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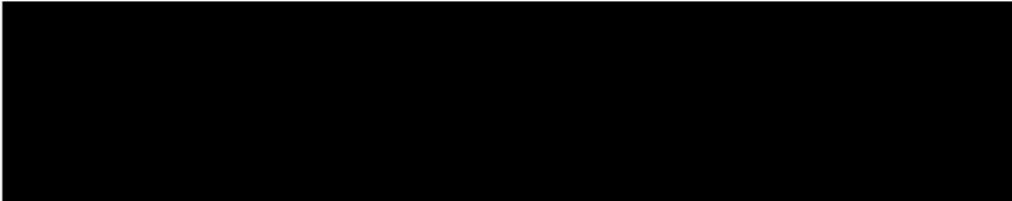
U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Room 3000
Washington, DC 20529



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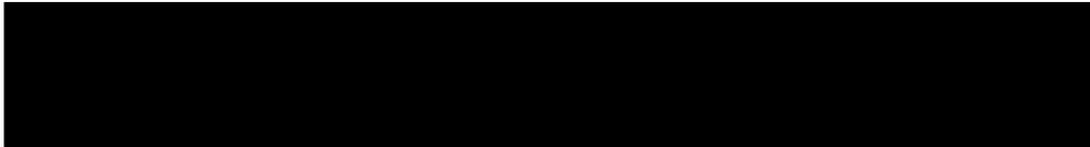
FILE: WAC 07 040 52393 Office: CALIFORNIA SERVICE CENTER Date: SEP 30 2008

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:



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 *Michael T. Keey*
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 public school district that seeks to continue its employment of the beneficiary as a teacher of the Spanish language. The petitioner, therefore, seeks to extend the beneficiary's classification 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation, received at the service center on November 24, 2006; (2) the director's first request for additional evidence, dated February 22, 2007; (3) the petitioner's response to the director's request, dated May 16, 2007; (4) the director's second request for additional evidence, dated June 11, 2007; (5) the petitioner's response to the director's request, dated August 31, 2007; (6) the director's denial letter, dated October 9, 2007; and (7) the Form I-290B and supporting documentation, received at the service center on November 9, 2007. The AAO reviewed the record in its entirety before issuing its decision.

The instant petition was received at the service center on November 24, 2006, but it did not contain a labor condition application (LCA) certified for the period of requested employment.¹ In her June 11, 2007 request for additional evidence the director requested an LCA certified for the period of requested employment. In his August 31, 2007 response to the director's request, counsel requested an additional sixty days in which to obtain a certified LCA. The director denied the petition on the basis of the petitioner's failure to obtain a certified LCA prior to filing the petition.

On appeal, counsel submits an uncertified LCA that he faxed to the Department of Labor on October 17, 2007. The record of proceeding, therefore, still lacks an LCA certified for the period of requested employment.

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 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). Further, 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 such, this petition may not be approved.

¹ Although the period of requested employment was November 24, 2006 through November 24, 2007, the petitioner submitted an LCA certified for employment between October 1, 2002 and September 20, 2005.

On appeal, counsel asserts that the LCA regulations go “beyond what is required by the statute,” and that “[t]here is no reason for the LCA regulations to go beyond the statute.” However, the role of the AAO is to apply the regulations, and it is without authority to question them.

The petitioner’s failure to procure a certified LCA prior to filing the H-1B petition precludes its approval, and the regulations contain no provision for the AAO to provide discretionary relief from the LCA requirements. Accordingly, the AAO cannot 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.