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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[Redacted]

File: WAC-02-028-54209 Office: California Service Center

Date: DEC 10 2002

IN RE: Petitioner:
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)

IN BEHALF OF PETITIONER:

[Redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a travel agency with five employees and a gross annual income of \$305,000. It seeks extend its authorization to employ the beneficiary as its manager of sales and operations for a period of three years. The director denied the petition because the petitioner had not submitted a Form ETA 9035 Labor Condition Application (LCA) that was certified by the Department of Labor (DOL) prior to the filing date of the petition as required by the regulations.

On appeal, counsel states that the petitioner had submitted an LCA that was certified by the DOL prior to the filing date of the petition.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. Evidence that the alien qualifies to perform services in the specialty occupation as described in paragraph (h)(4)(iii)(A) of this section,

The record shows that the petitioner filed the Form I-129 petition on November 1, 2001. The record further shows that the petitioner originally faxed a Form ETA Labor Condition Application to the DOL on October 31, 2001. The DOL rejected that LCA on November 1, 2001, because the petitioner had failed to complete Item E on page 2 of the LCA. On that same day, November 1, 2001, the DOL certified an identical copy of the LCA and faxed the certified LCA to the petitioner. This copy of the LCA contained the same discrepancy as the copy that was rejected by the DOL. The record contains copies of both the certified and the rejected LCA, the facsimile transmission sheet from the DOL acknowledging receipt of the original LCA on October 31, 2001, and the DOL notice explaining why the LCA was rejected.

Counsel states on appeal that the petitioner, in accordance with normal Service policy, waited until the director issued the Form I-797 Request for Evidence on November 8, 2001, before submitting a new LCA to the DOL for certification. The record contains a second LCA that was certified by the DOL on November 23, 2001.

Clearly, the DOL mistakenly certified the initial LCA that was faxed to that office on October 31, 2001, since the LCA was not properly completed by the petitioner. In response to the Service request for additional evidence, counsel submitted a properly certified Form ETA 9035 Labor Condition Application. However, that LCA was certified on November 23, 2001, a date subsequent to November 1, 2001, the filing date of the visa petition. Regulations at 8 C.F.R. 214.2(h)(4)(i)(B)(1) provide that 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. As this has not occurred, the petition may not be approved.

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.