therefore be denied.

Governing an application for change of status, the regulation at 8 C.F.R. § 248.1 ("Eligibility") states:

> (a) *General.* Except for those classes enumerated in §248.2, any alien lawfully admitted to the United States as a nonimmigrant, including an alien who acquired such status pursuant to section 247 of the Act, *who is continuing to maintain his or her nonimmigrant status*, may apply to have his or her nonimmigrant classification changed to any nonimmigrant classification . . . .

(Emphasis added.)

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[1] The director did not explain the delay in adjudicating the petition. The director's delay, while regrettable, was not contrary to law. Unlike the L-1 visa classification, USCIS is not mandated to adjudicate an H-1B petition within any specific timeframe. *Cf.* sec. 214(c)(2)(C) of the Act. During the delay, the director issued two requests for evidence pursuant to 8 C.F.R. § 103.2(b)(8), including one request that notified the petitioner of the delayed adjudication.

The regulation at 8 C.F.R. § 214.1(e) further states:

> *Employment.* . . . . A nonimmigrant who is permitted to engage in employment may engage only in such employment as has been authorized. Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act.

With respect to students, the regulation at 8 C.F.R. § 214.2(f)(11)(i)(D) states:

> *Start of employment.* A student may not begin employment prior to the approved starting date on his or her employment authorization except as noted in paragraph (f)(11)(i)(C) of this section. A student may not request a start date that is more than 60 days after the student's program end date. Employment authorization will begin on the date requested or the date the employment authorization is adjudicated, whichever is later.

In the denial dated June 15, 2010, the director noted that "[t]he beneficiary's optional practical training, Form I765 [sic] application, was denied on October 26, 2007."

On appeal, counsel for the petitioner stated in the appellate brief that "[o]n or about June 29, 2005, Avisena, Inc. filed an I-129 petition to obtain an H-1B visa of behalf of[redacted]." *See* Appellate Brief at page 2, line 7. Counsel continues: "Then, [redacted] requested permission again from USCIS for OPT [Optional Practical Training] and it was approved from August 15, 2005 until August 14, 2006." *Id.* at line 8. The petitioner did not submit evidence of any employment authorization document for these claimed dates.

Upon review, the beneficiary was authorized full-time Curricular Practical Training (CPT) with the petitioner in the field of Systems Engineering for a period of three months, from May 9, 2005 until August 12, 2005. This type of training is considered an integral part of an established curriculum, such as alternate work/study programs, internships, cooperative education or any other type of required internship or practicum. 8 C.F.R. § 214.2(f)(10)(i). No employment authorization document is required for CPT, only the approval of the Designated School Official (DSO). *Id.*, see also 8 C.F.R. § 274a.12(b)(6)(iii).

Unlike CPT, however, a request for OPT must be approved by USCIS and documented through the issuance of an employment authorization card. A DSO may "recommend" a period of OPT, but has no authority to approve OPT work authorization. A student may not begin employment under OPT until he or she receives an employment authorization document with a USCIS-approved start date. 8 C.F.R. § 214.2(f)(11)(i)(D).

In this case, the record indicates that the DSO recommended OPT from August 15, 2005 until August 14, 2006, and the beneficiary subsequently filed an Application for Employment Authorization (Form I-765) on June 1, 2005. USCIS assigned the application a receipt number of SRC 05 170 51653.

Rather than approving the request and designating an OPT start date, USCIS denied the beneficiary's application for work authorization. Contrary to the assertions of counsel, USCIS records indicate that the

agency never approved this application, but instead issued a denial on October 26, 2007, as noted by the director.

The petitioner submitted an "Employee Roster" on Avisena letterhead, dated October 5, 2009, listing the start date of the beneficiary's employment as January 26, 2005. *See* Petitioner's Response to the August 25, 2009 RFE, Exhibit F. At most, the beneficiary was authorized employment under the DSO-approved CPT for a period of three months, from May 9, 2005 until August 12, 2005. Thus, the record indicates that the beneficiary was employed without authorization.

The beneficiary's unauthorized employment constitutes a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act. Accordingly, the beneficiary is ineligible for change of status and the application must be denied. 8 C.F.R. § 248.1(a).

III. Certified LCA Does Not Correspond With Position

Finally, beyond the decision of the director, the AAO notes that the LCA position does not correspond with the position offered to the beneficiary, and the petition must be denied for this reason.

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 that it has filed a labor condition application *in the occupational specialty in which the alien(s) will be employed.*

(Emphasis added.)

While the U.S. Department of Labor (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) to determine whether the content of an LCA filed for a particular Form I-129 actually supports that petition. The DOL regulations at 20 C.F.R. § 655.705(b) state, 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. . . .

(Emphasis added.)

The regulations require that before filing a Form I-129 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." 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 an LCA with the DOL when submitting the Form I-129.

In the instant case, the petitioner filed the Form I-129 with USCIS on June 29, 2005. The petitioner identified the position as "Product Development Engineer" and stated that the beneficiary "will oversee all aspects of new product creation including market research and product design." The petitioner submitted a certified LCA dated June 21, 2005 which indicated that the beneficiary's occupational code would be 012. According to the DOL Employment Training and Administration, the occupation code of 012 represents Industrial Engineering Occupations. In addition, according to the Foreign Labor Certification Data Center Online Wage Library, the Level I prevailing wage for the Industrial Engineering Occupation (012) is $43,742.00, as indicated on the certified LCA.

In response to the director's RFE, the petitioner indicated that the position offered to the beneficiary is a specialty occupation. However, rather than submitting evidence relating to the proffered "Product Development Engineer" position or "Industrial Engineering Occupations" in general, the petitioner submitted an O*Net Online Summary Report for "Computer Software Engineers, Applications." In a letter dated October 1, 2009, counsel for the petitioner noted that the proffered position is actually for a product development engineer, but claimed that "according to O*Net online the proffered position can have several different titles." Upon review, the O*Net entry does list a number of "reported job titles" that fall under the entry for "Computer Software Engineers, Applications" but none of the listed job titles include the "Product Development Engineer" position or any industrial engineering occupations. Instead, the listed job titles include software engineer, application integration engineer, programmer analyst, computer consultant, software architect, software developer, programmer, and software analyst, among others.

The petitioner also submitted a detailed position description that allocates a majority of the beneficiary's duties to computer software engineering tasks. In an undated document submitted on the petitioner's letterhead, the petitioner described the duties to include "design, develop and maintain web and windows based application" (40%), "develop and maintain [the petitioner's] Dimensional Data warehouse following a snowflake schema" (15%), and "implement and maintain SQL server reporting services and analysis services" (25%), among other software engineering duties.

Thus, the petitioner described and characterized the proffered position as that of a Computer Software Engineer, Applications. However, the position of Computer Software Engineers, Applications has the occupation code of 030, rather than 012 as listed on the LCA.

Accordingly, the certified LCA does not correspond with the position offered to the beneficiary as stated in the Form I-129 and supporting documentation. Again, the LCA submitted with the petition was certified for a position as an Industrial Engineer with the occupation code of 012 and with the prevailing wage rate that falls under the position of Industrial Engineer. However, as noted above, the petitioner indicated that the position offered to the beneficiary falls under the category of Computer Software Engineer, Applications, with the occupational code of 030.

Based upon the evidentiary and regulatory analysis discussed above, the AAO finds that the LCA does not support the present petition as the LCA was not certified for the proffered position. For this additional reason, the petition must be denied.

IV. Conclusion

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

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 decision of the director is affirmed in part and withdrawn in part. The petition and related application for change of status is denied.