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U.S. Citizenship  
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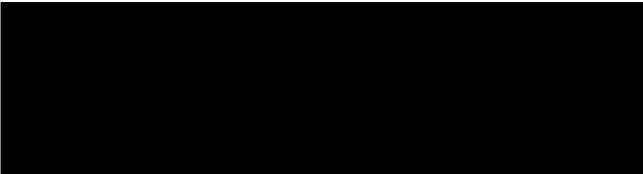
FILE: WAC 04 042 51967 Office: CALIFORNIA SERVICE CENTER Date: **AUG 01 2005**

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*

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 engaged in providing software development and seeks to employ the beneficiary as a software engineer. 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 did not have an approved labor certification for the proffered position at the time of filing. On appeal, counsel submits a letter and additional documentation.

The AAO will discuss the director's determination that the petitioner did not have an approved labor certification for the proffered position at the time of filing.

When a petition is filed under this section the petitioner must provide evidence of an approved Labor Certification Application for H-1B Nonimmigrant (ETA Form 9035). Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B) petitions involving a specialty occupation require the following:

- (1) 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.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's denial letter; and (3) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

On or about November 28, 2003, the petitioner submitted the instant H-1B petition. The petitioner included a labor condition application (LCA) that was not approved and the petitioner indicated that it was pending. The LCA was not certified and did not contain the starting and ending validity dates. On May 10, 2004, the director issued his decision denying the petition. The director noted that the petitioner had not submitted a valid LCA certified prior to the submission of the petition. The director determined that the petitioner did not have an approved labor certification for the proffered position at the time of filing.

On appeal, counsel contends that the petitioner mailed an approved labor certification on January 6, 2004 and submitted a postal receipt.

Upon review of the record, the petitioner has not established that it had an approved labor condition application for the proffered position at the time the I-129 H-1B petition was filed. The petitioner admits the labor condition application was certified after the instant petition was filed. The approved labor condition application was not submitted with the petition at the time of filing. 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). Accordingly, the AAO shall not disturb the director's denial of the petition on this ground.

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.