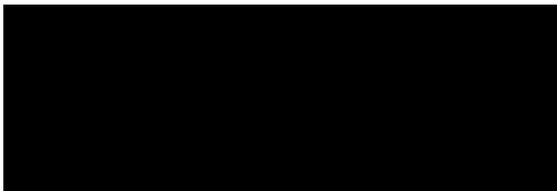


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*DZ*

FILE: WAC 03 031 55615 Office: CALIFORNIA SERVICE CENTER Date: NOV 02 2005

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

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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner was originally represented by counsel, Dorothea P. Kraeger. On June 2, 2005, however, Ms. Kraeger was suspended from practice before U.S. Citizenship and Immigration Services pursuant to the regulation at 8 C.F.R. § 292.3(a)(1)(ii). Accordingly, the petitioner is self-represented in this matter.

The petitioner is a charter school. It seeks to employ the beneficiary as a science teacher and soccer coach and to classify him 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 service center director initially denied the petition on the ground of abandonment, in accordance with the regulation at 8 C.F.R. § 103.2(b)(13). The petitioner filed a motion to reopen or reconsider, which was granted by the director. A new decision was issued denying the petition on the ground that the petitioner did not have an approved Labor Condition Application (Form ETA 9035) for the proffered position at the time its Petition for Nonimmigrant Worker (Form I-129) was filed, as required by the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1). The regulation reads as follows:

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 shows that the petitioner filed its Form I-129 petition on November 7, 2002, requesting H-1B classification for the beneficiary in the subject teaching position for the period of September 1, 2002 through September 1, 2005. The petition was not accompanied by a certified Labor Condition Application (LCA). On August 19, 2003, the director sent a request for evidence (RFE) to the petitioner which requested the submission, among other things, of a certified LCA. Counsel asserts that the petitioner responded to the RFE with additional documentation in October 2003, but the photocopied materials subsequently furnished to the service center as evidence of a timely response did not include any evidence that a certified LCA was submitted in October 2003. After the director's initial decision on May 11, 2004, dismissing the petition on the ground of abandonment, counsel filed an appeal and submitted a certified LCA, which bore an approval date of May 18, 2004 and a validity period of May 18, 2004 through September 1, 2005. Thus, the certification of the LCA postdated the filing of the H-1B petition by a year and a half. Since the petitioner did not obtain the requisite labor certification "[b]efore filing a petition for H-1B classification," as specified in 8 C.F.R. § 214.2(h)(4)(i)(B)(1), the director correctly denied the petition in his second decision, issued on June 25, 2004. CIS regulations require a petitioner to establish eligibility for the benefit at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12).

On appeal counsel asserts that the legacy INS allowed deviations from the regulatory requirements with respect to LCAs, and appears to argue that an LCA need not be approved by the Department of Labor prior to the filing of an H-1B petition. Counsel cites no legal authority for this proposition. The regulation at 8 C.F.R. § 214.2(h)(2)(E) clearly states that a petitioner must obtain certification of its LCA before filing an H-1B petition. Counsel also asserts that the RFE was erroneously sent to the petitioner,

rather than counsel, thereby delaying counsel's attention to the director's evidentiary requests. This complaint is not relevant to the issue on appeal, as the record demonstrates that the petitioner did not have a certified LCA to submit to the service center in response to the RFE.

For the reasons discussed above, the petitioner has failed to establish the beneficiary's eligibility for classification as a nonimmigrant worker employed in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Act.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

**ORDER:** The appeal is dismissed. The petition is denied.