

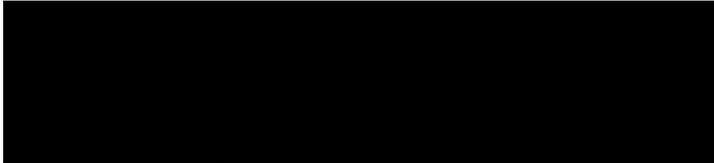
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FILE: WAC 02 187 50249 Office: CALIFORNIA SERVICE CENTER Date: **JAN 05 2005**

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 public high school district in California. It seeks to employ the beneficiary as a teacher of physics and mathematics and to classify him 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 Nonimmigrant Worker (Form I-129) was filed. On appeal the petitioner asserts that the required labor certification was obtained from the Department of Labor (DOL) before the "H-1B" petition was filed.

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 its Form I-129 petition on May 30, 2002, requesting H-1B classification for the beneficiary in the subject teaching position for the period of August 2002 through June 20, 2003. The petition was accompanied by a Labor Condition Application (LCA) for the teaching position which was certified by DOL on August 3, 2001 and valid from August 29, 2001 to June 21, 2002. Thus, the period of employment requested in the H-1B petition postdated the period approved by DOL in the LCA.

In a letter accompanying the appeal (Form I-290B) the beneficiary stated that he thought it was valid to process the H-1B petition because his LCA, approved in August 2001, was still valid on the date the Form I-129 was filed in May 2002. The beneficiary explained that he had intended to start working as a teacher in the 2001-02 school year, but then delayed for one year. As the director indicated in his decision, however, the period of employment requested in the H-1B petition must match the period approved in the LCA. The petitioner did not meet this requirement since he did not have DOL certification for the requested period of August 2002 through June 20, 2003 at the time the H-1B petition was filed in May 2002.

In response to the director's request for a valid LCA, the petitioner filed a new LCA for the subject teaching position on March 13, 2003, which was approved by DOL on April 24, 2003 and valid for the period of April 24, 2003 through June 20, 2003. As pointed out in the decision, however, that LCA approval postdated the filing of the H-1B petition by nearly a year. Thus, the petitioner did not obtain the requisite labor certification "[b]efore filing a petition for H-1B classification," as specified in 8 C.F.R. § 214.2(h)(4)(i)(B)(1). No new evidence or information has been submitted on appeal to refute these findings by the director. The only way the new LCA approved in April 2003 could have been considered by the director is if the petitioner had thereupon filed a new or amended H-1B petition, with fee, in accordance with 8 C.F.R. § 214.2(h)(2)(E).

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.

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