

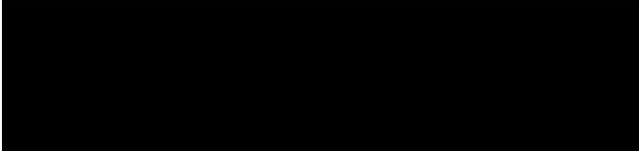
PUBLIC COPY

**identifying data deleted to
prevent disclosure of
warranted
invasion of personal privacy**

12

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

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



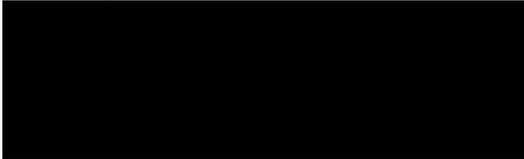
001 23 2005

File: WAC 01 045 52068 Office: CALIFORNIA SERVICE CENTER Date:

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 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 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 computer consulting company. It has 140 employees and a gross annual income of \$2,500,000. The petitioner seeks to employ the beneficiary as a programmer analyst for a period of three years. The director denied the I-129 petition on the grounds that the petitioner did not obtain an approved labor condition application (LCA), or submit evidence of filing a labor condition application before filing the I-129 petition.

On appeal, counsel submits a brief. Counsel asserts, and the record indicates, that an H-1B petition was filed on November 22, 2000, on behalf of the beneficiary, Gopinath Kannabiran. Submitted with that petition was an approved LCA for five H-1B nonimmigrants. On February 20, 2001, the director requested additional evidence from the petitioner. Specifically, the director requested a detailed list of all beneficiary file numbers approved under the aforementioned LCA. Counsel states that on January 19, 2001, the Department of Labor issued new regulations for H-1B dependent employers requiring employers to make attestations not previously included on LCA applications. As a result, the petitioner submitted a new LCA dated April 2, 2001, and did not comply with the director's request for a list of all beneficiary file numbers approved under the LCA submitted with the I-129 petition. Counsel asserts that the submission of the LCA dated April 2, 2001, was a lawful submission required by applicable regulation and that the I-129 petition cannot be denied for failure to respond to the director's request for evidence.

As previously noted, the I-129 petition was filed on November 22, 2000. The LCA supplied by the petitioner was certified by the Department of Labor on April 2, 2001, 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.

On appeal, counsel states that Citizenship and Immigration Services (CIS) should accept the LCA that the Department of Labor (DOL) approved on April 2, 2001 because it conforms to new DOL requirements that became effective in January 2001. The Administrative Appeals Office notes, however, that the petitioner must meet CIS regulations concerning the filing and certification of LCAs. 8 C.F.R. § 214.2 (h)(4)(iii)(B)(1).

The petitioner was put on notice of required evidence. The director asked specifically for information about the beneficiaries who had already used the LCA, valid from October 18, 2000 through October 17, 2003, that was filed with the initial I-129 petition. The petitioner failed to submit the requested evidence; instead, the petitioner submitted an LCA that was certified subsequent to the filing of the petition. The record still does not contain any evidence that the LCA filed initially with the I-129 petition was valid for the purpose of classifying the beneficiary as a nonimmigrant worker. 8 C.F.R. § 103.2 (b) (12). Therefore, the only LCA that CIS can consider valid for the purpose of this petition is the LCA that the DOL certified on April 2, 2001, a date subsequent to the filing of the petition.

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 April 2, 2001, 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 burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has the burden of establishing filing eligibility at the time of filing the I-129 petition. The petitioner's failure to identify all beneficiaries approved under the original LCA submitted with the I-129 petition makes it impossible to determine whether the beneficiary was covered by a certified LCA when the I-129 petition was filed. The petitioner has, therefore, failed to sustain its burden of proof and the appeal shall accordingly be dismissed.

ORDER: The appeal is dismissed.