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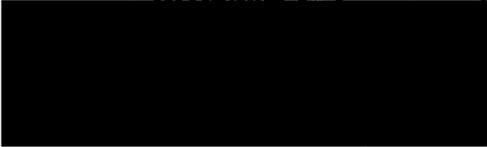
DA2

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



File: WAC-01-295-51275 Office: California Service Center

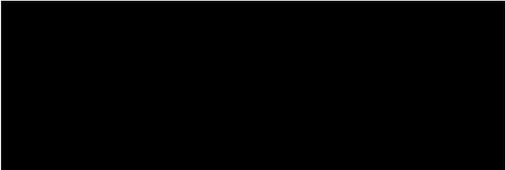
Date: **DEC 16 2002**

IN RE: Petitioner:
Beneficiary:



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:



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
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 owns and operates three gas stations and convenience stores. It has six employees and a gross annual income of \$9 million. The petitioner seeks to employ the beneficiary as a software engineer for a period of three years. The director determined the petitioner had not submitted a certification from the Department of Labor (DOL) that a Labor Condition Application (Form ETA 9035) had been properly filed.

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, . . .

In this case, the only Form ETA 9035 Labor Condition Application contained in the record was certified on January 22, 2002, a date subsequent to September 24, 2001, the filing date of the visa petition. Counsel asserts on appeal that the petitioner did file a Form ETA 9035 with the Department of Labor prior to the filing date of the petition, but that LCA was rejected by the DOL, as were at least two other LCA's that were faxed to the DOL by the petitioner. It is noted that counsel has not submitted any documentation to corroborate his statements. Counsel did submit a photocopy of a receipt notice and an approval notice relating to a different petition, where it appears that the LCA was certified by the DOL subsequent to the filing date of the petition. However, since this record does not contain a copy of that petition and its supporting documentation, it is not possible to determine whether the facts regarding the filing of that LCA are identical to those in this case. The fact remains that the regulation at 8 C.F.R. 214.2(h)(4)(i)(B)(1) provides 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.