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**U.S. Citizenship
and Immigration
Services**

02



FILE: EAC 07 142 54100 Office: VERMONT SERVICE CENTER Date: OCT 02 2008

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, 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 petitioner provides IT consulting services and seeks to employ the beneficiary as a programmer analyst. The petitioner 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).

On November 1, 2007, the director denied the petition determining that the petitioner had not provided a certified copy of the Form 9035E, Labor Condition Application (LCA) properly filed, completed and endorsed by the Department of Labor for the indicated employment location of Middlebury, Connecticut; thus, the petitioner had not complied with the requirements for filing a Form I-129, Petition for a Nonimmigrant Worker.

Counsel submitted a timely Form I-290B on December 3, 2007 and indicated that a brief and/or additional evidence would be submitted to the AAO within 30 days. On September 19, 2008, the AAO sent counsel a facsimile regarding the absence of the aforesaid appellate material. As of this date, however, the AAO has not received a response from counsel. Therefore, the record is complete.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel for the petitioner's response to the director's RFE; (4) the director's November 1, 2007 denial decision; and (5) the Form I-290B.

The issue before the AAO is whether the petitioner submitted a valid LCA for the beneficiary's work location when the petition was filed.

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 eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form

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

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 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 the Department of Labor when submitting the Form I-129.

In the instant matter, the petitioner submitted the Form I-129 to Citizenship and Immigration Services (CIS) on April 2, 2007. Documentation submitted with the petition established that the beneficiary's work location would be the petitioner's offices in Middlebury, Connecticut. The petitioner also provided a copy of an LCA certified on March 31, 2007 for the work location of "Middlebury, New Jersey and other client locations." In the director's RFE, the director requested a detailed explanation regarding the other client locations. In response, counsel for the petitioner submitted a new LCA certified on September 19, 2007 for the work location of "Middlebury, Connecticut and other client locations." In response to the director's RFE, counsel did not provide an explanation regarding the other client locations.

The director found that the second LCA was not sufficient because the LCA was certified after the Form I-129 filing date. On appeal, counsel for the petitioner asserts that the petitioner submitted an LCA that was certified before the Form I-129 filing date and that the place of employment listed Middlebury, New Jersey instead of Middlebury, Connecticut as a typographical error. Counsel contends that the typographical error should not bear on the validity of the LCA and that the two LCAs meet the requirements when considered together.

The purpose of the certified LCA is to establish that the Department of Labor concurs with the information relating to the work location listed on the LCA in terms of the prevailing wage. CIS did not have information at the time that the petition was filed that the Department of Labor concurred with the prevailing wage for the beneficiary's actual work location. The record was and is insufficient to establish that the submitted LCA is valid for the beneficiary's actual work locations.

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 Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petitioner failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B) and has not submitted evidence or argument sufficient to overcome the director's decision in this matter.

Thus, for the reasons discussed, 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.

The burden of proof in this proceeding rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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