

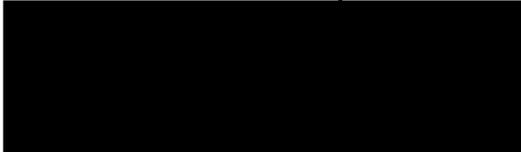
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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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invasion of personal privacy**

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 MASS. 3/F
Washington, D.C. 20536



File: LIN 02 068 54316 Office: Nebraska Service Center Date:

JUL 07 2009

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:



PUBLIC COPY

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.


Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is an Illinois corporation that operates a computer consulting firm. It has 35 employees and a gross annual income of approximately \$3,800,000. The petitioner seeks to employ the beneficiary as a software engineer for a period of three years. The director denied the I-129 petition on the ground that the petitioner failed to file with the Secretary of Labor a labor condition application (LCA) prior to the filing of the H-1B petition.

On appeal, counsel submits a brief. Counsel states in part that the H-1B petition should be approved in that the LCA was in fact filed with the Department of Labor prior to the filing of the initiating petition. In support of that assertion, counsel submits two fax confirmation reports indicating that an LCA was faxed to the Department of Labor on December 18, 2001 at 11:52 am, and again at 11:56 am. Counsel states that it again filed the LCA in February of 2001 when it failed to receive the certified LCA from its December filing.

The initiating petition was filed with the Bureau on December 21, 2001. On February 7, 2002, petitioner was asked to provide the Bureau with an LCA certified by the Department of Labor for the dates of intended employment. The LCA supplied by the petitioner in response to that request indicated that it was certified by the Department of Labor on February 27, 2002, subsequent to the filing of the H-1B petition.

Section 101(a)(15)(H) of the Immigration and Nationality Act (INA) defines an H-1B nonimmigrant as:

. . . an alien who is coming temporarily to the United States to perform services . . . in a specialty occupation . . . and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary of Labor an application under section 212(a)(n)(1)

Title 8, Code of Federal Regulations, part 214.2(h)(4)(iii)(B)(1) provides that the petitioner shall submit with an H-1B petition "a certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary." The regulations further provide:

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.

8 C.F.R. § 214.2 (h)(4)(i)(B) (1).

Pursuant to 8 C.F.R. § 103.2(b)(12), "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. . . ." The LCA in this instance was certified by the Department of Labor on February 27, 2002, subsequent to the filing of the nonimmigrant visa petition. The petition must, accordingly, be denied because certification was not obtained prior to the filing of the H-1B petition. The petitioner's good faith effort to obtain certification prior to filing the petition does not relieve it of its obligation to satisfy applicable regulations.

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 and the appeal shall accordingly be dismissed.

ORDER: The appeal is dismissed.