U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a public school that seeks to employ the beneficiary as an English as a second language teacher. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to 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).

The director denied the petition because the petitioner failed to submit a timely certified labor condition application (LCA).

On appeal, the petitioner submits a certified LCA, along with other evidence, and counsel and the petitioner request that Citizenship and Immigration Services (CIS) accept the certified LCA.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), defines the term "specialty occupation" as an occupation that requires:

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) 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 at 8 C.F.R. § 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. Evidence that the alien qualifies to perform services in the specialty occupation.

On June 5, 2003, the director denied the petition, finding that the petitioner failed to provide a certified labor condition application. Specifically, the director stated that in response to its request for a certified labor condition application, the petitioner submitted a copy of the "Foreign Labor Certification Application" instead of a certified LCA. In the absence of the requested document, the director denied the petition.

On appeal, counsel and the petitioner request that CIS accept the certified LCA. Counsel claims that the petition should be approved because CIS misinformed the petitioner about the required documents for filing an H-1B petition, and counsel submits an affidavit from the petitioner to substantiate this claim.

The record in this proceeding contains: (1) a labor condition application that the Department of Labor certified on June 18, 2003; (2) the I-129 petition that CIS received on August 23, 2002; (3) two affidavits; and (4) printed computer screens from an online Form ETA 9035E, an application that is undated and lacks proof of certification.

The petitioner's I-129 petition was received by CIS on August 23, 2002, and the petitioner seeks to submit an LCA with a June 18, 2003 certification date. CIS regulations 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). Furthermore, regulations at 8 C.F.R. § 214.2(h)(4)(iii)(B)(*1*) provide that the petitioner shall submit with the H-1B petition a certification from the Secretary of Labor that it has filed an LCA. Based on the regulations, it is incumbent upon the petitioner to file the proper documents in order to establish eligibility for a benefit. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at the future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The evidence in the record shows this has not occurred; accordingly, the petition will be denied.

The AAO wishes to note that counsel's claim, that the petition should be approved because CIS misinformed the petitioner about the required documents for filing an H-1B petition, is without merit. The regulations provide ample guidance about filing an H-1B petition. Furthermore, it is the petitioner's responsibility to establish eligibility for the benefit it is seeking; it is not CIS's responsibility to establish eligibility for the petitioner.

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.