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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

File: WAC 00 273 50584

Office: CALIFORNIA SERVICE CENTER

Date: JAN 13 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)

IN BEHALF OF PETITIONER:

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INSTRUCTIONS:

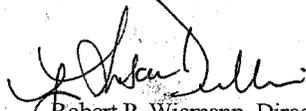
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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 the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a medical practice in Concord, California, that indicates it has no other employees and a gross annual income of \$100,000 to \$225,000. It seeks to temporarily employ the beneficiary as a Medical Research Consultant for a period of three years. The director determined that the petitioner had not filed a Labor Condition Application (LCA) in a timely manner and denied the petition.

On appeal, the petitioner submits the certified LCA stating that repeated LCA applications were submitted and faxed to the Department of Labor without response.

Section 214(i)(1) of the Act, 8 U.S.C. 1184 (i)(1), defines the term "specialty occupation": as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" as:

an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

1. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
2. The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can

be performed only by an individual with a degree;

3. The employer normally requires a degree or its equivalent for the position; or

4. The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The issue in this proceeding is whether the petitioner obtained a certification from the Department of Labor that it had filed a labor condition application prior to filing the instant petition.

8 C.F.R. 214.2 (h) (4) (i) (B) (1) states:

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.

In the initial filing of the petition received by the Service Center on September 21, 2000, the petitioner submitted no LCA or any other supporting documentation for the petition.

On January 2, 2001, the director stated that only the petition had been submitted, and he requested further evidence with regard to why the proffered position would be considered a specialty occupation. The director also asked for evidence with regard to the beneficiary's qualifications to perform services in a specialty occupation. Finally, the director stated that all Form I-129 petitions required evidence of filing a Labor Condition Application (LCA), Form ETA 9035, with the U.S. Department of Labor.

In response, the petitioner submitted a copy of a newly filed LCA dated March 24, 2001 and explained that the Department of Labor (DOL) required a different LCA form after January 19, 2001. The submitted LCA had not been certified by DOL. The petitioner also submitted an Internet document that explained the requirements for filing the new document.

On July 30, 2001, the director denied the petition stating that although the petitioner had submitted a copy of a LCA filed with the Department of Labor in its response to the request for further evidence, to date, the petitioner had not provided evidence of an approved Labor Condition Application.

On appeal, the petitioner submits a copy of the filed LCA with the certification by DOL as of August 27, 2001. In addition, the petitioner states that several and repeated LCA applications were submitted and faxed, but the petitioner received no response

until August 27, 2001.

Upon review of the record, it is clearly established that the petitioner submitted at least two LCA forms to the Department of Labor. The first one is dated March 24, 2001 and the second is dated August 24, 2001. The latter one contains the required certification by DOL. The petitioner submitted both documents to DOL a considerable time following the Service's receipt of the original I-129 petition on September 21, 2000. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. Matter of Michelin Tire Corporation, 17 I&N Dec. 248 (Comm. 1978). Also, 8 C.F.R. 103.2 (a) (12).

Although the Service acknowledges that the processing of LCA forms may often pose problems of coordination with the submission of the I-129 petition, it provides for such circumstances by requesting the certified LCA along with other requests for additional evidence following the submission of the I-129 petition. In the instant petition, the petitioner did not appear to have submitted the LCA to the Department of Labor prior to submitting the I-129 petition to the Service, and only presented the certified LCA in the appeal process. This submission does not appear to conform with the regulatory requirements, or current Service policy. Accordingly, the petitioner did not establish that the beneficiary is eligible for classification as an alien employed in a specialty occupation.

Beyond the decision of the director, the issue of whether the proffered position is a specialty occupation and whether the beneficiary is qualified to perform a specialty occupation has also not been established on the record. For example, in the original petition, the petitioner stated that the beneficiary would work as a "medical research consultant" with the following duties:

Review, gather, compile and disseminate medical information from medical journals, research material and medical literature pertinent to the practice and care of patients;

Maintain and update OSHA and Workmen's Comp compliance;

Disseminate, update and implement to staff & personnel the information and be available for consultation.

When the director requested further evidence with regard to the beneficiary's qualifications, the petitioner submitted a one-page document that changed the proffered position title to "Resident Physician Trainee-in-Charge of Research and Prevention," and expanded upon the duties of the proffered position. One new duty was to take "lead physician role in training, assisting, and consulting with the staff with the care of the patients and other

health issues." This job description appears unrelated to the original proffered position. For example, it is unclear what staff and personnel the beneficiary would be working with, as the original petition reflects that the medical practice has no other employees.

In addition, the petitioner indicated that a curriculum vita was attached to the submitted one page document that apparently documented the beneficiary's qualifications to perform a specialty occupation. No such curriculum vita was found on the record.

To date, the record remains insufficient as to whether the proffered position is a specialty occupation or as to whether the beneficiary is qualified to perform a specialty occupation. As the appeal will be dismissed on other grounds, these issues need not be examined further.

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.