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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, NW
Washington, D.C. 20536



FILE: EAC 02 078 50633 Office: VERMONT SERVICE CENTER

Date: DEC 16 2003

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)

ON BEHALF OF PETITIONER:



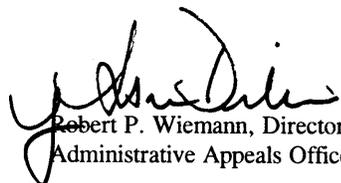
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an educational center. It employs 100 people and has a gross annual income of \$2,400,000. It seeks to temporarily employ the beneficiary as a kindergarten teacher for a period of two years. The petitioner seeks a change of status for the beneficiary from an F-1 classification to an H1-B classification. The director determined that the petitioner had not filed a Labor Condition Application (Form ETA 9035) at the time of filing. In addition, the beneficiary was not in valid legal status at the time the petition was filed.

On appeal, counsel asserts that the petitioner requested a Form ETA 9035 following the director's request for proof that the form was filed. Counsel submits the completed form with the appeal. Counsel also states that the beneficiary's F-1 status ended in June 2001¹, and that the regulations allow the beneficiary 60 days to leave the country, which counsel states gives the beneficiary legal status until August 2001. The petition was filed in November 2001, and counsel requests Citizenship and Immigration Services to exercise discretion regarding the request to change the beneficiary's status.

The Vermont Service Center (VSC) initially received the petition on November 5, 2001, although it was returned with a request that the current I-129W form be used. The petition was resubmitted and received by the VSC on December 26, 2001. The labor condition application was filed with the VSC on August 26, 2002. Counsel states that, following the director's request, dated February 19, 2002, for proof that the labor condition application had been filed, the petitioner made several requests of the Department of Labor and the Immigration and Naturalization Service (INS) to get the appropriate form. On April 29, 2002, the petitioner requested that INS grant an extension of time to submit the form, which counsel finally submitted with the appeal on August 26, 2002.

The regulations state, "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

¹ The AAO notes that while the beneficiary's diploma is dated June 6, 2001, his transcript indicates that the degree was awarded on December 30, 2000 and that if the beneficiary completed his degree on December 30, 2000, the departure deadline would have been February 28, 2001.

in which the alien(s) will be employed." 8 C.F.R. § 214.2(h)(4)(B)(1).

The petitioner obtained certification almost 10 months after the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The director determined that the petitioner was out of status at the time of filing. According to 8 C.F.R. § 248.1(b), "a change of status may not be approved for an alien who failed to maintain the previously accorded status or whose status expired *before the application or petition was filed.*" (Emphasis added). The AAO, however, does not have the authority to review an application for a change of status that has been filed on an I-129 petition. See 8 C.F.R. § 248.3(g).

The regulations require that the petition be denied due to the missing labor condition application. "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." 8 C.F.R. § 103.2(b)(12).

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.