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FILE: WAC 03 104 50573 Office: CALIFORNIA SERVICE CENTER Date: FEB 08 2005

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

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(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 and the Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal. The matter is presently before the AAO on a motion to reconsider the summary dismissal. The motion is granted, and the prior decision of the AAO is withdrawn. The appeal will be dismissed, and the petition will be denied.

The petitioner is an engineer/architecture firm. In order to employ the beneficiary as an architectural engineer, 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, 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition because the Labor Condition Application (Form ETA 9035) (LCA) provided by the petitioner had not yet been approved by the Department of Labor.

The AAO summarily dismissed the subsequent appeal on the basis that neither counsel nor the petitioner submitted any brief or additional evidence to specify how the director had made any erroneous conclusion of law or statement of fact, despite counsel's assertion on the Form I-290B (Notice of Appeal) that such matters would be sent within 30 days. The evidence submitted on motion overcomes the basis of the AAO's summary dismissal for failure to submit a brief or additional evidence: it appears that such matters had been filed, but had not been included in the record at the time of the AAO's decision. Therefore, the previous AAO decision summarily dismissing the appeal is withdrawn.

However, the appeal must be dismissed. The substance of the appeal is that the petitioner filed a certified LCA after filing the petition. The certification date on the LCA provided on appeal (November 7, 2003) is later than the date the Form I-129 (Petition for a Nonimmigrant Worker) was filed (February 13, 2003). The postdated LCA violates the relevant Citizenship and Immigration Service (CIS) regulations and precludes approval of the petition.

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 occupational specialty in which the alien(s) will be employed.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that with the petition an H-1B petitioner shall submit "[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary."

Counsel has failed to demonstrate that the petitioner filed and obtained a certified LCA prior to filing the petition. Thus, under the cited regulations, the petition must be denied.

The burden of proof in this proceeding 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.