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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

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[Redacted]

Date: **FEB 07 2012** Office: VERMONT SERVICE CENTER File: [Redacted]

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,

*for Michael T. Kelly*  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on April 1, 2008. The petitioner indicated that it is a for-profit, enterprise engaged in information technology consulting with 22 employees and a gross annual income of approximately \$2 million.

Seeking to employ the beneficiary in what it designates as a business analyst position, the petitioner filed this H-1B petition in an endeavor 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 on October 3, 2008, finding that the petitioner failed to establish eligibility at the time the Form I-129 was filed in accordance with the controlling statutory and regulatory provisions. On appeal, the petitioner asserts that the director's basis for denial was erroneous and contends that it satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; (5) the Form I-290B and documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO concurs with the director that the petitioner failed to establish eligibility at the time the Form I-129 was filed in accordance with the controlling statutory and regulatory provisions. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

In this matter, the petitioner indicated on the Form I-129 and supporting documentation that it seeks the beneficiary's services as a business analyst at an annual salary of \$49,000. The petitioner provided a job description of the proffered position that began "[t]he main duties of the beneficiary are to management, financial management, planning, budgeting etc." The petitioner then provided a paragraph of the "specific duties of the beneficiary." The AAO notes that the wording of the "specific duties" as provided by the petitioner for the proffered position are excerpts taken verbatim from the description of duties for "Management Analysts" and "Budget Analysts" provided at the Internet version of the *O\*NET* (which is commonly, and hereinafter, referred to as *O\*NET OnLine*).<sup>1</sup> This language, the AAO finds, does not provide substantive details

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<sup>1</sup> *O\*NET OnLine* is accessible at <http://www.onetonline.org/>. As stated on the Home Page of this Internet site, *O\*NET OnLine* is created for the U.S. Department of Labor's Employment & Training Administration by the National Center for *O\*NET* Development. The *O\*NET OnLine* Summary Report for the occupational classification Management Analysts is accessible on the Internet at <http://www.onetonline.org/link/summary/13-1111.00>. The *O\*NET OnLine* Summary Report for the occupational classification Budget Analysts is accessible on the Internet at <http://www.onetonline.org/link/summary/13-2031.00>.

of the actual work that the beneficiary would actually perform in the particular business operations of this petitioner.

On the Form I-129 and the Labor Condition Application (LCA) provided in support of the instant petition, the petitioner stated that the proffered position falls under the occupational code 161, which, the AAO notes, is assigned by the U.S Department of Labor (DOL) to "Budget and Management Systems Analysis Occupations" as a subcategory of "Occupations in Administrative Specializations."<sup>2</sup>

On the LCA, the petitioner stated that the prevailing wage for the occupation is \$48,526.<sup>3</sup> On the Form I-129 petition (page 10), the petitioner denoted that it was not a dependent employer and had not been found to be a willful violator. On the LCA, the petitioner also attested that "Employer is not H-1B dependent and is not a willful violator." The AAO observes that the petitioner stated that the LCA was prepared for five nonimmigrants.

The LCA was certified on March 21, 2008 and signed by the petitioner on March 31, 2008. The AAO notes that by completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

On July 30, 2008, the director issued an RFE requesting additional information from the petitioner. The petitioner was asked to clarify its status as to whether or not it is an H-1B dependent employer. The director also requested the employer submit a detailed statement setting forth all of the beneficiary's proposed duties and responsibilities and to indicate the percentage of time the beneficiary would spend performing each of the proposed duties each day. The petitioner was asked to clarify whether the beneficiary would be working for a client of the petitioner or for the petitioner's own business, and to provide an explanation as to why a company with 22 employees would need multiple business analysts, performing exactly the same job. The RFE outlined the specific evidence to be submitted by the petitioner depending upon whether the beneficiary would be working on client accounts or as an in-house employee.

In response to the RFE, counsel submitted a letter stating that the petitioner is an H-1B dependent employer and that a new LCA was enclosed. A review of the new LCA reveals that

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<sup>2</sup> See U.S. Department of Labor, Employment and Training Administration, *Form ETA 9035CP, Appendix 1*, which provides a list of the "Three-Digit Occupational Groups." The form is accessible on the Internet at [http://www.lca.doleta.gov/h1bcl\\_oc.pdf](http://www.lca.doleta.gov/h1bcl_oc.pdf) (visited January 11, 2012).

