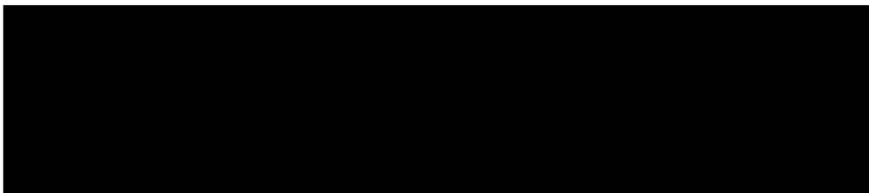


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FILE: WAC 07 007 51951 Office: CALIFORNIA SERVICE CENTER Date: **MAR 17 2008**

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 private school that seeks to employ the beneficiary as a social studies teacher. The petitioner, therefore, endeavors to extend the classification of 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 petitioner denied the petition on July 13, 2007, on the basis of the petitioner's failure to obtain a certified LCA prior to filing the petition.

The instant petition was received at the service center on October 10, 2006, but it did not contain a certified labor condition application (LCA). As such, the director requested a certified LCA in an April 30, 2007, request for evidence. In the response to the request for evidence, the petitioner stated the following regarding the LCA:

The original LCA was sent to USCIS along with all other supporting documents and the completed I-129 in July 2006. It would appear that all of those documents were lost, which is why they are being re-submitted now. We have gathered all the documents together again, but there is a problem with the LCA. You should have the ETA case number for the original LCA on form I-129. We do not have the case number as we did not retain a copy. . . .

The record reflects that the petitioner prepared a new LCA online, which was rejected since the dates of employment had passed when the application was submitted. In addition, the petitioner subsequently sent a letter, dated June 28, 2007, enclosing a copy of the LCA since the petitioner "just located this copy, which was not sent with original documents mailed in the last two weeks." The LCA submitted with the June 28, 2007 letter, states that the form is pending approval and does not bear a date. The LCA submitted on appeal is not certified, and is dated by the petitioner on July 26, 2007, ten months after the instant petition was filed.

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 noted above, the petitioner submitted a pending LCA which was not certified by the Department of Labor as required by the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). There is no provision in the regulations for discretionary relief from the LCA requirements.

The petitioner's failure to procure a certified LCA prior to filing the H-1B petition precludes its approval, and 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.