

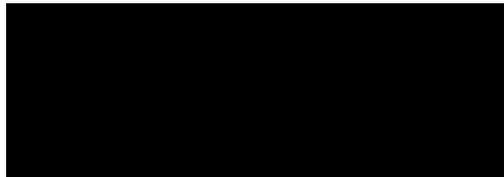
**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



DI

FILE: WAC 03 100 54135 Office: CALIFORNIA SERVICE CENTER Date: **MAR 09 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:

SELF-REPRESENTED

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

The petitioner provides Internet infrastructure services, and seeks to employ the beneficiary as a director of marketing. It endeavors 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 because a certified labor condition application (LCA) was not obtained prior to the filing of the Form I-129 petition. On appeal, the petitioner submits a brief and additional information.

The issue to be discussed in this proceeding is whether a certified LCA was obtained prior to the filing of the I-129 petition.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 101(a)(15)(H) of the Act defines an H-1B nonimmigrant as:

[A]n alien who is coming temporarily to the United States to perform services . . . in a specialty occupation . . . and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary of Labor an application under section 1182(n)(1)

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) provides that the petitioner shall submit with an H-1B petition “a certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary.” The regulations further provide:

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.

8 C.F.R. § 214.2(h)(4)(i)(B)(1).

The present petition is a petition for continuation of previously approved employment. The initial petition was approved by Citizenship and Immigration Services (CIS) and valid from June 11, 2000 until May 1, 2003. It was supported by a certified LCA that was valid from May 1, 2000 until May 1, 2003. The petition for continuation of previously approved employment (the petition now before the AAO) was filed on February 10, 2003. The LCA filed in support of the continuation petition was the same LCA filed in support of the initial petition, valid from May 1, 2000 until May 1, 2003.

The regulation at 8 C.F.R. § 214.2(h)(15)(ii)(B) provides in part that an H-1B extension of stay may be authorized for a period of up to three years for a beneficiary of an H-1B petition in a specialty occupation. The request for extension must be accompanied by either a new or a photocopy of the prior Department of Labor certification that the petitioner continues to have on file an LCA valid for the period of time requested for the occupation. While the present Form I-129 petition states that the dates of intended employment are from “now” to “indefinite,” the petition may not be extended beyond a period of three years. Thus, the petition must be supported by a certified

LCA covering employment from the date of the petition, February 10, 2003, until February 10, 2006. The LCA filed with the initial petition expired on May 1, 2003, and is not valid for the period of continued employment requested for the occupation. On appeal, the petitioner submitted a new LCA that was certified on November 26, 2003, and covers employment from November 26, 2003 until November 26, 2006.

Pursuant to 8 C.F.R. § 103.2(b)(12), “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. . . .” As previously stated, the present Form I-129 petition was filed February 10, 2003. The LCA submitted on appeal in support of the petition was certified subsequent to the filing of the petition. The petition must, accordingly, be denied because certification was not obtained prior to the filing 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 failed to sustain that burden.

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