

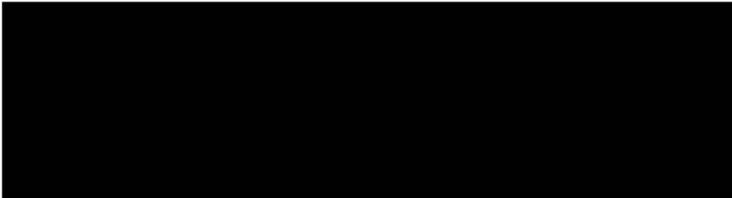
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U.S. Department of Homeland Security  
20 Massachusetts Ave. NW, Rm. 3000  
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U.S. Citizenship  
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Services

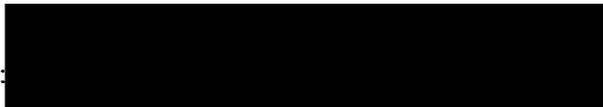
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FILE: WAC 07 182 50172 Office: CALIFORNIA SERVICE CENTER Date: **OCT 30 2008**

IN RE: Petitioner:  
Beneficiary:



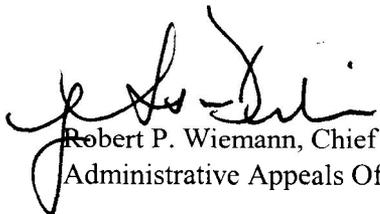
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California 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 is denied.

The petitioner provides semiconductor testing hardware services and seeks to employ the beneficiary as a staff software engineer. The petitioner endeavors 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).

On September 20, 2007, the director denied the petition determining that the petitioner had not provided a certified copy of the Form 9035E, Labor Condition Application (LCA) properly filed, completed and endorsed by the Department of Labor for employment from May 1, 2007 to May 1, 2010; thus, the petitioner had not complied with the requirements for filing a Form I-129, Petition for a Nonimmigrant Worker. In addition, the director denied the petition because the beneficiary was not in valid H-1B status when the petition was filed.

Counsel submitted a timely Form I-290B on December 3, 2007 and indicated that a brief and/or additional evidence would be submitted to the AAO within 30 days. On September 19, 2008, the AAO sent counsel a facsimile regarding the absence of the aforesaid appellate material. As of this date, however, the AAO has not received a response from counsel. Therefore, the record is complete.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and (5) the Form I-290B.

The issue before the AAO is whether the petitioner submitted a valid LCA when the petition was filed.

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 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 the Department of Labor when submitting the Form I-129.**

In the instant matter, the petitioner submitted the Form I-129 to Citizenship and Immigration Services (CIS) on June 5, 2007. In the director's RFE, the director requested a signed and dated LCA. In response, the petitioner provided a copy of an LCA certified on January 18, 2003 for employment from May 1, 2004 to May 1, 2007. On appeal, counsel submits a second LCA certified on October 2, 2007.

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)(1). As such, the AAO finds that the director's denial of the petition was proper.

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 AAO notes the petitioner's assertion that the delay in filing was unintentional. The petitioner submitted a Form I-129 petition and it was originally received on May 15, 2007, fourteen (14) days after the beneficiary's H-1B status expired on May 1, 2007. Pursuant to 8 C.F.R. § 214.1(c)(4), an extension of stay may not be approved for an applicant who fails to maintain the previously accorded status or where such status expires before the application or petition is filed. The record reflects that the petitioner did not file the petition for an extension within the required time frame. In the present case, the beneficiary's authorized period of stay expired on May 1, 2007. However, the petition for an extension of the beneficiary's H-1B status was filed on May 15, 2007. Pursuant to 8 C.F.R. § 214.1(c)(4), an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed. As the extension petition was not timely filed and counsel did not demonstrate that the delay was due to extraordinary circumstances, it is noted for the record that the beneficiary is ineligible for an extension of stay in the United States.

A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petitioner failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B) and has not submitted evidence or argument sufficient to overcome the director's decision in this matter.

Thus, for the reasons discussed, the beneficiary is ineligible for classification as an alien employed in a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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 not sustained that burden.

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