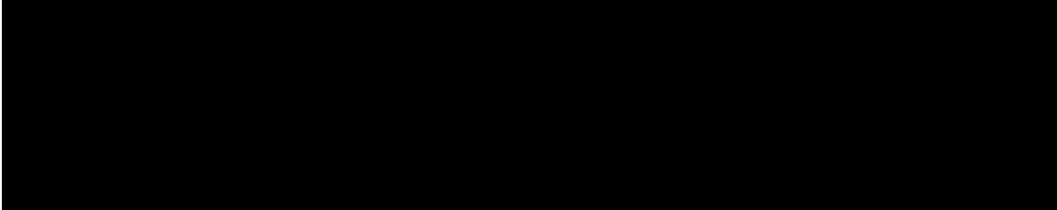


Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

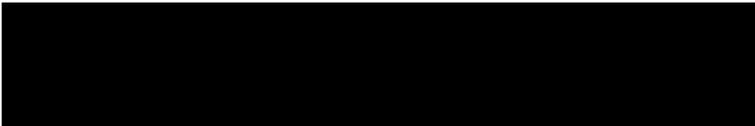
PUBLIC COPY



D-2

FILE: WAC 05 135 52395 Office: CALIFORNIA SERVICE CENTER Date: JAN 08 2007

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: Self-represented

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a biotechnology company. It seeks to employ the beneficiary as a chemist and to extend his 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 director denied the petition on the ground that the petitioner did not have an approved Labor Condition Application (Form ETA 9035) for the proffered position at the time its Petition for a Nonimmigrant Worker (Form I-129) was filed to continue the beneficiary's previously approved employment without change and to extend his stay in the United States.

As specified in the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1):

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 same applies to petitions for an extension of stay in H-1B status. As specified in the regulation at 8 C.F.R. § 214.2(h)(15)(ii)(B)(1):

The request for extension must be accompanied by either a new or a photocopy of the prior certification from the Department of Labor that the petitioner continues to have on file a labor condition application valid for the period of time requested for the occupation.

The record shows that the petitioner filed the instant Form I-129 extension petition on April 11, 2005, requesting H-1B classification for the beneficiary in the chemist position for a three-year employment period from May 1, 2005 to May 1, 2008. The petition was accompanied by a photocopy of the Labor Condition Application (LCA) that had been certified by the Department of Labor (DOL) for the initial H-1B petition which was filed on behalf of the beneficiary and approved in 2002. That LCA bore an approval date of November 26, 2002 and was valid from then until November 15, 2005. On April 29, 2005, the director sent a request for evidence (RFE) to the petitioner which requested the submission of a certified LCA for the correct dates of the instant petition – May 1, 2005 to May 1, 2008. The petitioner responded on May 23, 2005 by submitting an LCA which failed to identify the starting and ending dates of requested H-1B classification and was not certified by the Department of Labor (DOL). On June 23, 2005 the director issued a second RFE requesting a certified LCA with validity dates. In response the petitioner again submitted an LCA without validity dates or DOL certification. As the petitioner did not provide a valid LCA, the director denied the petition on October 17, 2005.

On appeal the petitioner submits a new LCA, certified by DOL on October 25, 2005, with a validity period of October 25, 2005 to October 25, 2008. The new LCA also fails to satisfy regulatory requirements because it was not certified by DOL before the instant H-1B extension petition was filed on April 11, 2005. Thus, the LCA does not comply with 8 C.F.R. § 214.2(h)(15)(ii)(B)(1).

For the reasons discussed above, the petitioner has failed to establish the beneficiary's eligibility for classification as a nonimmigrant worker employed in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Act.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

This dismissal is without prejudice to the petitioner's filing of a new petition accompanied by the proper documentation and requisite fee.

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