<sup>3</sup> The AAO will address the deficiencies of this LCA, as well as the issues with the second LCA submitted subsequently by the petitioner, in further detail later in the decision. However, the AAO notes that the prevailing wage provided by the petitioner on this LCA corresponds to the occupational category of computer programmers; yet, all of the job duties for the proffered position, as described in the petitioner's letter of support, are taken verbatim from the "Management Analysts" and "Budget Analysts" occupations of *O\*NET OnLine*. None of the job duties provided by the petitioner regarding the proffered position involve computer programming tasks. Thus, this LCA does not correspond to the Form I-129 petition.

the petitioner attested that "Employer is H-1B dependent and/or a willful violator." The LCA also states, for the first time, that the beneficiary would be employed as a "Programmer Analyst." The petitioner designated the occupational code 030 for the position. The AAO notes that the code 030 is assigned by DOL to "Occupations in System Analysis and Programming" as a subcategory of "Computer Related Occupations."<sup>4</sup> The AAO observes that the petitioner indicated that the LCA was prepared for ten nonimmigrants. The LCA was certified on September 5, 2008, five months after the filing of this petition.

In his letter in response to the RFE, counsel stated that "the beneficiary will work on in-house project. Please find attached Letter from employer regarding the project." The petitioner's letter that was provided in response to the RFE requested USCIS make a favorable decision on the case but referenced someone who is not the beneficiary. Additionally, the petitioner stated in its letter that it is "looking for possibilities of expansion in the field of ERP focusing on CRM. But our company's success and growth will not be possible without building up a team of experts."

The petitioner's response did not provide information as to the nature of the beneficiary's duties and responsibilities or clarify where and for whom the beneficiary would be working. The petitioner failed to provide a detailed statement setting forth all of the beneficiary's proposed duties and responsibilities, along with the percentage of time that the beneficiary would spend performing each of the proposed duties each day. The petitioner's letter stated that a "shortened description of selected [company] projects since 2003" was included with its response to the RFE; however, upon a complete review of the record of proceeding, the AAO observes that the document was not included in the petitioner's submission.

The petitioner failed to provide substantive evidence regarding the actual work that the beneficiary would perform and sufficient details regarding the nature and scope of the beneficiary's employment. The petitioner's RFE response included no evidence of an in-house project, and thus no corroboration of counsel's claim that the petition was filed so that the beneficiary would work on an in-house project. Counsel's assertion that the beneficiary will be working on an in-house project for the petitioner is not probative evidence. This information has no evidentiary weight, as it is an assertion by counsel without supporting documentary evidence to corroborate its accuracy. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner failed to establish that the petition was filed on the basis of employment for the beneficiary that, at the time the petition was filed, was definite and

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<sup>4</sup> See U.S. Department of Labor, Employment and Training Administration, *Form ETA 9035CP, Appendix 1*, which provides a list of the "Three-Digit Occupational Groups," located on the Internet at [http://www.lca.doleta.gov/h1bcl\\_oc.pdf](http://www.lca.doleta.gov/h1bcl_oc.pdf) (visited January 11, 2012).

nonspeculative for the entire period of employment specified in the Form I-129. The burden of proof falls on the petitioner to demonstrate a legitimate need for an employee exists.

The director reviewed the evidence submitted by the petitioner. He noted that the petitioner had not submitted all of the requested evidence and denied the petition, finding that the petitioner had not satisfied its burden of proof to establish eligibility at the time the Form I-129 was filed in accordance with the controlling statutory and regulatory provisions.

On November 4, 2008, counsel submitted an appeal of the director's denial of the petition. Counsel provided a copy of the LCA certified on September 5, 2008 (which, as noted above, had been submitted with the RFE response) and requested that the "corrected LCA" be considered as having been filed with the Form I-129 petition. Counsel did not acknowledge or address the director's claim that the petitioner had not submitted all of the requested evidence, including information regarding the nature of the proffered position (job description, where and for whom the beneficiary would be working).

The AAO reviewed the complete record of proceeding and for the reasons that will be discussed below, the AAO concludes that the director was correct in his determination to deny the petition.

