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U.S. Citizenship
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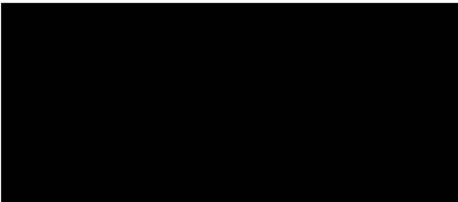


FILE: EAC 07 159 54469 Office: VERMONT SERVICE CENTER Date: SEP 04 2008

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:



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, Vermont 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 software development and design company headquartered in Tulsa, Oklahoma. It seeks to extend the employment of the beneficiary as a supply chain software engineer. 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 June 6, 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 May 22, 2007 request for evidence (RFE); (3) documentation submitted in response to the director's request; (4) the director's June 6, 2007 decision denying the petition; and (5) the Form I-290B and supporting documentation.

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.

In the instant matter, the petitioner filed the Form I-129 with CIS on May 11, 2006. The petitioner submitted an LCA certified on May 5, 2007 for a work location at the company's headquarters in Tulsa, Oklahoma for employment beginning May 31, 2007 to May 31, 2010. In response to the director's RFE, the petitioner submitted a second LCA certified May 29, 2007 for a work location in College Station, Texas, the work location for the beneficiary's proposed employment from May 31, 2007 to May 31, 2010. On appeal, counsel for the petitioner indicates that the second LCA that was certified May 29, 2007, replaced an LCA for College Station, Texas that expired on May 31, 2007. In this circumstance, the petitioner had a certified LCA on file for College Station, Texas when the petition was filed, as well as a LCA on file for work at the company's headquarters. In response to the director's RFE, the petitioner also provided a new certified LCA continuing the work location in College Station, Texas as the director requested. In this limited situation, the AAO will accept the petition and the LCA as timely filed.

As the petitioner has provided evidence that the proffered position is a specialty occupation and the beneficiary is eligible for classification as an alien employed in a specialty occupation, 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