

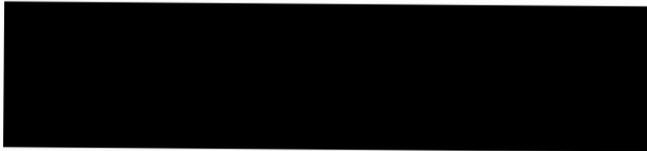
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FILE: EAC 04 179 51080 Office: VERMONT SERVICE CENTER Date: OCT 05 2006

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

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The director of the service center denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen or reconsider. The motion will be granted. The AAO's previous decision will be affirmed. The petition will be denied.

The petitioner is a law firm that seeks to employ the beneficiary as a legal writer and editor. The petitioner, therefore, endeavors to classify the beneficiary 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation, filed on May 26, 2004; (2) the director's denial, dated July 30, 2004; (3) the Form I-290B and supporting documentation, filed on August 24, 2004; (4) the AAO's May 25, 2005 dismissal of the appeal; and (5) the petitioner's motion to reopen or reconsider, received on June 3, 2005. The AAO reviewed the record in its entirety before issuing its decision.

The petition was initially denied on two grounds: (1) that the petitioner had not submitted evidence to establish that the beneficiary qualified to perform the services of a specialty occupation; and (2) that the petitioner had failed to submit a certified labor condition application (LCA) with the petition.

On appeal, the petitioner contended, and submitted evidence to support the assertion, that the beneficiary is in fact qualified to perform the services of a specialty occupation. The petitioner asserted that in denying the petition without first issuing a request for evidence (RFE), the director violated 8 C.F.R. § 103.2(b)(8).

In its dismissal of the appeal, the AAO cited the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1), which stipulates the following:

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 regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition "[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary."

As noted by the AAO in its dismissal, the instant petition was received at the service center on May 26, 2004, but it did not contain a certified LCA. However, the petition did contain a facsimile transmission sheet indicating that the petitioner had faxed an LCA to the Department of Labor (DOL) for certification on May 25, 2004.

As such, the AAO found the petitioner's assertion that 8 C.F.R. § 103.2(b)(8) required the director to issue an RFE unpersuasive. When there is evidence of ineligibility in the record, 8 C.F.R. § 103.2(b)(8) requires the director to deny the petition, and there is no requirement to issue an RFE. The petitioner's cover letter, dated May 25, 2004, stated that an LCA had been submitted to the DOL, and attached the uncertified LCA. The AAO found that as the LCA was submitted to the DOL the very same day that the petitioner sent the H-1B petition to the service center, it could not have been certified prior to the

petition's receipt at the service center, which constituted evidence of ineligibility in the record (i.e., no certified LCA, and evidence that it could not have been certified prior to the filing of the petition), and that there was no need for the director to issue an RFE.

The petitioner submitted a certified LCA on appeal. However, the certification was dated May 27, 2004, subsequent to the date the petition was filed, so it satisfied neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1).

The AAO further noted that Citizenship and Immigration Services (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).

As CIS regulations do not provide for discretionary relief from the LCA requirements, the AAO held that it was unable to sustain the appeal and approve the petition.

Although the director had also found the beneficiary unqualified to perform the duties of a specialty occupation, the AAO found the beneficiary's qualifications immaterial to the outcome of the appeal.

On motion, the petitioner again asserts that the late-filed and certified LCA should be accepted, stating that CIS has an established practice of accepting such documents, and that the director should have issued an RFE for the document. The petitioner states that the AAO erred in upholding the director's decision, and that it should have considered the petitioner's evidence regarding the beneficiary's qualifications to perform the duties of a specialty occupation. The petitioner states that CIS's treatment of its case is a due process violation, and that if the AAO does not reverse its earlier decision and approve the petition it will be subject to federal court litigation.

In support of its contention that the late-filed and certified LCA should be accepted, the petitioner submits a document entitled "Consolidated Questions & Answers For AILA-Vermont Service Center Liaison Meetings 2000." The petitioner underlines a section of this document at page 24, which is in a section of the document subtitled "Vermont Service Center Agenda for AILA New York Chapter Meeting," dated October 2, 2000. In relevant part, this section at page 24 states the following:

We have seen a number of H[-]1B cases filed without LCA[?]s. Most of these cases, such as an extension of stay for a change of employer, are not time sensitive. When this occurs the VSC [Vermont Service Center] must send out an RFE to request the LCA because the RFE document is the only vehicle we have to insure the LCA will eventually get matched with the correct file. Usually the attorney will even tell us in a cover letter that the LCA process has not been completed and that the completed LCA will be provided at a later date. It would be far better for the Service Center if the attorney held on to the case until all documentation had been gathered and could be filed at the same time. By doing this, it would prevent the need to use scarce clerical resources to process an unnecessary RFE.

The AAO first notes that this passage does not state that CIS will ignore the regulatory criteria and accept late-filed and certified LCA's as timely filed. Even if the quoted passage were interpreted as indicating the service center's willingness to overlook late filing of an LCA, the service center does not have the authority to ignore or overrule the governing regulations. It states that as of October 2000, the Vermont Service Center would issue an RFE if an application did not contain a certified LCA. This is in

compliance with 8 C.F.R. § 103.2(b)(8), which states that the director shall issue an RFE when a piece of missing initial evidence is missing. However, as noted previously, 8 C.F.R. § 103.2(b)(8) does not require the issuance of an RFE when there is evidence of ineligibility in the record. When such evidence is present, the petition is to be denied “on that basis notwithstanding any lack of required initial evidence.” *See id.*

In the instant case, the petitioner submitted evidence of ineligibility when it filed the petition. Specifically, it submitted evidence that it had filed for the LCA on May 25, 2004, the same day that it sent the petition to the service center. This evidence demonstrated that, even if the LCA were later certified (which it was) and sent to the director, the petition could not be approved, as the LCA would have been certified subsequent to the date the petition was filed. As this evidence demonstrated the unapprovable nature of the petition, it constituted evidence of ineligibility, and there was no reason to issue an RFE. In accordance with 8 C.F.R. § 103.2(b)(8), the petition was denied “on that basis notwithstanding any lack of required initial evidence.” *See id.* **Even if the director had issued the RFE, the petition still would have been denied.**

Moreover, even if the document submitted by the petitioner did state that late-filed and certified LCA’s would be found to be compliant with the regulation, the AAO could still not approve the petition. As noted previously, and pursuant to 8 C.F.R. § 214.2(h)(4)(i)(B)(1) and 8 C.F.R. § 214.2(h)(4)(iii)(B)(1), the late-filed and certified LCA precludes the approval of the petition. The AAO has no authority to re-write or ignore the regulations.

Finally, counsel’s assertion that denial of the petition constituted a due process violation fails. Counsel has demonstrated no error by the director in conducting her review of the petition, nor any resultant prejudice that would constitute a due process violation. *See Vides-Vides v. INS*, 783 F.2d 1463, 1469-70 (9th Cir. 1986); *Nicholas v. INS*, 590 F.2d 802, 809-10 (9th Cir. 1979); *Martin-Mendoza v. INS*, 499 F.2d 918, 922 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975). As discussed previously, the petitioner has not met its burden of proof, and the denial was the proper result under the regulation.

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 AAO’s May 25, 2005 decision is affirmed. The petition is denied.