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U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 106 50017 Office: CALIFORNIA SERVICE CENTER Date: **MAR 18 2005**

IN RE: Petitioner:
Beneficiary:



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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the 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 petition will be denied.

The petitioner is a public school that seeks to continue employing the beneficiary as a Spanish teacher in accordance with a previously approved petition to employ the beneficiary as an H-1B nonimmigrant worker in a specialty occupation 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). In order to continue this employment, the petitioner endeavors to continue the beneficiary's H-1B classification and extend her stay.

The director denied the petition on the basis that the petitioner had failed to file a certified labor condition application for H-1B Nonimmigrants (Form ETA 9035) (LCA) for the period of proposed employment, as required by Citizenship and Immigration Service (CIS) regulations. On appeal, the petitioner requests that CIS accept a certified LCA that was certified after the petition was filed.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) states:

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.

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

The regulation at 8 C.F.R. § 214.2(h)(15)(i) states, in pertinent part:

General. The petitioner shall apply for extension of an alien's stay in the United States by filing a petition extension on Form I-129 accompanied by the documents described for the particular classification in paragraph (h)(15)(ii) of this section. . . .

The regulation at 8 C.F.R. § 214.2(h)(15)(ii)(B)(1) states that a request for an H-1B extension of stay “must be accompanied by either a new or a photocopy of the prior certification from the Department of Labor (DOL) that the petitioner continues to have on file a labor condition application valid for the period of time requested for the occupation.”

The record reflects that the previous petition was approved for the period December 20, 2002 to May 30, 2003; that the present petition, filed on February 18, 2003, specified August 11, 2003 to May 21, 2004 as the period for which the petitioner intended to continue the beneficiary's employment; and that the LCA that the petitioner initially submitted had been certified by the DOL for August 14, 2002 to May 30, 2003.¹ In light of

¹ This appears to be the certified LCA that the petitioner had filed with the previous petition.

these facts, the director's decision to deny the petition accorded with the relevant CIS regulations, cited above. The petitioner failed to comply with the regulatory requirement for filing with the Form I-129 an LCA certified for the period for which the petitioner is applying to extend the beneficiary's stay.

The validity period specified on the certified LCA that the petitioner submits on appeal is the same as the period for which the petitioner seeks to extend the beneficiary's stay (August 11, 2003 to May 21, 2004). However, because this second LCA was certified on December 31, 2003, a date after the petition was filed, it does not remedy the deficiency upon which the director's decision was based.

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.