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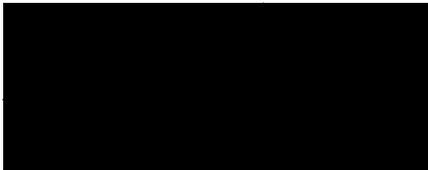
FILE: WAC 05 045 50646 Office: CALIFORNIA SERVICE CENTER Date: **AUG 02 2006**

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 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 provides background screening services. It seeks to employ the beneficiary as a systems analyst, and endeavors 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 director denied the petition, finding the petitioner failed to furnish a certified labor condition application (LCA). Counsel submits a timely appeal.

The record in this proceeding contains: (1) the uncertified LCA with the page link number of 045997; (2) the Form I-129 petition and supporting documentation that CIS received on December 3, 2004; (3) the LCA that was certified by the Department of Labor (DOL) on January 19, 2005; (4) the director's denial letter; and (5) the Form I-290B and counsel's letter. The AAO reviewed the record in its entirety before issuing its decision.

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.

On appeal, counsel contends that the LCA had been filed before the filing of the H-1B petition; however, when the DOL changed its LCA form the petitioner received a request for evidence from the director that sought the newest version of the LCA form. Counsel asserts that as CIS allows for filing the LCA and submitting the I-129 petition with proof of filing the LCA, then the petitioner should be allowed to file a new LCA in response to the request for evidence.

The AAO finds counsel's statement is not persuasive in light of the regulations relating to the H-1B petition and the LCA. 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 LCA submitted with the Form I-129 petition is uncertified. The LCA submitted in response to the request for evidence was certified by the DOL subsequent to the December 3, 2004 filing date of the H-1B petition. Thus, based on the evidence of record, the petitioner has not complied with the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) and 8 C.F.R. § 103.2(b)(12). 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.