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102



FILE: SRC 06 045 50464 Office: TEXAS SERVICE CENTER Date: AUG 10 2007

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:



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 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 engineering consulting firm that seeks to continue its employment of the beneficiary as a network and computer systems administrator. The petitioner, therefore, seeks to extend the beneficiary's classification 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; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The instant petition was received at the service center on November 28, 2005, but it did not contain a certified LCA. In her December 29, 2005 request for additional evidence the director requested, among other items, a certified LCA. In response to the director's request, the petitioner submitted an LCA that had been certified on January 12, 2006. The director denied the petition on the basis of the petitioner's failure to obtain a certified LCA prior to filing the petition.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) 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." Thus, in order for a petition to be approvable, the LCA must have been certified before the H-1B petition was filed. The submission of an LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). 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 such, the AAO finds that the director's denial of the petition was proper.

On appeal, counsel contends that the director "improperly and without consideration denied" the petition. Counsel states that the LCA "was certified a mere 15 days after the expiration of the previously approved period of stay," and that "approval of the [p]etition now in review would not have resulted in undue hardship or inconvenience to the Texas Service Center." Counsel also cites to 8 C.F.R. § 214.1(c)(4) as a basis for approving the petition.

The AAO disagrees with counsel's analysis. Whether approval of the petition would cause hardship to the service center is not at issue here. The issue is whether the petitioner has complied with the requisite regulatory criteria.

Counsel's citation of 8 C.F.R. § 214.1(c)(4) is misplaced. Whether the beneficiary has maintained valid nonimmigrant status is not at issue here. Even if the beneficiary's maintenance of valid nonimmigrant

status were at issue in this case, the issue would not be for the AAO to determine, as issues relating to the beneficiary's maintenance of status are not within the jurisdiction of the AAO and are within the director's sole discretion. However, the AAO notes that before the director would be able to undertake the analysis requested by counsel under 8 C.F.R. § 214.1(c)(4), the underlying nonimmigrant petition (which *is* at issue here) itself would have to be first approved. Only then could a determination be made as to whether to exercise discretion and extend the beneficiary's nonimmigrant status.

However, in this case the petition may not be approved. The petitioner's failure to procure a certified LCA prior to filing the petition precludes its approval, and the regulations contain no provision for the AAO to provide discretionary relief from the LCA requirements. Accordingly, the AAO cannot disturb the director's denial 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 not sustained that burden.

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