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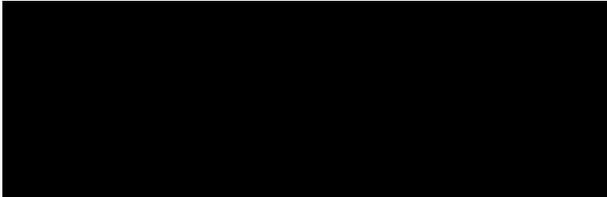
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U.S. Citizenship
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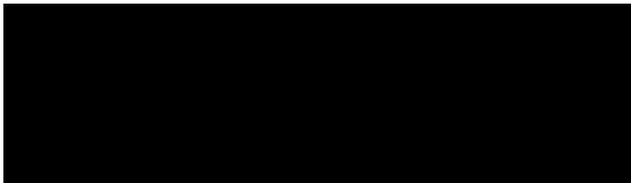
FILE: WAC 03 240 50107 Office: CALIFORNIA SERVICE CENTER Date: NOV 21 2005

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, Director
Administrative Appeals Office

DISCUSSION: The service center director 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 school that seeks to employ the beneficiary as a teacher. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 timely submit a certified labor condition application (LCA). On appeal, counsel submits a statement and submits a “previously certified and not in use” labor condition application, which covers the period from August 10, 2001 until August 4, 2004.

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 petitioner has provided two certified labor condition applications, one that was certified from August 10, 2001 until August 4, 2004, and another that was certified from May 19, 2004 until August 25, 2006. It is noted that the requested period of stay on the instant petition is from August 25, 2003 until August 25, 2006. The labor condition application that is valid until August 25, 2006 was certified on May 19, 2004, a date subsequent to August 20, 2003, the filing date of the visa petition.

On appeal, counsel indicates that the previously approved LCA is no longer in use by the school, and may be used by the beneficiary. Counsel states: “This Labor Condition Application was not in use during the period 8/25/03 to 5/19/04 since the teacher for who [sic] it was originally filed was no longer in valid H-1B status.” The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(4) states:

When petitions have been approved for the total number of workers specified in the labor condition application, substitution of aliens against previously approved openings shall not be made. A new labor condition application shall be required.

Under this regulation, the petitioner may not substitute the beneficiary under an LCA previously utilized for another H-1B approved petition. Thus, the petitioner did not have a valid LCA pending at the time the petition was filed on behalf of this beneficiary. 8 C.F.R. § 103.2(b)(12) requires that evidence must establish eligibility as of the time of filing. As such, the petitioner has not overcome this portion of the director's objections. For this reason, the petition may not be approved.

On appeal, the petitioner fails to specify how the director made any erroneous conclusion of law or statement of fact in his finding that the proffered position is not a specialty occupation. As such, the petitioner has not overcome this portion of the director's objections. For this additional reason, the petition may not be approved. Accordingly, the AAO shall not disturb the director's denial of the petition.

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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.