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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, DC 20536

FILE: WAC-01-066-52929 OFFICE: CALIFORNIA SERVICE CENTER

DATE: OCT 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:

**PUBLIC COPY**

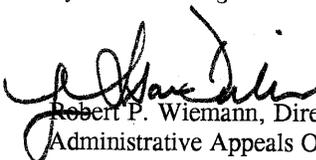
INSTRUCTIONS:

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 and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer software development company that employs 6000 employees worldwide, of which 1700 persons are employed in the United States, and has a gross annual income of \$156,000,000. It seeks to employ the beneficiary as a Programmer Analyst. The director denied the petition because the petitioner failed to submit proof that it filed a labor condition application with the U.S. Department of Labor (DOL) prior to the date it filed its nonimmigrant visa petition.

On appeal, counsel submits a letter and a copy of a labor condition application signed by the petitioner on December 1, 2000. Counsel states, in part, that Citizenship and Immigration Services (CIS) erred in denying the petition because: (1) the labor condition application was filed prior to the nonimmigrant visa petition's filing but was not certified and returned to the petitioner; (2) CIS has a policy of accepting uncertified labor condition applications because of the DOL's delay; and (3) the director's request for evidence only sought a certified labor condition application.

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and 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.

Pursuant to section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The regulations at 8 C.F.R. § 214.2(h)(4)(i)(B)(1), which govern general requirements for nonimmigrant visa petitions involving a specialty occupation, states the following: "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 December 2000, the petitioner filed the nonimmigrant visa petition. In April 2001, the director requested from the petitioner evidence of filing a labor condition application with the U.S. Department of Labor (DOL).<sup>1</sup> In her request for evidence, the director stated, "the certification from the Secretary of Labor will be a copy of the original [labor condition application] filed by the petitioner with the DOL. The certification will include the signature stamp of DOL['s] certifying officer, validity dates, ETA case number and the filing date affixed to the form."

In April 2001, the petitioner submitted a labor condition application certified by the DOL on April 6, 2001. A date stamp on the front of the labor condition application indicates it was received by the DOL on March 12, 2001. The labor condition application indicates that the petitioner signed it on February 27, 2001. The director subsequently denied the nonimmigrant visa petition because the labor condition application was filed after the petitioner filed the nonimmigrant visa petition.

On appeal, counsel states that the petitioner:

did file a Labor Condition Application for the offered position with the Department of Labor on December 1, 2000. And, according to council's [sic] records, [the petitioner] submitted the uncertified [labor condition application] with its petition. As [CIS] is aware, it is [CIS's] policy to accept uncertified Labor Condition Applications with H-1B petitions. See Report of IS Teleconference, February 1, 2001.

Due to the Department of Labor's well-publicized inefficiencies in returning [labor condition applications], this [labor condition application] was never certified by the DOL and returned to [the petitioner]. [The petitioner] therefore had to file a new [labor condition application] with the DOL upon its receipt of [CIS's] request for additional evidence.

[CIS's] Request for Additional Evidence merely

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<sup>1</sup> Counsel's assertion that the director did not specifically request a certified labor condition application pre-dating the filing of the visa petition is without a basis in law. The regulatory provisions are clear concerning the timing requirement of filing the labor condition application with the DOL prior to filing the nonimmigrant visa petition.

requested that [the petitioner] submit a certified [labor condition application]. Since [the petitioner] never received the original [labor condition application] certified by the DOL, [the petitioner] filed a new [labor condition application] with the DOL. Upon its certification, [the petitioner] forwarded it to [CIS] with its April 27, 2001 letter.

Counsel submitted a document that he asserts is an original labor condition application signed on December 1, 2000. However, this copy of a labor condition application does not contain a date stamp or other receipt verification from the U.S. Department of Labor (DOL). The record contains no evidence of this labor condition application's transmission to the DOL by facsimile or mail or other mode of delivery. For example, the record does not contain a facsimile receipt, mail receipt, stamp receipt, or receipt notice from the DOL. There is no explanation provided for the purported return of the labor condition application to the petitioner without certification. If the DOL returned the labor condition application declining certification, then the labor condition application would contain evidence that the DOL had received and rejected it. There is no evidence in the record that proves that the petitioner filed a labor condition application with the DOL for the nonimmigrant visa petition prior to the nonimmigrant visa petition's filing date, if at all. Thus, the petitioner has failed to establish that it filed a labor condition application with the U.S. Department of Labor (DOL) prior to its filing the nonimmigrant visa petition.<sup>2</sup>

Counsel made assertions on behalf of the petitioner concerning the filing date of the labor condition application. However, counsel's assertions do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1998); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record does not contain a statement by the petitioner concerning the filing date of the labor condition application. Even if the record did contain such a statement, however, simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Beyond the decision of the director, the AAO notes that the petitioner's proposed employment location would be at a client's site. Under *Defensor v. Meissner*, 201 F.3d 384 (5<sup>th</sup> Cir. 2000),

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<sup>2</sup> Counsel's statement concerning CIS's policy to accept uncertified labor condition applications is without supporting documentation. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1998); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

the petitioner must establish that the work to be performed by the beneficiary at the client's site meets the definition of a specialty occupation. To date, there is no evidence in the record from the petitioner's client detailing the beneficiary's proposed job duties. Without such evidence, the petitioner has failed to establish that the proffered position where the work will be performed meets the definition of a specialty occupation.

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. The petition is denied.