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**U.S. Citizenship
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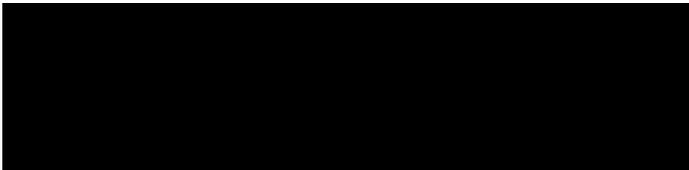
FILE: SRC 03 257 51792 Office: TEXAS SERVICE CENTER Date: **SEP 02 2005**

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

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 private/church school and seeks to employ the beneficiary as a co-teacher in a multi-level classroom. It endeavors to classify her 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 because a certified labor condition application (LCA) was not obtained prior to the filing of the Form I-129 petition. On appeal, the petitioner states that the LCA was submitted to the certifying agency (U.S. Department of Labor) prior to the filing of the Form I-129 petition, but was not certified, through no fault of the petitioner, until after the petition was filed.

The issue to be discussed in this proceeding is whether a certified LCA was obtained prior to the filing of the I-129 petition.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 101(a)(15)(H) of the Act defines an H-1B nonimmigrant as:

[A]n alien who is coming temporarily to the United States to perform services . . . in a specialty occupation . . . and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary of Labor an application under section 1182(n)(1)

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

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.

8 C.F.R. § 214.2(h)(4)(i)(B)(1).

The present petition is a petition for continuation of previously approved employment. The initial petition was approved by Citizenship and Immigration Services (CIS) and valid from October 1, 2000 until October 1, 2003. The record does not contain a copy of the LCA supporting those approval dates. The petition for continuation of previously approved employment (the petition now before the AAO) was filed on September 24, 2003. The LCA filed in support of the continuation petition was certified on January 26, 2004, and valid from that date until October 1, 2006.

The regulation at 8 C.F.R. § 214.2(h)(15)(ii)(B) provides in part that an H-1B extension of stay may be authorized for a period of up to three years for a beneficiary of an H-1B petition in a specialty occupation. The request for extension must be accompanied by either a new or a photocopy of the prior Department of Labor certification that the petitioner continues to have on file an LCA valid for the period of time requested for the occupation. Thus,

the petition must be supported by a certified LCA covering employment from the date of the petition, September 24, 2003, until October 1, 2006. The LCA submitted by the petitioner to support the request for continuation of previously approved employment was certified on January 26, 2004, and covers employment from January 26, 2004 until October 1, 2006.

Pursuant to 8 C.F.R. § 103.2(b)(12), “an application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed. . . .” As previously stated, the present Form I-129 petition was filed September 24, 2003. The LCA submitted in support of the petition was certified subsequent to the filing of the petition. The petition must, accordingly, be denied because certification was not obtained prior to the filing 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 failed to sustain that burden.

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