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U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 159 50335 Office: CALIFORNIA SERVICE CENTER Date: **MAR 22 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 documents 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 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 manufacturer of paint and sundry products. It seeks to employ the beneficiary as a special projects administrator and endeavors to classify her 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 because a certified labor condition application (LCA) was not obtained prior to the filing of the I-129 petition. On appeal, the petitioner submits a new LCA.

The issue to be discussed in this proceeding is whether a certified LCA was obtained prior to the filing of the I-129 petition.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 101(a)(15)(H) of the Act defines an H-1B nonimmigrant as:

[A]n alien who is coming temporarily to the United States to perform services . . . in a specialty occupation . . . and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary of Labor an application under section 212(a)(n)(1)

Title 8, Code of Federal Regulations, part 214.2(h)(4)(iii)(B)(1) provides that the petitioner shall submit with an H-1B petition “a certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary.” The regulations further provide:

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.

8 C.F.R. § 214.2(h)(4)(i)(B)(1).

Pursuant to 8 C.F.R. § 103.2(b)(12), “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 Form I-129 petition was filed April 28, 2003, accompanied by an LCA certified on March 11, 2003 and valid from March 11, 2003 through May 3, 2003. On August 25, 2003, the director requested additional evidence from the petitioner, including a request for the petitioner to submit a properly certified Labor Condition Application (LCA) and noting that the validity dates of the LCA had already passed. In response to that request the petitioner resubmitted the same LCA filed with the petition, which was valid from March 11, 2003 until May 3, 2003, a period of time less than the dates of intended employment (June 3, 2002, until May 3, 2006). The petition was accordingly denied. On appeal, the petitioner submitted a new LCA certified on January 22, 2004, subsequent to the filing of the initial petition. The petition must, accordingly, be denied because certification was not obtained prior to the filing of the H-1B 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 failed to sustain that burden.

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