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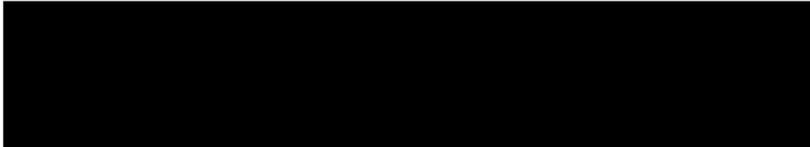
U.S. Department of Homeland Security  
20 Massachusetts Avenue NW, Room 3000  
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U.S. Citizenship  
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FILE: LIN 05 259 51938 Office: NEBRASKA SERVICE CENTER Date: JUN 20 2007

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:

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.

*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 wholesale food distributor that seeks to employ the beneficiary as a marketing manager. The petitioner, therefore, seeks 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 instant petition was received at the service center on September 8, 2005, but it did not contain a certified Form ETA 9035 Labor Condition Application (LCA). As such, the director requested a certified LCA in a December 6, 2005 request for evidence. In response, the petitioner submitted an uncertified LCA on January 23, 2006. The director denied the petition on the basis of the petitioner's failure to obtain a certified LCA and noted that should the evidence submitted not establish that the petition was approvable at the time of filing, then the petition would be denied.

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." Therefore, in order for a petition to be approvable, the LCA must have been certified *before* the H-1B petition was filed. The submission of a certified 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 that 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, the petitioner submits a copy of the LCA, case number [REDACTED], certified on March 15, 2006 and states the following on the Form I-290B:

When we filed the original petition we were not aware that Form ETA 9035 had to [be] certified by the Dept. of Labor. Thus, we are re-submitting a Form ETA 9035 that has been certified by the Dept. of Labor.

The petitioner's submission of a certified LCA has not satisfied the regulation. The petitioner's failure to procure a certified LCA prior to filing the H-1B petition precludes its approval, 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), there is no provision for discretionary relief from the LCA requirements. Accordingly, the AAO will not 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.