

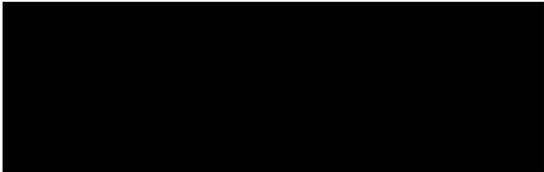
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D-2

FILE: EAC 06 198 52757 Office: VERMONT SERVICE CENTER Date: SEP 30 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

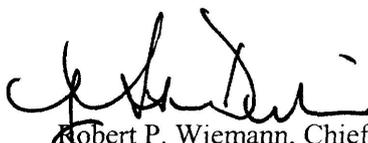
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, 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 is a pharmacy. It seeks to employ the beneficiary as a pharmaceutical intern¹ in New York, New York. Accordingly, the petitioner endeavors to classify the beneficiary as a temporary nonimmigrant worker 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 record of proceeding before the AAO contains: (1) the Form I-129 filed June 26, 2006 with supporting documentation; (2) the director's October 11, 2006 request for further evidence (RFE); (3) previous counsel for the petitioner's January 3, 2007 response to the director's RFE; (4) the director's March 1, 2007 denial decision; and (5) the Form I-290B and counsel's brief in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On March 1, 2007, the director denied the petition. The director observed that he had requested that the petitioner provide a copy of the beneficiary's license to practice as a pharmacy intern in New York or other evidence establishing that the beneficiary is immediately eligible to engage in that profession and that the petitioner provide a copy of the beneficiary's Certification by the Foreign Pharmacy Graduate Examination Committee. The director determined that the record did not contain evidence establishing that the beneficiary is a licensed pharmacist intern in New York or other evidence showing that she is immediately eligible to practice her profession in New York. The director also noted that the petitioner had requested that the qualifying occupation on the petition be amended to that of a manager of pharmacy services. The director observed that if Citizenship and Immigration Services (CIS) entertained the petitioner's request, the Form ETA 9035E, Labor Condition Application (LCA) submitted in response to the RFE and certified on January 2, 2007 would not be valid, making the petitioner ineligible for the benefit sought as of the date of filing as required by 8 C.F.R. § 214.2(h)(4)(i). The director further found, quoting *Matter of Izummi* that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to Service requirements. *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

On appeal, counsel for the petitioner asserts that the petitioner has established: that the proffered position, whether as a pharmaceutical intern or as a manager of pharmacy services is a specialty occupation; that the beneficiary is qualified for either position based on her education and/or work experience; and that the wages and working conditions offered to the beneficiary satisfy the LCA criteria. Counsel contends that the petitioner has a valid petition for the position of manager of pharmacy services, (citing 8 C.F.R. § 214.2(h)(4)(i)); an LCA certified for the location where the employee will work, (citing 8 C.F.R. § 214.2(h)(4)(i)(B)(1)); and that if there is a material change in the terms of the employment an amended petition is allowed and can be filed as in this matter, (citing 8 C.F.R. § 214.2(h)(11)). Counsel avers that the amended petition was intended to rectify an error on the initial Form I-129 and that the alleged error was innocuous and did not prejudice the government or any other party.

¹ The petitioner submitted a second petition as exhibit 1 in its response to the director's request for further evidence seeking to employ the beneficiary as a manager of pharmacy services.

Preliminarily, the AAO finds that the petitioner must comply with 8 C.F.R. § 214.2(h)(2)(i)(E) when filing an amended petition. This regulation provides:

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.

In this matter, the petitioner did not file an amended petition with fee, but rather submitted a second petition as an exhibit to its response to the director's RFE. The AAO finds that the second petition included in the petitioner's response to the RFE was not properly filed and is insufficient to amend the petitioner's initial petition requesting the beneficiary's employment as a pharmaceutical intern.

The AAO acknowledges counsel's references to 8 C.F.R. § 214.2(h)(11) for the proposition that an amended petition may be filed if there is a material change in the terms of employment. However, the heading of 8 C.F.R. § 214.2(h)(11) is "*Revocation of approval of petition,*" and states:

- (i) *General.* (A) The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(H) of the Act and paragraph (h) of this section. An amended petition on Form I-129 should be filed when the petitioner continues to employ the beneficiary. If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition.

The AAO does not find the above regulation relevant to this proceeding as this is not a revocation proceeding. The more relevant regulation is 8 C.F.R. § 214.2(h)(2)(i)(E), cited above. Moreover, the AAO affirms the director's finding (referencing *Matter of Izummi*, 22 I&N Dec. at 176) that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to Service requirements. The purpose of an RFE 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 as a specialty occupation. See e.g. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new or amended petition rather than seek approval of a petition that is not supported by the facts in the record. The petitioner's offer of a new position to the beneficiary with a completely different set of duties than initially offered without filing an amended petition is improper. Therefore, the analysis of this matter will be based on the initially offered position, that of a pharmaceutical intern.

The issue in this proceeding is whether the petitioner has provided sufficient evidence to demonstrate that the beneficiary is immediately eligible to perform the duties of pharmaceutical intern in New York when the petition was filed on June 26, 2006. In this matter the petitioner has not provided such evidence.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C)
 - (i) experience in the specialty equivalent to the completion of such degree, and
 - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The relevant LCA² in this matter indicates that the petitioner plans to employ the beneficiary in New York, New York. The record does not reflect that the beneficiary has obtained a license, or has complied with other New York State requirements to practice as a pharmaceutical intern. The record does not contain evidence of the beneficiary's Certification by the Foreign Pharmacy Graduate Examination Committee. Thus, the beneficiary is not eligible to perform the duties of the proffered specialty occupation.

The record does not establish that the beneficiary has complied with the New York law regarding licensure of a pharmacy intern when the petition was filed. The record does not establish that the beneficiary is qualified to perform the duties of the specialty occupation.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 361. The petitioner has not sustained that burden.

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

² The LCA submitted as an exhibit in the petitioner's response to the director's RFE is not properly before the AAO. It is not for the position proffered to the beneficiary in the petition filed June 26, 2006. As explained above, the petitioner has not filed an amended petition and the only petition before the AAO is the June 26, 2006 petition. In addition, the LCA submitted as an exhibit in response to the director's RFE was not certified by the Department of Labor when the petition was filed. Thus, this LCA does not comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B) which indicates that before filing a petition for H-1B classification in a specialty occupation, a petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational capacity in which the alien will be employed.