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FILE: WAC 02 159 50848 Office: CALIFORNIA SERVICE CENTER Date: AUG 25 2005

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, Director
Administrative Appeals Office

DISCUSSION: The director of the California Service Center denied the nonimmigrant visa petition and the matter is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is an importer of textile items, with ten employees. It seeks to extend its employment of the beneficiary as a director of operations 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 because the petitioner failed to meet the requirements for filing a Form I-129, Petition for a Nonimmigrant Worker.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) documentation submitted in response to the director's request; (4) the director's June 26, 2003 denial of the petition; (5) counsel's July 15, 2003 motion to reconsider; (6) the director second request for evidence; (7) counsel's response to the director's request; (8) the director's March 15, 2004 denial of the petition; and (9) Form I-290B, with counsel's brief.

The issue before the AAO is whether the petitioner met the requirements for the filing of a Form I-129 when submitting the instant petition.

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 cases 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

Regulation requires that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified labor condition application (LCA) from the 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 document the filing of a labor condition application with the Department of Labor when submitting the Form I-129.

In the instant case, the petitioner filed the Form I-129 with CIS on April 12, 2002. No certified LCA (Form ETA 9035) was provided at the time of filing. In response to the director's December 11, 2002 request for evidence, counsel indicated that it would submit a certified ETA 9035 once it had received a response regarding the prevailing wage rate from the state of Nevada. Therefore, the record establishes that, at the time of filing, the petitioner had not yet obtained a certified LCA in the occupational specialty.

On appeal, counsel contends that the instant petition should not be denied on the basis that the Form ETA 9035 was not timely filed because the petitioner had no control over the length of time taken by the Department of Labor to complete a prevailing wage statement. He notes that the certified LCA submitted by the petitioner on March 14, 2003 was "accepted" by CIS, as it subsequently requested the petitioner submit a more legible copy. Counsel's argument is not persuasive.

The regulatory requirements for filing Form I-129 stipulate that a petitioner must submit evidence of a certified LCA at the time of filing. In the instant case, the petitioner first submitted a certified LCA on March 14, 2003, nearly a year after filing the Form I-129. Therefore, the petitioner failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). A petitioner must establish eligibility at the time of filing a 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).

As to counsel's statements regarding CIS' acceptance of the petitioner's LCA, the AAO notes that CIS' willingness to review the petitioner's LCA was not an indication that the petitioner had satisfied the filing requirements for the Form I-129. Instead, the director's September 21, 2003 request for a legible copy of the petitioner's LCA indicated only that the director was seeking the information necessary to make that determination, i.e., whether the LCA had been certified prior to the petitioner's filing of the Form I-129 on April 12, 2002. CIS routinely requests information needed for the adjudication of applications and petitions. Such requests and CIS consideration of the information provided in response to them should not be viewed as predictors of approval.

In reviewing the record, the AAO has noted that the LCA initially submitted by counsel on March 14, 2003 is not the same LCA submitted by counsel in response to the director's September 21, 2003 request for a legible LCA. The AAO notes that the date of certification on the legible LCA, submitted by counsel on October 15, 2003, is September 25, 2003. Accordingly, this document cannot be the LCA submitted by counsel on March 14, 2003. The AAO also finds that the largely illegible LCA submitted in March 2003 shows the petitioner's signature in Section H, "Declaration of Employer" to be dated March 5, 2002; the legible LCA submitted in October 2003 was signed by the petitioner on September 29, 2003, a date several days after the date of certification. Whatever the explanation for counsel's submission of different LCAs and the discrepancy in the second LCA between the petitioner's September 29, 2003 signature and the September 25, 2003 date of certification, neither document was certified prior to the date on which the petitioner filed the Form I-129.

Therefore, for the reasons already 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 these proceedings 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.