The AAO will first address the petitioner's submission of the new LCA for the instant petition. The petitioner's attempt to "correct" the original LCA is ineffective, as it runs counter to the controlling regulations. The AAO finds that director properly rejected the newly submitted LCA as the petitioner failed to provide a certified LCA that corresponds to the petition and was certified prior to the filing of the Form I-129.

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 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 an LCA with DOL when submitting the Form I-129.

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 regulation at 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.

Petitioners who are H-1B-dependent and/or found to have willfully violated their H-1B obligations are required to designate their status on the LCA. An LCA that does not accurately state the employer's status may not be used to support an H-1B petition. *See* Title 20 C.F.R. § 655.736(e) and (g), which states, in pertinent part:

The employer is required to designate its status by marking the appropriate box on the Form ETA-9035 or 9035E (*i.e.*, either H-1B-dependent or non-H-1B-dependent) . . . . An employer that is "H-1B-dependent" . . . is subject to the attestation obligations regarding displacement of U.S. workers and recruitment of U.S. workers . . . for all LCAs . . . to be used to support any petitions for new H-1B nonimmigrants or any requests for extensions of status for existing H-1B nonimmigrants. An LCA which does not accurately indicate the employer's H-1B-dependency status or willful violator status shall not be used to support H-1B petitions or requests for extensions.

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 the following:

*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.

The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. Here, the petitioner submitted an LCA with its petition to USCIS but later indicated that the LCA contained incorrect information – that is, the petitioner had not accurately stated its H-1B-dependency status. Thus, as noted above, the regulations exclude the initial LCA from being used by the petitioner to support the instant H-1B petition filed on behalf of the beneficiary.

In response to the RFE, the petitioner attempted to submit a new LCA. However, the AAO notes that the LCA was (1) certified approximately five months after the petitioner filed the Form

I-129; (2) altered the petitioner's H-1B dependent status; (3) modified the job title of the proffered position; and (4) changed the occupational category for the position. A review of the new LCA reveals that it does not correspond with the Form I-129 petition.<sup>5</sup>

The AAO notes that the record contains significant discrepancies regarding the proffered position. Based upon a complete review of the record of proceeding, it is impossible to determine the actual work that the beneficiary would perform and the nature and scope of the beneficiary's employment. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. It must be further noted, that any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In this case, the petitioner failed to address or provide any evidence to reconcile the inconsistencies in the record of proceeding regarding the nature of the proffered position.

On appeal, counsel requests that the new LCA be considered as filed with the Form I-129 petition. However, the petitioner has made material changes in the terms and conditions of employment as specified in the petition. The record of proceeding reveals significant conflicting information between the Form I-129 and new LCA. Accordingly, the AAO cannot conclude that the newly submitted LCA supports and corresponds to the H-1B petition

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity, but rather changed the petitioner's H-1B dependent status, the job title of the position and the occupational category for the proffered position.

To ascertain the intent of a petitioner, USCIS looks 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

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<sup>5</sup> The record reflects that (1) the petitioner claims it is not an H-1B dependent employer on the Form I-129 but designated that it is H-1B dependent and/or a willful violator on the new LCA; (2) the petitioner claims the job title of the proffered position is "Business Analyst" on the Form I-129, which is inconsistent with the job title of "Programmer Analyst" as provided on the new LCA; and (3) the designated occupational code 161 "Budget and Management Systems Analysis Occupations" is provided on the Form I-129, which differs from the occupational code 030 "Occupations in System Analysis and Programming" selected by the petitioner on the new LCA.

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:

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 or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. As noted above, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).

In the instant case, the director reviewed the Form I-129 and supporting documentation and found the initial evidence insufficient to establish eligibility for the benefit sought. He issued an RFE on July 30, 2008. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated.

The petitioner failed to adequately respond to the RFE by providing sufficient information and documentation regarding the nature of the proffered position as well as failing to submit a valid LCA that properly supports the H-1B petition filed on behalf of the beneficiary. Thus, for the reasons related in the preceding discussion, the petitioner has failed to establish eligibility at the time the Form I-129 was filed in accordance with the controlling statutory and regulatory provisions.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed, and the petition will be denied.

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