



U.S. Citizenship  
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*Dr*

FILE: WAC 04 025 50056 Office: CALIFORNIA SERVICE CENTER Date: **DEC 23 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 systems contractor that seeks to employ the beneficiary as an office manager. 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, finding the petitioner failed to furnish a certified labor condition application (LCA). On appeal, the petitioner states that it submitted a certified LCA along with the H-1B petition and in response to the request for additional evidence.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. Evidence that the alien qualifies to perform services in the specialty occupation.

The record in this proceeding contains: (1) an LCA that the Department of Labor (DOL) certified on January 1, 2001; (2) the I-129 petition and supporting documentation that CIS received on October 20, 2003 and returned to the petitioner; (3) the October 22, 2003 letter from the CIS concerning the return of the H-1B petition; (4) the resubmitted I-129 petition and supporting documentation that CIS received on November 4, 2003; (5) the director's request for additional evidence; (6) the petitioner's response to the director's request; (7) the director's denial letter; (8) Form I-290B; and (9) a letter dated September 20, 2004. The AAO reviewed the record in its entirety before issuing its decision.

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)(4)(iii)(B)(1) provides that the petitioner shall submit with the H-1B petition a certification from the Secretary of Labor that it has filed an LCA. Based on the regulations, it is incumbent upon the petitioner to file the proper documents in

order to establish eligibility for a benefit. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at the future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The record reveals that the submitted LCA has a January 4, 2001 certification date and is valid from January 4, 2001 through January 1, 2004. The validity date of the beneficiary's previously approved H-1B status is shown on the submitted approval notice (receipt number WAC-01-087-52472) as from April 25, 2001 to January 1, 2004. The H-1B petition does not indicate the beneficiary's starting date of employment; it does indicate that the petitioner seeks to employ the beneficiary to January 2007. Based on this evidence, the submitted LCA does not cover the requested period of employment as shown on the H-1B petition (which is to January 2007) because the LCA is valid only to January 1, 2004. Thus, the petitioner has not complied with the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) or 8 C.F.R. § 214.2(h)(15)(ii)(B)(1), which requires that when a petitioner seeks an extension, the 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 certification application valid for the period of time requested by the occupation. The LCA does not cover the duration of the alien's authorized period of stay. The petitioner also fails to comply with the CIS regulation set forth at 8 C.F.R. § 103.2(b)(12), as the petitioner had not established eligibility as of the time of filing the petition. For this reason, the petition will be denied.

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.