



U.S. Citizenship  
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Services

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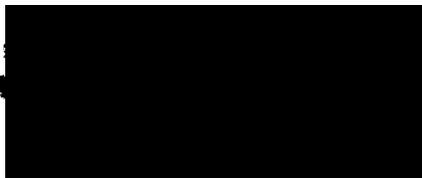


FILE: WAC 04 069 50607 Office: CALIFORNIA SERVICE CENTER Date: JUN 10 2004

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(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 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

Administrative Appeals Office  
U.S. Citizenship and Immigration Services  
Department of Homeland Security

**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 limited partnership which is mainly engaged in real estate investment, development, leasing, and management. In order to employ the beneficiary as a financial analyst, 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, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because he determined that the petitioner had not obtained the requisite certified ETA Form 9035 labor condition application (hereinafter, LCA) before filing the present petition.

The director based his decision on 8 C.F.R. § 214.2(h)(4)(i)(B)(I), which states:

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 occupation specialty in which the alien(s) will be employed.

Although not cited by the director, the AAO also notes that the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(I) expressly includes a certified LCA among the documents that a petitioner “shall submit” with an H-1B petition.

On January 12, 2004, the petitioner filed the Form I-129. The supporting documentation included a copy of an LCA that the Department of Labor (DOL) appears to have certified on January 9, 2004. The certified LCA filed with the Form I-129 is a standard form consisting of three pages; however, the document that counsel filed with the Form I-129 has a case number only on the last page and contains a discrepancy in the information about the proposed period of employment: part C of the LCA and the Form I-129 designated the employment period as July 16, 2004 to July 15, 2007; but the period certified by the DOL official, on page 3, was January 9, 2004 through December 31, 2006.

According to the January 13, 2004 e-mail message contained within the record, counsel contacted the service center after filing the petition and advised that he had not received the third page of the LCA directly from the DOL. (It should be noted that this is the only page that reflects DOL certification). Counsel admitted that he had been provided this third page by an attorney from another state who found it among papers that he had received from the DOL on matters not related to this proceeding. Counsel for the petitioner requested that the petition be returned to his office so that he could substitute a new and correct LCA certification. On appeal, counsel advised “[o]n January 14, 2004, an examiner of CSC [the service center] called the undersigned and advised that the CSC would not allow withdrawal after a petition was filed.” However, according to the January 13, 2004 e-mail contained within the record, counsel clearly requested that the “H-1B petition be returned to my office,” not withdrawn. Another e-mail from counsel, dated January 14, 2004, thanks a premium processing examiner for calling counsel in response to the earlier e-mail, and requests that the service center issue a request for additional evidence (RFE) to allow counsel to “submit a correct LCA.” There is no evidence that counsel or the petitioner ever requested that the petition actually be withdrawn.

On January 21, 2004, the service center issued an RFE, of which the pertinent part states:

**Labor Condition Application:** All Form I-129 petitions for “specialty occupations” require evidence of filing a Labor Condition Application (LCA), Form ETA 9035 from the United States Department of Labor (DOL). *The certification from the Secretary of Labor will be a copy of the original ETA 9035 filed by the petitioner with the DOL.* (Emphasis added). 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.

The [LCA] the petitioner has provided appears to be for two different positions. The validity period on page 1 of the Form ETA 9035 differs from the validity period listed on page 3.

To assure that there has [sic] been no alterations to the [LCA] and that it is truly valid, please have the DOL provide you with a copy that lists the ETA Case Number on the bottom of each page to ensure the authenticity of the form.

In response to this portion of the RFE, counsel obtained and submitted a new certified LCA with the correct information about the proposed employment period, but failed to submit the requested “original ETA 9035 filed by the petitioner with the DOL.” The new LCA was certified by the DOL on January 22, 2004, ten days after the filing of the Form I-129.

The petition was properly denied because the petitioner did not comply with the requirements at 8 C.F.R. §§ 214.2(h)(4)(i)(B)(I) and (h)(4)(iii)(B)(I) for an LCA certified by the DOL for the period for which the petitioner sought to employ the beneficiary. The initial certified LCA was invalid on its face because it was incomplete (by counsel’s admission, only one of the three LCA pages was issued by the DOL) and because the employment period certified by the DOL did not reflect the proposed period of employment on the Form I-129 or the period requested in Part C of the LCA. For this reason the certified LCA was not acceptable for petition filing purposes. The second certified LCA filed by counsel does not alter the regulatory consequence of this defect.

Counsel states on appeal that he interpreted the RFE as if it were indicating that the problem created by the first certified LCA would be rectified by a second LCA certified by the DOL for the employment period reflected on the Form I-129. However, the service center clearly noted that the certified LCA must be “a copy of the original ETA 9035 filed by the petitioner with the DOL” rather than a newly certified LCA. The sole purpose of an RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established as of the time the petition was filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). An RFE is not a vehicle to allow for substituting, changing, or adding required information once a petition has been filed. In addition, 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).

Because the petitioner failed to obtain and submit a complete copy of the certified LCA that reflects the correct period of employment before filing the instant petition, the decision of the director was correct and will not be disturbed.

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.