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U.S. Citizenship and Immigration Services

D2

[redacted]

FILE: WAC 01 136 56579 Office: CALIFORNIA SERVICE CENTER Date JUL 30 2004

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.

Marin Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director 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 business solutions provider that seeks to employ the beneficiary as a marketing and public relations manager. The petitioner 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 did not submit a certified labor condition application (LCA) for the proffered position.

On appeal, counsel states, "Records show that a certified LCA was on file," and submits a copy of the LCA.

The petitioner submitted an LCA with the initial petition filed March 15, 2001, but it had not been certified by the Department of Labor. On May 17, 2001, the director issued a request for evidence, asking for several pieces of information, including evidence of a certified LCA. In response, on July 27, 2001, counsel stated that it had not yet received a certified LCA from the Department of Labor, but would forward it as soon as it became available. The director issued her decision on June 27, 2002 denying the petition because of the missing LCA. On appeal, filed July 26, 2002, counsel submits a certified LCA dated November 12, 2001, almost eight months after the petition was filed.

The regulations state, "[b]efore 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." 8 C.F.R. § 214.2(h)(i)(4)(B)(*1*).

The petitioner obtained certification for the proffered position more than eight months after the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The regulations require that the petition be denied due to the missing labor condition application. "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." 8 C.F.R. § 103.2(b)(12).

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.