

(b)(6)

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

Date: **JUN 18 2013**

Office: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

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:

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.

Thank you,

James Blunzinger, for
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The director of the Vermont Service Center denied the nonimmigrant visa petition and the matter is before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the petition remanded for further consideration and action.

On the Form I-129 petition, the petitioner describes its type of business as "statistics computer programming services." In order to employ the beneficiary in what it designates as a financial analyst position, the petitioner seeks 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 establish that a valid employer-employee relationship would exist for the duration of the requested H-1B validity period. On appeal, the petitioner submits evidence in support of the assertion that it will in fact serve as the beneficiary's employer.

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

Upon review, the AAO finds that the petitioner has submitted sufficient evidence on appeal to overcome the director's sole ground for denying this petition. Specifically, the petitioner has submitted sufficient evidence to establish that it will maintain an employer-employee relationship with the beneficiary during the period of requested employment.

However, the petitioner as currently constituted may not be approved for two reasons: (1) the petitioner has not established filing eligibility at the time the Form I-129 was received by U.S. Citizenship and Immigration Services (USCIS) in that the record of proceeding lacks a valid certified Labor Condition Application (LCA); and (2) the petitioner has not established that the proffered position is a specialty occupation.

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):

Demonstrating eligibility. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must

continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions. Any evidence submitted in connection with a benefit request is incorporated into and considered part of the request.

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 U.S. Department of Labor (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 submit evidence that an LCA has been certified by DOL when submitting the Form I-129.

In the instant matter, the petitioner submitted the Form I-129 to USCIS on April 18, 2011, which stated that the work location of the beneficiary would be [REDACTED]. The petitioner also provided a copy of an LCA certified for that work location on April 17, 2011.¹

In response to the director's RFE, the petitioner submitted a copy of an employment contract with the beneficiary, which demonstrated that her work location, contrary to the claim set forth on the I-129 petition, would be [REDACTED].

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 locations are 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 newly-identified work location in [REDACTED] Massachusetts. The petitioner in this case was required to submit an amended or new H-1B petition with USCIS indicating the change in locations and dates along with the newly certified LCA that establishes eligibility at the time that new or amended petition is filed.

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

¹ It is noted that this address is also the home address of the beneficiary as claimed in Part 3 of the I-129 petition.

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.

[emphasis added]. As 20 C.F.R. § 655.705(b) requires that USCIS ensure that an H-1B petition is filed with a "DOL-certified LCA attached" that actually supports and corresponds with the petition on the petition's filing, this regulation inherently necessitates the filing of an amended H-1B petition to permit USCIS to perform its regulatory duty to ensure that a certified LCA actually supports and corresponds with an H-1B petition as of the date of that petition's filing. 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 certified 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 or new petition, with fee, whenever a beneficiary's job location changes such that a new LCA is required to be filed with DOL.

In light of the above, the AAO finds that a necessary condition for approval of an H-1B visa petition is an LCA, certified *on or before* the filing date of the petition, with information, accurate as of the date of the petition's filing, as to where the beneficiary would actually be employed. Furthermore, the petition must list the locations where the beneficiary would be employed and be accompanied by an itinerary with the dates the beneficiary will provide services at each location. Both conditions were not satisfied in this proceeding. The petitioner's submission of the employment contract in response to the RFE, which identifies a different work location for the beneficiary than that listed on the Form I-129 petition and the accompanying LCA, demonstrates a material change to the conditions of the beneficiary's employment. Again, a petitioner must establish eligibility at the time of filing a nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). 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'r 1978).

It is further noted that 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:

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).

In view of the foregoing, the petitioner has not overcome the director's first basis for denying the petition, and it has also failed to meet the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B). For these reasons, the petition may not be approved. Accordingly, the AAO shall not disturb the director's denial of the petition on this ground and shall deny the petition on the additional ground that the requisite itinerary was not filed with the petition.

It is further noted that 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.

For all of these reasons, the petitioner's failure to submit an LCA certified prior to the filing of the petition, for the actual location at which the beneficiary will work, precludes approval of this petition. Specifically, the petitioner's failure to present such an LCA precludes a determination that the petitioner demonstrated its eligibility for the requested benefit at the time it filed the petition.

However, as the director did not address this issue in his decision denying the petition, the matter will be remanded for further consideration and action on this issue.

As indicated above, the AAO finds further that the record of proceeding as currently constituted does not establish that the proffered position is a specialty occupation. However, as the LCA issue discussed above will alone mandate denial of the petition if not overcome, the AAO will not address this matter further, except to note that this issue should be further explored by the director on remand.

As set forth above, the petitioner has overcome the director's sole basis for denying this petition, and his decision is hereby withdrawn. However, the director did not address the two issues identified by the AAO: (1) whether the petitioner established filing eligibility at the time it filed the petition; and (2) whether the proffered position is a specialty occupation. Consequently, the AAO is remanding the petition for the director to do so.

On remand, the director should issue an additional RFE affording the petitioner a final opportunity to: (1) submit an LCA that was certified prior to the petition's filing for the actual location where the beneficiary would work; and (2) evidence pertinent to the proffered position's claimed status as a specialty occupation.

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 been met in part. Accordingly, the director's decision will be withdrawn and the matter will be remanded for entry of a new decision.

ORDER: The decision of the director is withdrawn. The matter is remanded to the director for further action consistent with the above and entry of a new decision.