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U.S. Citizenship
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FILE: WAC 07 098 50086 Office: CALIFORNIA SERVICE CENTER Date JUN 03 2008

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.

for *Robert P. Wiemann*
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the AAO. The appeal will be sustained. The petition will be approved.

The petitioner is a school district. It seeks to extend the employment of the beneficiary as a special education school teacher. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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).

On July 12, 2007, the director denied the petition determining that the petitioner had not complied with the requirements for filing a Form I-129, Petition for a Nonimmigrant Worker.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's April 26, 2007 request for evidence (RFE); (3) documentation submitted in response to the director's request; (4) the director's July 12, 2007 decision denying the petition; and (5) the Form I-290B.

The issue before the AAO is whether the petitioner established filing eligibility at the time the Form I-129 was received by U.S. Citizenship and Immigration Services (CIS).

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form

In matters where evidence related to filing eligibility is provided in response to a director's request for evidence, 8 C.F.R. § 103.2(b)(12) states:

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

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must obtain a certified labor condition application (LCA) from the Department of Labor (DOL) in the occupational specialty in which the H-1B worker will be employed. See 8 C.F.R. § 214.2(h)(4)(i)(B). The

instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of a labor certification application with the Department of Labor when submitting the Form I-129.

The petitioner filed the Form I-129 for the present extension petition on February 20, 2007. At that time the certified LCA that had been filed for the previous extension petition was still valid, as that LCA had been certified for the period June 2, 2006 to June 1, 2007. In response to the director's RFE, the petitioner submitted an LCA that DOL certified, on May 16, 2007, for the period of employment sought in this extension petition (that is, June 2, 2007 through June 1, 2008). Thus, the petitioner filed the present petition during coverage by a certified LCA; and prior to the starting date of the proposed employment, the two certified LCAs together covered the entire period of the proposed employment. In light of these narrow and limited circumstances, the AAO will not deny the petition on LCA grounds.

In addition, the petitioner has provided evidence that the proffered position is a specialty occupation and that the beneficiary is eligible for classification as an alien employed in a specialty occupation. Accordingly, the appeal will be sustained, and the petition will be approved.

The burden of proof in this proceeding rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The appeal is sustained. The director's order is withdrawn and the petition is approved for the requested period of time