

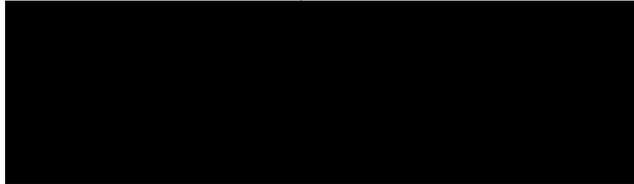


U.S. Citizenship
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FILE: SRC 04 133 50945 Office: TEXAS SERVICE CENTER Date: DEC 16 2005

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:

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

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 a design group that seeks to continue to employ the beneficiary as an assistance project coordinator. The petitioner, therefore, endeavors to extend the classification of 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 on the basis that the petitioner had failed to submit a certified labor condition application (LCA).

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

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 instant petition was received at the service center on April 9, 2004, but it did not contain a certified LCA. As such, the director requested a certified LCA in a July 13, 2004 request for evidence. In response, the petitioner submitted an uncertified LCA. The director therefore denied the petition.

On appeal, the petitioner states that there is “confusion” regarding the requirements to file for H-1B extensions and that Citizenship and Immigration Services (CIS) press releases imply that a certified LCA is not necessary. The petitioner states that in spite of this confusion, the “applicant submitted the [r]equested documents” before the deadline of the request for evidence.

However, the AAO notes that a certified LCA has still not been submitted.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition “[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary.” Thus, in order for a petition to be approvable, the LCA must have been certified before the H-1B petition was filed. The submission of a certified LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The regulation at 8 C.F.R. § 214.2(h)(15)(ii)(B) indicates that: “[t]he request for extension must be accompanied by either a new or a photocopy of the prior certification from the Department of Labor that the petitioner continues to have on file a labor condition application valid for the period of time requested for the occupation.” The petitioner did not include a certified LCA with its filing for petition extension.

On appeal, the petitioner states that it has acted in good faith, and that it would be unfair to deny the petition. However, the regulations contain no provision for discretionary relief from the LCA requirements.

The petitioner’s failure to procure a certified LCA prior to filing the H-1B petition precludes its approval, and the AAO will not disturb the director’s denial of the petition.

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.