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

PUBLIC COPY

[redacted]

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FILE: SRC 05 146 51482 Office: TEXAS SERVICE CENTER Date: DEC 04 2006

IN RE: Petitioner:
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:

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 acting 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 Christian church serving the Russian-speaking community in the Atlanta area. In order to employ the beneficiary as its Music Director, the petitioner seeks to classify her as an H-1B nonimmigrant worker in a specialty occupation 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).

The acting director denied the petition on the basis that the petitioner had failed to timely file a certified labor condition application for H-1B Nonimmigrants (Form ETA 9035) (LCA) for the period of proposed employment, as required by Citizenship and Immigration Service (CIS) regulations.

The acting director based her denial of the petition on the facts established by the record of proceeding in this case. The petition was filed on April 26, 2005, unaccompanied by a certified LCA. As part of its reply to the service center's request for additional evidence, the petitioner submitted a certified LCA dated August 18, 2005.

The director's decision to deny the petition because the LCA was certified after the petition was filed is correct.

The AAO concurs with the petitioner's assertion that, contrary to the director's decision, the service center had not requested a certified LCA. However, that error does not excuse the petitioner from the requirements of the relevant regulations.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) states:

> 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 with the petition an H-1B petitioner shall submit "[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary."

The record establishes, and the petitioner acknowledges, that the petition was filed before the LCA was certified. This violates the regulatory requirements, cited above, for filing an H-1B petition. The petitioner's argument that untimely certification of the LCA should be excused as "an inadvertent procedural error which was not material or substantial" is without merit. CIS regulations have no provision for discretionary relief from the LCA requirements quoted above, and the petitioner cites no basis in statute, regulation, or precedential decisions for its argument. Accordingly, the AAO shall not disturb the director's decision.

Denial of the present petition does not preclude the petitioner from submitting a new petition, accompanied by the proper fee, an LCA certified for the requested period of H-1B employment, and documentation to establish that the proffered position is a specialty occupation and that the beneficiary is qualified to serve therein, in accordance with the regulations at 8 C.F.R. §§ 214.2(h)(4)(iii)(A) and (C).

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.