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- U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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

File: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: JUN 03 2003
LN 01 262 52931

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)

ON BEHALF OF PETITIONER:

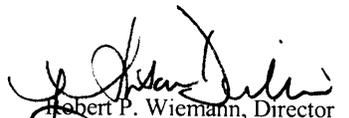
INSTRUCTIONS:

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 the Bureau of Citizenship and Immigration Services (Bureau) 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, Nebraska Service Center, and is now before the Administrative Appeals Office ("AAO") on appeal. The appeal will be dismissed.

The petitioner is a precision metal fabrication business with 80 employees and a gross annual income of \$8,750,435. It seeks to extend its authorization to employ the beneficiary as a management trainee for a period of three years. The director denied the petition because the petitioner had failed to submit a Form ETA 9035 Labor Condition Application ("LCA") that was certified by the Department of Labor ("DOL") prior to the filing date of the petition as required by the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(B). The director further noted that the uncertified LCA that was submitted did not reflect the specific dates of the beneficiary's intended employment as set forth on the I-129 petition.

On appeal, counsel asserts that the petition should be approved because the petitioner timely submitted a certified LCA prior to January 29, 2002, the deadline specified by the director in the request for evidence ("RFE").

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the DOL that it has filed an LCA in the occupational specialty in which the alien will be employed. 8 C.F.R. § 214.2(h)(4)(B)(1).

An employer of an alien employee in H-1B status must apply for extension of approval of the alien's stay in the United States by filing a new petition on Form I-129. The petition must be accompanied by either a new LCA or a photocopy of the prior certification from the DOL that the petitioner continues to have on file a labor condition application valid for the period of time requested for the occupation. 8 C.F.R. § 214.2(h)(15)(ii)(B).

If initial evidence or eligibility information is missing, the Bureau must request the missing initial evidence and may request additional evidence. In such cases, the petitioner must be given 12 weeks to respond to a request for evidence. Within this period, the petitioner may submit all the requested initial or additional evidence; submit some or none of the requested additional evidence and ask for a decision based on the record; or withdraw the petition. 8 C.F.R. § 103.2(b)(8).

All evidence submitted in response to a Bureau request for evidence must be submitted at one time. The submission of only some of the requested evidence will be considered a request for a decision based on the evidence of record. 8 C.F.R. § 103.2(B)(11).

The record shows that the Bureau approved the initial H-1B petition filed by the petitioner on behalf of the beneficiary for the period from November 12, 1998 to October 1, 2001. On September 10, 2001, the petitioner filed a new I-129 petition seeking to extend its authorization to employ the beneficiary in H-1B status. The petition was not accompanied by an LCA as required by the regulation at 8 C.F.R. § 214.2(h)(15)(ii)(B).

On November 6, 2001, the director issued an RFE instructing the petitioner to submit an LCA certified by the DOL along with evidence to show that the proffered position is a specialty occupation and the beneficiary qualifies to perform services in a specialty occupation.

On December 11, 2001, the petitioner mailed its response to the Nebraska Service Center. This material was received by the Nebraska Service Center on December 17, 2001. The petitioner's response included a copy of an uncertified LCA that had been signed by the petitioner on October 12, 2001, a date subsequent to September 10, 2001, the filing date of the petition.

In a separate mailing, the petitioner subsequently submitted an LCA that was certified by the DOL on December 12, 2001, a date subsequent to the filing date of the petition. The certified LCA was received by the Nebraska Service Center on January 14, 2002. It is noted that the dates of intended employment specified on the certified LCA, January 25, 2002 through January 25, 2005, do not correspond to the dates of intended employment set forth by the petitioner on the I-129 petition, October 1, 2001 to October 1, 2004.

The LCA submitted by the petitioner on January 14, 2002, cannot be accepted as properly filed. The petitioner has not timely submitted an LCA that was certified by the DOL prior to the filing date of the petition, nor has the petitioner provided evidence to show that it continues to have on file with the DOL an LCA valid for the period of time requested for the occupation. 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.