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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 N.W.
Washington, D.C. 20536



File: WAC 02 041 54952 Office: CALIFORNIA SERVICE CENTER Date: OCT 14 2003

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:



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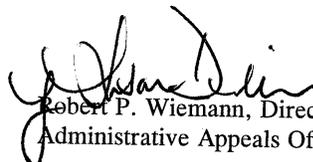
INSTRUCTIONS:

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 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 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 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, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation that develops automated fraud and abuse decision support systems in Medicaid. It has one employee and a gross annual income of \$1,289,754. The petitioner seeks to employ the beneficiary as a computer software programmer for a period of one year. The director denied the I-129 petition on the grounds that the proffered position failed to qualify as a specialty occupation, and that the petitioner failed to provide evidence of an approved Labor Condition Application (LCA).

On appeal, counsel submits a brief and additional information. Specifically, counsel submits a detailed job description, educational requirements and qualifications for the offered position, employment letters from past employers, a copy of the beneficiary's I-94 card, copies of two pay stubs for the beneficiary, the beneficiary's resume, and a copy of a certified LCA. Counsel asserts that the proffered position qualifies as a specialty occupation.

The record of proceeding establishes that the initial I-129 petition was returned to the petitioner for failure to file with the petition Form I-129W. The petition was then resubmitted and deemed filed on November 14, 2001. On January 31, 2002, the director requested from the petitioner additional evidence in support of the initiating petition. Specifically, the director asked that the petitioner provide: a detailed job description; evidence that the proffered position qualified as a specialty occupation; employment letters establishing that the beneficiary has training and/or experience in the specialty occupation; a certified LCA; copies of all prior I-797 approval notices; and a copy of the beneficiary's I-94. On February 12, 2002, counsel responded to the director's request for evidence indicating that he had previously submitted an I-129 petition with attachments, an I-129W, and the terms of a proposed employment agreement between the petitioner and the beneficiary. The petitioner did not further respond to the director's request for evidence and asked that a determination be expedited. The director's decision denying the I-129 petition was then issued on April 8, 2002. Counsel's brief in support of the petitioner's appeal addressed, for the first time, the director's request for additional evidence.

The regulations that govern the filing of petitions before Citizenship and Immigration Services (CIS) affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). The purpose of a Request for Evidence (RFE) is to elicit further information that clarifies whether eligibility for

the benefit sought has been established. 8 C.F.R. § 103.2(b)(8).

On January 31, 2002, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the Administrative Appeals Office will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

As previously noted, the I-129 petition was filed on November 14, 2001. The LCA supplied by the petitioner was certified by the Department of Labor on May 24, 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:

[A]n 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 at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) 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.

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 record does not contain an LCA that was certified by the Department of Labor. The petition must, accordingly, be denied because certification was not obtained prior to the filing of the H-1B petition. Qualification of the proffered position as a specialty occupation, and the beneficiary's qualifications to perform the duties associated with that position, shall not be addressed in this opinion as the petitioner failed to establish filing eligibility.

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.