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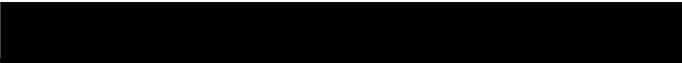
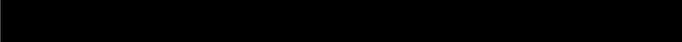
**U.S. Citizenship  
and Immigration  
Services**

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FILE: EAC 03 174 50665 Office: VERMONT SERVICE CENTER Date: **SEP 07 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.

*Joh* *Michael T. Kelly*  
Robert P. Wiemann, Chief  
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 is a manpower resources company that seeks to employ the beneficiary as an elementary school teacher. 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 director denied the petition, finding that the petitioner failed to furnish a certified labor condition application (LCA) and establish the beneficiary's qualifications for the offered position. Counsel submits a timely appeal.

The record in this proceeding contains: (1) the LCA that was certified on May 6, 2003 for the New York City, New York, work location; (2) the LCA that was certified on November 17, 2004 for the Passaic, New Jersey, work location; (3) the Form I-129 petition and supporting documentation that CIS received on May 20, 2003; (4) the director's denial letter; and (5) the Form I-290B, the brief, and supporting documentation. 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 submits the LCA for the Passaic, New Jersey, work location and contends that prior counsel erroneously submitted the LCA for the New York City, New York, work location. Counsel asserts that the petitioner has 137 employees, and the submitted quarterly withholding reports confirm this. Counsel states that prior counsel may have erred in referring to old estimates regarding the number of the petitioner's employees. According to counsel, the petitioner pays its employees in accordance with the information shown in the LCA and deductions from employee paychecks will not reduce their salary levels below LCA specifications. Counsel states that the director's denial letter refers to prior filings by the petitioner and that the instant petition should be

adjudicated on its own merits. Counsel asserts that the director's decision described grounds for denial that pertain to another case.

The AAO concurs with the director's determination that at the time of filing the H-1B petition the petitioner failed to submit a certified LCA for the location of intended employment, which is Passaic, New Jersey. 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 on appeal for Passaic, New Jersey has a November 17, 2004 certification date, which is subsequent to the filing date of the H-1B petition. Therefore, the LCA cannot be used to establish compliance with the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(B), 8 C.F.R. § 103.2(b)(12), and 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). For this reason, the petition will be denied.

For the record, the AAO notes that the director's denial letter discussed discrepancies and alterations of evidence in prior filings by the petitioner. The director concluded that in light of the prior filings, she could not determine the validity of any positions offered or claims made, or the authenticity of any documents submitted by the petitioner. The AAO finds that the director improperly considered evidence adverse to the petitioner without the issuance of a notice of intent to deny. The director properly denied the petition on the grounds that the LCA is not valid for the proposed work location. The AAO agrees, and bases its dismissal of the appeal on the invalid LCA.

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.