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U.S. Citizenship
and Immigration
Services



FILE: WAC 02 169 54088 Office: CALIFORNIA SERVICE CENTER Date: **MAR 15 2004**

IN RE: Petitioner: 
Beneficiary:

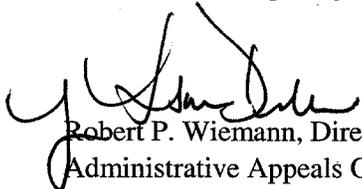
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H) (i) (b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i) (b)

ON BEHALF OF PETITIONER:



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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the matter will be remanded for further action.

The petitioner is a California independent college that seeks to employ the beneficiary as a professor of Armenian music. 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).

In his denial, the director stated that the Labor Condition Application (LCA) was certified after the original I-129 petition was filed. On appeal, counsel states that the LCA was certified on the same day that the petition was filed, and submits further documentation to support his assertion.

With regard to the submission of a certified Department of Labor's Labor Condition Application (LCA), 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 occupational specialty in which the alien(s) will be employed.

With regard to the receipt of petitions at by Citizenship and Immigration Services (CIS), 8 C.F.R. § 103.2(a)(7)(i) states the following:

General. An application or petition received in a Service office shall be stamped to show the time and date of actual receipt, and unless otherwise specified in part 204 or part 245 or part 245a of this chapter, shall be regarded as properly filed when so stamped.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for further evidence, dated September 13, 2002; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The issue in this proceeding is whether the petitioner obtained a certification from the Department of Labor that it had filed a labor condition application prior to filing the instant petition.

The record indicates that the original I-129 petition was filed with an uncertified LCA. The date stamp on the I-129 petition is April 15, 2002, while the barcode on the same I-129 petition is dated April 24, 2002. The petition and Form G-28 are signed by both the petitioner and counsel and are dated April 22, 2002. The letter of support submitted by the petitioner is dated April 17, 2002, while the cover letter signed by counsel is dated April 22, 2002.

On September 13, 2002, the director requested further evidence as to whether the beneficiary was qualified to perform the duties of the proffered position, which the director identified as a budget analyst. In addition, the director asked for clarification as to the Philippine university in which the beneficiary had studied. The barcode on the I-797, Notice of Action, is dated April 24, 2002. In response, counsel submitted the certified LCA dated April 24, 2002, and called the director's attention to the discrepancy in the identification of the

proffered position and of the two universities. On November 15, 2002, the director denied the petition because the date of the certification of the LCA was April 24, 2002, whereas the petition was filed on April 15, 2002.

On appeal, counsel states that the I-129 petition was filed on April 24, 2002, and not on April 15, 2002. Counsel submits a letter from Fedex that indicates that the service center received a package from counsel in reference to the beneficiary on April 24, 2002. Counsel also submits a copy of the Wells Fargo check that accompanied the petition. This check is dated April 23, 2002.

Upon review of the record, it should be noted that 8 C.F.R. § 103.2(a)(7)(i) clearly establishes that the date stamped on the I-129 petition should be considered the day of receipt of the petition at the service center. Nevertheless, in the instant petition, the preponderance of documents in the record, either submitted with the original petition or on appeal, that are dated from seven to eight days subsequent to the April 15, 2002 date, raise some doubt as to the accuracy of the date stamp. It is also not clear from the contents of the request for further evidence whether the instant petition was processed correctly in subsequent stages of its adjudication. An equitable resolution of this matter appears to necessitate acknowledging the date of filing as April 24, 2002, and adjudicating the H-1B petition on its merits.

The director will need to determine whether the proffered position is a specialty occupation and whether the beneficiary qualifies to perform services in the specialty occupation. Accordingly, the matter will be remanded to make such a determination and to review all relevant issues. The director may request additional evidence that is deemed necessary. The petitioner may also provide additional documentation within a reasonable period to be determined by the director. Upon receipt of all evidence and representations, the director shall enter a new decision.

ORDER: The decision of the director is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision which, if adverse to the petitioner, is to be certified to the AAO for review.