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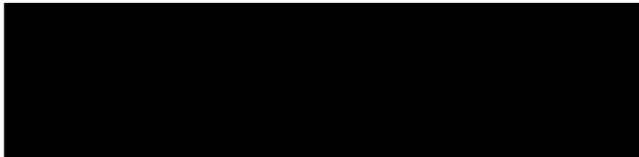
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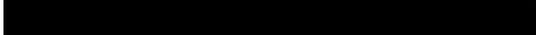
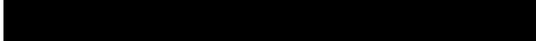
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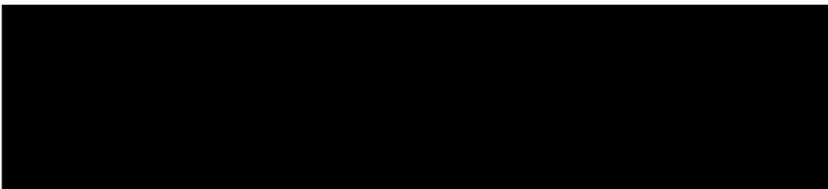


FILE: WAC 05 210 51477 Office: CALIFORNIA SERVICE CENTER Date: **JUL 05 2007**

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.

For Michael T. Kelly
Robert P. Wieman, Chief
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 medical office that seeks to employ the beneficiary as a personnel manager. 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 of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on the basis of the petitioner's failure to submit a certified labor condition application (LCA).

The instant petition was received at the service center on July 22, 2005, but it did not contain a certified LCA. In his October 4, 2005 request for additional evidence the director requested, among other items, a certified LCA. In its December 23, 2005 response to the director's request, the petitioner stated that it needed additional time in which to obtain the certified LCA. The director did not grant the petitioner's request for additional time and denied the petition.

On appeal, newly-retained counsel submits a certified LCA. However, the AAO notes that this LCA was certified on February 24, 2006. 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." Thus, 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). Further, CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). As such, this petition may not be approved.

On appeal, counsel states that, since the petitioner has now submitted a certified LCA, the only issue at hand is whether it would be appropriate to deny the case based upon the petitioner's failure to submit the certified LCA within the timeframe prescribed by the director in his October 4, 2005 request. Counsel asserts that the petitioner is the victim of ineffective assistance of counsel, and states that it would be unfortunate to hold the petitioner and beneficiary accountable for the serious procedural errors committed by previous counsel.

However, the failure to procure an LCA certified for the location of intended employment prior to filing the H-1B petition precludes its approval, and the regulations contain no provision for the AAO to provide discretionary relief from the LCA requirements.¹ Accordingly, the AAO cannot 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.

¹ This denial is without prejudice to the filing of a new petition, with certified LCA and fee.