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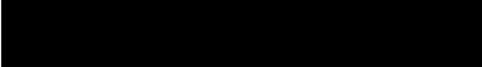
U.S. Citizenship  
and Immigration  
Services

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FILE: WAC 06 192 50167 Office: CALIFORNIA SERVICE CENTER Date: NOV 30 2007

IN RE: Petitioner:   
Beneficiary: 

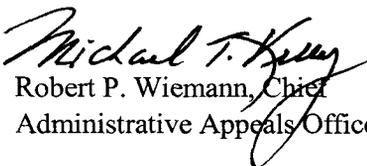
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



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.

*for*   
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The service center director 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 states on the Form I-129 that it is an “education/day care” business. It seeks to employ the beneficiary as a preschool teacher, and endeavors to classify him 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 because a certified labor condition application (LCA) was not obtained prior to the filing of the Form I-129 petition. The present petition was filed on June 1, 2006, and is a petition for continuation of previously approved employment without change, and with the same employer. The petitioner did not submit, with the Form I-129 petition, a properly certified LCA as required by regulation. The director then submitted a request for evidence asking that the petitioner submit the required LCA. In response to the director’s request for evidence, the petitioner submitted an LCA that was certified on December 18, 2006.

The issue to be discussed in this proceeding is whether a certified LCA was obtained prior to the filing of the Form I-129 petition.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 101(a)(15)(H) of the Act defines an H-1B nonimmigrant as:

[A]n alien who is coming temporarily to the United States to perform services . . . in a specialty occupation . . . and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary of Labor an application under section 212(a)(n)(1) . . . .

Title 8, Code of Federal Regulations, part 214.2(h)(4)(iii)(B)(1) provides that the petitioner shall submit with an H-1B petition “a certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary.” The regulations further provide:

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.

8 C.F.R. § 214.2(h)(4)(i)(B)(1).

The regulation at 8 C.F.R. § 214.2(h)(15)(ii)(B)(1) indicates that any 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 an LCA valid for the period of requested employment.

Pursuant to 8 C.F.R. § 103.2(b)(12), “an application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed. . . .” As stated above, the Form I-129 petition was June 1, 2006. A properly certified LCA for the beneficiary’s intended work location covering the dates of intended employment was not submitted at the time of

filing. The director then issued a request for evidence (RFE) requesting that the petitioner submit a properly certified LCA for the dates of intended employment (April 1, 2006 – March 31, 2009). In response to that request the petitioner submitted an LCA certified on December 18, 2006, valid from December 18, 2006 through April 9, 2009. On appeal, the petitioner acknowledges that failure to submit a properly certified LCA justifies denial of the petition. The petitioner concludes, however, that CIS waived its right to deny the petition by requesting that the petitioner remedy the defect in a request for evidence. The petitioner submits no authority supporting that conclusion. The LCA submitted in response to the director's request for evidence was certified by the Department of Labor subsequent to the filing of the present petition. The petition must, accordingly, be denied because certification was not obtained prior to the filing of the H-1B 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 failed to sustain that burden.

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