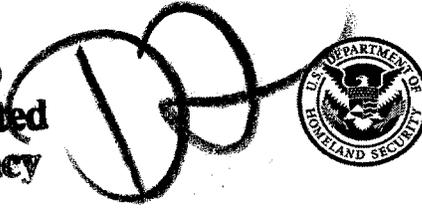


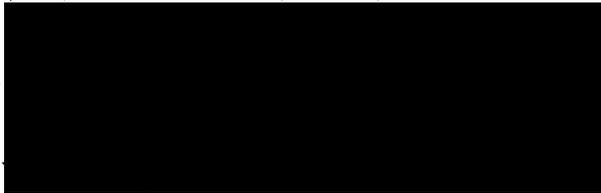
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20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

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invasion of personal privacy**



**U.S. Citizenship
and Immigration
Services**



FILE: SRC 02 231 55510 Office: TEXAS SERVICE CENTER Date: **MAR 03 2004**

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

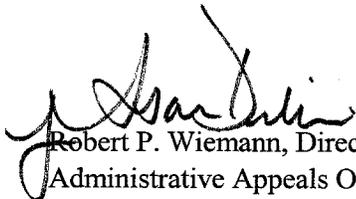
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 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 Florida corporation founded to plan and coordinate various aspects of day-care center business. The petitioner seeks to employ the beneficiary as a day care center director. 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 record of proceeding before the AAO includes: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's RFE response documents; (4) the director's denial letter; and (5) the Form I-290B and the petitioner's letter asserting the grounds of its appeal. The AAO reviewed the record in its entirety before issuing this decision.

The director's decision denying the petition cited two reasons for the denial: failure of the evidence to establish that the proffered position is a specialty occupation; and inadequacy of the petitioner's explanation as to discrepancies on the original Forms I-129 and ETA 9035E.

On appeal, the petitioner submits a Form I-290B, annotated with reasons for the appeal, and a two-page letter.

A brief outline of the administrative history is appropriate for an understanding of the facts upon which the AAO has determined that the appeal must be dismissed.

On July 25, 2002, the petitioner filed a Form I-129 (Petition for a Nonimmigrant Worker) and supporting documentation. The form identified the job title as "President" and, for a non-technical description of the position, stated "Director Day Care." The labor condition application (Form ETA 9035E) (hereinafter referred to as LCA) that accompanied the Form I-129 identified the job title as "Bachelor's of Education Degree." The supporting documents included a letter from the petitioner's president that described the proffered position as "Director Day Care (Education)," and listed five sets of responsibilities related to the administration of day care activities.

On August 8, 2002, the director issued a request for additional evidence (RFE); which, in material part, stated:

The ETA 9035 has the job title listed as bachelor[']s of education degree. The Form I-129 has the job listed as president. The person signing the Form I-129 is listed as president. Please explain these discrepancies and submit a new ETA 9035 certified by the Department of Labor with the correct job title for this case.

The petitioner responded to the RFE on August 20, 2002, by submitting a letter from its president and two newly executed I-129 and LCA forms. The letter stated that the job title is "Director Day Care Center" and, as an explanation for the discrepancies noted in the RFE, stated, "There was a typing error when filing the form."

The new Form I-129, which bears the same July 16, 2002 signature date as the I-129 that the petitioner had filed in this proceeding, changed the job position to "director day care center," to indicate the actual position

proposed for the beneficiary. This Form I-129 also changed the section for a non-technical description of the job to read, "See cover letter."

The new LCA, which also correctly identified the title of the proffered position as "director day care center," bears a Department of Labor (DOL) certification date of August 4, 2002, a date which is later than the July 25, 2002 filing date of the Form I-129 which initiated this proceeding.

On August 20, 2002, the director issued her decision denying the petition. The grounds for the denial are captured in this summation section of the decision:

The evidence submitted does not show the position offered to be a specialty occupation. The discrepancies in the original submission also have not been explained satisfactorily.

On appeal, the petitioner contends that the evidence of record has established that the proffered position is a specialty occupation within the meaning of the 8 C.F.R. § 214.2(h)(4)(iii)(A) criteria. The petitioner also asserts that, contrary to the director's view, the response to the RFE provided a satisfactory explanation of the discrepancies in the petition forms, namely, that a secretary had made clerical errors.

In short, the facts indicate that (a) the petitioner filed a Form I-129 and a LCA that materially misidentified the position in which the beneficiary of the H-1B visa classification would be employed, and (b) on appeal, the petitioner proceeds on the assumption that it has corrected its filing errors by submitting new forms with the correct information.

The petitioner in effect asserts that it has substituted the new I-129 and LCA for those filed with erroneous information. This is not the case. For reasons that shall be explained below, the forms submitted in response to the RFE neither replaced nor corrected the erroneous ones. Accordingly, because the petition remains to be for a position that is not the one in which the petitioner proposes to hire the beneficiary, the appeal must be dismissed and the petition denied.

The corrected Form I-129, which was submitted to the service center in response to an RFE, did not constitute a new petition. A petition is only accepted for processing by Citizenship and Information Services (CIS) when it has been date-stamped by CIS after the receipt of the required filing fee. *See* 8 C.F.R. §§ 103.2 (a)(1) and (7). Also, the second Form I-129 did not operate to correct the mistakes on the Form I-129 that had been actually filed. CIS regulations do not provide for correction of material errors on a petition once it has been filed. CIS regulations do allow for amendment of a petition, but only by the filing of a new petition, with fee. *See* 8 C.F.R. § 214.2(h)(2)(i)(E).

The new LCA does not affect the proceeding, because an LCA has value in the nonimmigrant visa petition process only when it submitted with a Form I-129 that has been filed with fee. Furthermore, the corrected LCA cannot be used to support the petition that has been duly filed in this proceeding. This is because an LCA submitted for a nonimmigrant visa petition must bear a DOL certification date that is no later than the date on which the Form I-129 is filed with proper fee. The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) 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.

The AAO will not address the substantive issue of whether or not the position for which the petitioner actually seeks to hire the beneficiary is a specialty occupation. That issue is not properly before the AAO.

Because the position identified in the Form I-129 that was filed in this proceeding is not actually the position in which the petitioner seeks to hire the beneficiary, the appeal must be dismissed and the petition must be denied. Accordingly, the AAO shall not disturb the director's denial of the petition.

Of course, the petitioner may, if it so desires and totally at its own discretion, file a new petition that correctly identifies the proffered position and otherwise accords with CIS regulations for a nonimmigrant visa petition. The AAO shall not at this time opine on the merits of any petition that the petitioner may choose to file.

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.