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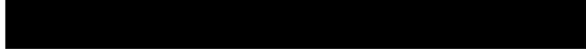
U.S. Citizenship
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Services

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FILE: WAC 06 134 52573 Office: CALIFORNIA SERVICE CENTER Date: **AUG 21 2007**

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:


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, California 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 manufactures and sells equestrian equipment and seeks to employ the beneficiary as an accountant/inventory control processor. The petitioner, therefore, seeks to classify the beneficiary 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 record includes: (1) the Form I-129 and supporting documents; (2) the director's request for evidence (RFE); (3) counsel's response to the RFE; (4) the director's decision denying the petition; and (5) the Form I-290B and counsel's statement in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

The petition for an extension of the beneficiary's H-1B status for employment from April 1, 2006 to March 31, 2009 was received at the service center on March 23, 2006. The instant petition contained a certified Form ETA 9035 Labor Condition Application (LCA), case number [REDACTED]. The LCA submitted was valid from April 1, 2003 through March 31, 2006. In response to the director's April 6, 2006 request for evidence, the petitioner submitted an LCA, case number [REDACTED] certified on June 7, 2006. On June 30, 2006, the director denied the petition on the basis of the petitioner's failure to obtain a certified LCA from the Department of Labor prior to the submission of the I-129 petition with USCIS. The director also determined that the evidence did not establish that a genuine job offer or employer-employee relationship existed.

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

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, when filing an H-1B petition, the petitioner must submit with the petition "[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary." Therefore, in order for a petition to be approvable, the LCA must have been certified *before* the H-1B petition was filed. The submission of a certified LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time that the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). As such, the AAO finds that the director's denial of the petition was proper.

On appeal, counsel makes the following statements:

In this case the USCIS failed to note that [REDACTED] had received a certification from the Department of Labor on or about April 1, 2003, with the job title of Accountant

Inventory Control. She was given an LCA Code "160" and a NAICS Code of "541210". Therefore, the Appellant would take the position that it had fully complied with the requirement of 8 CFR 214.2(h)(4)(i)(B)(1). Therefore, [REDACTED] was eligible for classification as a specialty occupation worker.

* * *

In sum, the USCIS has failed to recognize that this Petition is simply a mirror of the previous petition which was filed in the year 2001 and which was approved by USCIS. Nothing has changed and [REDACTED] has continued to work in the same position in the occupational specialty which was approved by the Department of Labor.

The petitioner's submission of a certified LCA has not satisfied the regulation. The regulation at 8 C.F.R. § 214.2(h)(15)(ii)(B)(1) states that "the request for extension 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's failure to procure a certified LCA valid for the period of time requested for the occupation prior to filing the H-1B petition precludes its approval, and pursuant to 8 C.F.R. § 214.2(h)(4)(i)(B)(1) and 8 C.F.R. § 214.2(h)(4)(iii)(B)(1), there is no provision for discretionary relief from the LCA requirements. Accordingly, the AAO will not disturb the director's denial of the petition.

The director also found that the petitioner had not established that an employer-employee relationship exists, or that it would employ the beneficiary. The record establishes that the employer paid the beneficiary \$29,138.50 in 2004 and 2005. Thus, the AAO finds that both the job exists, and that the petitioner will employ the beneficiary. The AAO withdraws the director's comments on these issues. The decision may not be approved, however, as the petitioner failed to timely file an LCA valid for the period of the extension petition.

Beyond the decision of the director, the position does not appear to be a specialty occupation. The duties of accountant/inventory control processor described in the record appear to be those of a bookkeeping, accounting and auditing clerk as described in the *Occupational Outlook Handbook (Handbook)*, a resource relied upon by USCIS in determining whether a position qualifies as a specialty occupation. These duties do not require a bachelor's degree in a specialty as a minimum for entry into the occupation, and the position does not qualify as a specialty occupation under any of the regulation criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) – (4). For this additional reason, the petition may not be approved.

Furthermore, although counsel argues that the request for an extension of the H-1B visa is a mirror of the previously approved petition; prior approvals do not preclude CIS from denying an extension of the original visa based upon a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

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.