U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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FILE: WAC 03 262 50263 Office: CALIFORNIA SERVICE CENTER Date: JUN 28 2005

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Michael T. Kelley
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a manufacturer and distributor of zippers. It seeks to employ the beneficiary as a zipper dyeing engineer and to extend his 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 director denied the petition on the ground that the petitioner did not have an approved labor condition application (LCA) for the proffered position at the time its Form I-129 (Petition for Nonimmigrant Worker) was filed seeking to continue the beneficiary's H-1B classification.

On appeal the petitioner asserts that the required LCA (Form ETA 9035) was certified by the Department of Labor (DOL) five months before the petition was adjudicated by U.S. Citizenship and Immigration Services (CIS), and that an application for alien employment certification (Form ETA 750), which foreshadowed the filing by the petitioner of a Form I-140 (Petition for Immigrant Worker) on behalf of the beneficiary, was certified by DOL nearly a year and a half before the filing of the instant Form I-129 and was submitted with the instant petition for H-1B classification.

As specified in 8 C.F.R. § 214.2(h)(4)(i)(B)(1):

> 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 record shows that the petitioner filed its Form I-129 petition on September 18, 2003, requesting that the beneficiary's H-1B classification be continued for a one-year period from September 29, 2003 to September 29, 2004. The petition was accompanied by an LCA (Form ETA 9035), but it had not been certified by DOL. In its subsequent response to the director's request for evidence, the petitioner submitted a certified LCA, which had been issued by DOL on October 16, 2003. This was nearly one month after the H-1B petition was filed.

Thus, the petitioner did not obtain the requisite LCA certification "[b]efore filing a petition for H-1B classification," as specified in 8 C.F.R. § 214.2(h)(4)(i)(B)(1). No new evidence or information has been submitted on appeal to refute these findings by the director. The only way the Form ETA 9035 that was certified by DOL in October 2003 could have been considered by the director is if the petitioner had thereupon filed a new or amended H-1B petition, with fee, in accordance with 8 C.F.R. § 214.2(h)(2)(E). The petitioner's alternative argument that a Form ETA 750 had been certified earlier by DOL (on May 4, 2002) and should suffice for the purposes of this petition is faulty because the applicable regulation expressly provides that a labor condition application (Form ETA 9035) must be certified by DOL prior to the filing of a petition for H-1B classification, not a Form ETA 750 (application for alien employment certificate).

For the reasons discussed above, the petitioner has failed to establish the beneficiary's eligibility for classification as a nonimmigrant worker employed in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Act.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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