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U.S. Department of Justice  
Immigration and Naturalization Service

any person who...  
prevents...  
invasion of personal privacy

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



File: EAC-00-223-50865 Office: Vermont Service Center

Date: JUN 21 2002

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)

PUBLIC COPY

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 which 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, Vermont Service Center. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner for Examinations on motion to reopen and reconsider. The motion will be dismissed.

The petitioner is engaged in the sale of mechanical products such as heating and air conditioning parts. It has four employees and a gross annual income of \$2,823,517. The petitioner seeks to extend its authorization to employ the beneficiary as a mechanical engineer for a period of three years. The director determined the petitioner had not submitted a valid labor condition application.

On appeal, the petitioner submitted a Form ETA 9035 Labor Condition Application which was certified on April 18, 2001, a date subsequent to June 5, 2000, the date of filing of the 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. The Associate Commissioner dismissed the appeal because the petitioner had not submitted a labor condition application which was certified prior to the date of filing of the petition as required by 8 C.F.R. 214.2(h)(4)(i)(B)(1).

On motion, the petitioner states that the beneficiary has been a competent and responsible employee. The petitioner further states that it currently has several profitable contracts and wishes to continue to employ the beneficiary as a mechanical engineer. The petitioner's statement that its gross annual income has increased from \$50,497 to \$2,823,517 in the year 2000, due in part to the beneficiary's professional skills, is noted. However, that statement has no relevance to the basis for the denial of the petition and the subsequent dismissal of the appeal.

8 C.F.R. 103.5(a)(2) states that a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

8 C.F.R. 103.5(a)(3) states that a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

8 C.F.R. 103.5(a)(4) states, in pertinent part, that the Service shall dismiss any motion that does not meet applicable requirements. As the petitioner provides no new facts that the

Service may consider on motion, or provides any precedent decisions to establish that the previous decisions were based on an incorrect application of law or Service policy, the motion must, therefore, be dismissed.

In visa petition proceedings, the burden of proof remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met. In accordance with 8 C.F.R. 103.5(a)(4), the motion will be dismissed.

**ORDER:** The motion is dismissed.