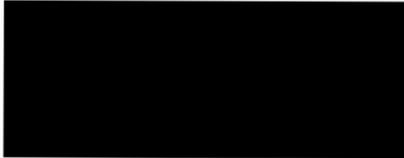


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02

FILE: WAC 07 080 50195 Office: CALIFORNIA SERVICE CENTER Date: NOV 24 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

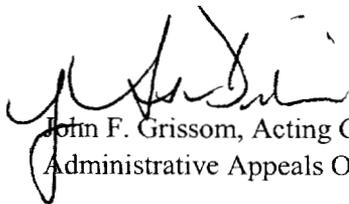
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



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.


John F. Grissom, Acting 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 is involved in the importation and wholesale distribution of plumbing fixtures. It seeks to employ the beneficiary as an accountant and endeavors to classify her 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. On appeal, the petitioner notes that the present petition is a petition for continuation of previously approved employment without change, with the same employer. The petitioner asserts that an LCA was obtained by the petitioner and filed with its prior petition, and that this filing “should meet and satisfy the code and regulation requirements.” The petitioner includes with the appeal a copy of the initial LCA filed with the previously approved petition, and a copy of the related approval notice.

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.

As previously noted, this is an extension petition for continuation of previously approved employment without change, and with the same employer. 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. The director issued a request for evidence requesting, in part, that the petitioner provide a copy of a properly certified LCA for the intended dates of employment. In response to that request for evidence, the petitioner submitted a copy of an LCA obtained from the Department of Labor on September 4, 2007, valid for employment from September 4, 2007 – February 14, 2010. The Form I-129 was filed on January 22, 2007, seeking continuation of the beneficiary’s employment from February 15, 2007 until February 14, 2010. The petitioner submitted, on appeal, a copy of the LCA submitted with the initial petition which was certified on

December 31, 2003, and valid for employment from January 1, 2004 until January 1, 2007. That LCA had expired when the present petition was filed on January 22, 2007. Thus, a valid LCA was not in effect when the present petition was filed, and the LCA submitted by the petitioner in response to the director's request for evidence was obtained subsequent to the filing of the present petition. 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. . . ." 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.