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**U.S. Citizenship
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FILE: WAC 06 800 07444 Office: CALIFORNIA SERVICE CENTER Date: **OCT 04 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 documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the AAO. The appeal will be sustained and the petition will be approved until May 8, 2009.

The petitioner is a university. It seeks to continue to employ the beneficiary as an assistant volleyball coach. Accordingly the petitioner endeavors to continue the H-2B classification that it obtained by a previously approved petition to classify the beneficiary as a nonimmigrant 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).

On October 10, 2006, the director denied the petition, determining that the petitioner had not complied with the requirements for filing a certified Department of Labor (DOL) Form ETA 9035E, Labor Condition Application (LCA). On appeal, the petitioner submits a newly certified LCA, which, as discussed below, has no effect on the present petition.

The record of proceeding before the AAO contains: (1) the Form I-129 filed May 11, 2006 and supporting documentation; (2) the director's June 28, 2006 request for evidence (RFE); (3) the petitioner's documentation submitted in response to the RFE; (4) the director's October 10, 2006 denial decision; and (5) the Form I-290B, petitioner's statement, and a new LCA in support of the appeal. The AAO has considered the record in its entirety before issuing its decision.

As discussed below, the director's decision will be reversed because the petitioner had filed a timely certified LCA that the director apparently overlooked in his consideration of the record of proceeding. However, the AAO will sustain the appeal and approve the petition only for the period July 1, 2006 to May 8, 2009, which is that part of the period of employment sought in this petition that exceeds neither the three-year limit on the validity of an approved H-1B petition nor the validity period of the labor condition application that applies to the present petition.

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form

In matters where evidence related to filing eligibility is provided in response to a director's request for evidence, 8 C.F.R. § 103.2(b)(12) states:

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

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must obtain a certified LCA from DOL in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of an LCA with DOL when submitting the Form I-129.

The regulation at 8 C.F.R. § 214.2(9)(iii)(A)(1) limits the validity of an H-1B petition to a period of up to three years that does not exceed the validity period of the related certified LCA:

H-1B petition in a specialty occupation. An approved petition classified under section 101(a)(15)(H)(i)(b) of the Act for an alien in a specialty occupation shall be valid for a period of up to three years but may not exceed the validity period of the labor condition application.

The record of proceedings reveals the following salient facts. Pursuant to a previously approved petition, the beneficiary was in valid H-2B status until July 1, 2006. The petitioner electronically filed the Form I-129 (Petition for Nonimmigrant Worker) on May 8, 2006. The petition was timely filed to continue the beneficiary's H-1B classification and extend her stay; and the petition was filed for the period July 1, 2006 to December 31, 2010. The CIS Confirmation Receipt to the petitioner contains a standard notice that supporting documentation should be mailed to the attention of the "E-Filed I-129" section at the California Service Center. On May 12, 2006, the California Service Center received a copy of a certified LCA for the position in question. DOL certified that LCA on May 8, 2006, for the period May 8, 2006 to May 8, 2009. In denying the petition, the director overlooked this LCA, for the only LCA that he addresses in the denial is the LCA that apparently relates to the petition that had been approved for the prior period of the beneficiary's employment with the petitioner. In pertinent part, the decision states:

After reviewing the petition, the USCIS asked the beneficiary to submit a copy of an approved LCA (ETA Form 9035) in the occupational specialty in which the beneficiary will be employed. In response to that request, the petitioner provided a copy of an LCA certified for the period from September 14, 2004 through July 1, 2006. The petitioner is requesting validity dates of July 1, 2006 through December 31, 2010. . . . The petitioner has submitted a copy of an approved LCA. However, the LCA of record is not relevant to the period of time requested in this petition. The petitioner did not provide evidence of a valid approved Labor Condition Application.

On appeal, the petitioner submits a new LCA, DOL-certified on October 19, 2006 for the validity period of October 19, 2006 to July 31, 2009. The petitioner requests consideration of this new LCA.

Based upon the facts of this particular case, the AAO finds as follows. The director erred in denying the petition, as the LCA certified for the period May 8, 2006 to May 8, 2009 was timely certified. Thus, the AAO will reverse the director's decision. The facts support approval of the present petition, but only until May 8,

2009, which ends the validity period of employment approved in the certified LCA that pertains to the present petition. The petition's request for approval until December 31, 2010 cannot be granted, as it would violate 8 C.F.R. § 214.2(9)(iii)(A)(I) by both exceeding the three-year-maximum limit on validity of H-1B petitions and also exceeding the validity period of the related certified LCA. The newly submitted LCA, certified for the period October 19, 2006 until July 31, 2009 is irrelevant to the present petition: certified after the petition was filed, it does not comply with the timing requirement at 8 C.F.R. § 214.2(h)(4)(i)(B).

The burden of proof in this proceeding rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden to the extent discussed above.

As discussed above, the appeal will be sustained and the petition will be approved for the period July 1, 2006 to May 8, 2009.

ORDER: The appeal is sustained and the petition is approved until May 8, 2009.