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U.S. Citizenship
and Immigration
Services

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FILE: WAC 04 049 50512 Office: CALIFORNIA SERVICE CENTER Date: MAY 15 2006

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 materials 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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a non-profit organization providing community services to the disabled. It seeks to employ the beneficiary as a music therapist and to extend her classification 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 on the ground that the petitioner did not have an approved labor certification for the proffered position at the time its Petition for a Nonimmigrant Worker (Form I-129) was filed to continue the beneficiary's previously approved employment without change and to extend her stay in the United States.

As specified in 8 C.F.R. § 214.2(h)(4)(i)(B)(1):

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 record shows that the petitioner filed the instant Form I-129 petition on December 11, 2003, requesting H-1B classification for the beneficiary in the music therapist position for a three-year employment period from March 1, 2004 through March 1, 2007. The petition was not accompanied by a Labor Condition Application (LCA) for the proffered position certified by the Department of Labor (DOL). In response to the director's request for such evidence the petitioner submitted in May 2004 a photocopy of the LCA certified by DOL for the beneficiary's original three-year period of intended employment in H-1B status, which was valid from March 1, 2001 to March 1, 2004. Since that LCA had expired and the record still contained no certified LCA for the three years of intended employment under the instant H-1B petition, the director denied the petition on June 3, 2004.

The petitioner filed an appeal on June 14, 2004 and submitted a new LCA for the proffered position, which was certified by DOL on June 4, 2004 and valid for a three-year employment period running from June 4, 2004 to June 4, 2007. The new LCA cannot be accepted, however, because it postdates the filing of the instant H-1B petition in December 2003. As provided in 8 C.F.R. § 103.2(b)(12), a petitioner must establish that it was eligible for the requested benefit at the time the petition was filed. A visa petition may not be approved at a later date based on a set of facts not present at the time of filing. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248 (Reg. Comm. 1978). Moreover, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to legal requirements. *See Matter of Izummi*, 22 I&N Dec. 169 (Assoc. Comm. 1998).

The regulation at 8 C.F.R. § 214.2(h)(15)(ii)(B)(1) specifies that a request for extension of stay in H-1B visa status "must be accompanied by either a new or a photocopy of the prior certification from the Department of Labor that the petitioner continues to have on file a labor condition application valid for the period of time requested for the occupation." The petitioner did not provide, or have, a certified LCA

for the requested employment period of March 1, 2004 to March 1, 2007 at the time the instant petition was filed, in December 2003, requesting the extension of stay.

For the reasons discussed above, the petitioner has failed to establish the beneficiary's eligibility for classification as a nonimmigrant worker employed in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Act.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

This dismissal is without prejudice to the petitioner's filing of a new petition accompanied by the proper documentation and requisite fee.

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