



U.S. Citizenship
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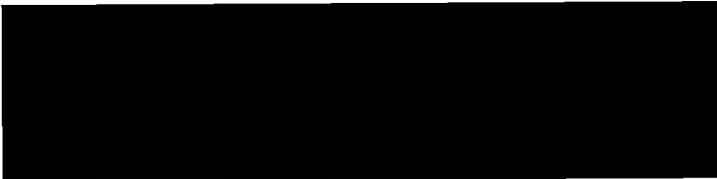
FILE: WAC 01 062 54630 Office: CALIFORNIA SERVICE CENTER Date: **APR 12 2006**

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, 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 an IT consulting firm. It seeks to employ the beneficiary as a programmer/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 because a certified labor condition application (LCA) was not obtained prior to the filing of the Form I-129 petition. On appeal, the petitioner submits a new LCA.

The issue to be discussed in this proceeding is whether a certified LCA was obtained prior to the filing of the Form 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 212(a)(n)(1)

Title 8, Code of Federal Regulations, part 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).

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. . . .” The Form I-129 petition was filed December 14, 2000, accompanied by an uncertified Labor Condition Application (LCA). On April 30, 2001, the director issued a request for evidence requesting a properly certified LCA. In response to that request the petitioner submitted an LCA which was signed by the Department of Labor’s regional administrator on December 29, 2000. The validity dates for the LCA were left blank. The petition was denied. On appeal, counsel submits evidence that the certified LCA was faxed to CIS on May 2, 2001. The LCA submitted on appeal, however, had been altered with the validity dates handwritten on the LCA. The circumstances of the alteration are not explained in the record. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits

competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petition must be denied because a properly certified LCA was not obtained prior to the filing of the H-1B petition. As previously noted, the Form I-129 petition was filed on December 14, 2000. The LCA submitted by the petitioner in response to the director's request for evidence was not certified until December 29, 2000, subsequent 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.