U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: WAC 07 027 52817 Office: CALIFORNIA SERVICE CENTER Date: MAY 29 2008

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:

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.

Michael T. Kelly

for Robert P. Wiemann, 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 a software development and consulting firm. It seeks to employ the beneficiary as a programmer analyst 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 states that a valid LCA was obtained prior to the filing of the petition, and that a subsequent LCA was obtained when the beneficiary was moved to a new job location in Texas.

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.

8 C.F.R. § 214.2(h)(4)(i)(B)(1).

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 Form I-129 petition was filed November 6, 2006. Submitted with that filing was an LCA for a Herndon, VA work location that was certified on November 3, 2006. On November 17, 2006, the director submitted a request for evidence. In partial response to that request, the petitioner submitted a new LCA certified on November 22, 2006 for a Dallas, TX work location. The petitioner submitted a consulting agreement with Datalinx dated November 3, 2006 whereby the petitioner would provide consulting services to Datalinx clients. Attached to that agreement was a work order dated November 3, 2006 providing that the beneficiary would provide services for Datalinx's client (Verizon) in Irving, TX beginning November

3, 2006. The director denied the petition because the Texas LCA was certified subsequent to the filing of the petition.

The petitioner states that the beneficiary initially worked for the petitioner at its Virginia location, in accord with the initial LCA filed of record, then transferred to its client location in Texas. The record does not support that assertion. Pay stubs issued for the beneficiary indicate that the beneficiary is located in Texas. The Datalinx contract and work order are for the beneficiary's services in Texas and dated immediately prior to the filing of the Form I-129 petition and the beneficiary's employment with the petitioner on November 7, 2007. All evidence of record, other than the petitioner's unsubstantiated assertions, indicate that the beneficiary was employed in Texas from the beginning of her employment with the petitioner, and that her employment was anticipated in Texas prior to the filing of the present petition. Simply going on the record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N 190 (Reg. Comm. 1972)). The LCA submitted for the petitioner's Texas work location was certified subsequent to the filing of the petition. The petition must accordingly be denied.

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.