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

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U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 06 125 50440 Office: VERMONT SERVICE CENTER Date: OCT 01 2008

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:

[redacted]

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 Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 an accounting and tax firm that seeks to employ the beneficiary as a financial manager. The petitioner, therefore, seeks 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).

The record includes: (1) the Form I-129 and supporting documents; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision denying the petition; and (5) the Form I-290B and supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

The petition for an extension of the beneficiary's H-1B status for employment was received at the service center on March 14, 2006. The record establishes that at the time that the extension petition was filed, on March 14, 2006, the petitioner still had on file a certified labor condition application (LCA) that was valid until August 25, 2006.

In her May 16, 2006 request for evidence, the director requested that the petitioner submit "a properly endorsed Labor Condition Application (LCA)." In response, the petitioner submitted an LCA, case number [redacted] certified on June 27, 2006. That LCA is certified for the period November 1, 2006 to October 31, 2009. The date of its certification is 105 days after the filing of the Form I-129 (Petition for Nonimmigrant Worker), and the certification is for a period not covered by the earlier certified LCA.

The director denied the petition on the basis of the petitioner's failure to obtain a timely certified LCA, and noted that the LCA must be certified prior to the filing of the Form I-129.

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." 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). Therefore, the AAO finds that the director's denial of the petition was proper.

The regulation at 8 C.F.R. § 214.2(h)(15)(ii)(B) specifies that a request for extension of the validity of a petition must be accompanied by either a new LCA or a photocopy of the prior certified LCA that is "valid for the period of time requested for the occupation." The LCA certified in 2003 is not valid for the

entire period of time requested for the occupation and, therefore, does not fulfill the requirements of 8 C.F.R. § 214.2(h)(15)(ii)(B).

On appeal, the petitioner states "after filing the [Form] I-129 petition, [the petitioner] was informed that a new labor condition application must be obtained." The petitioner argues that "since the original certified labor condition application obtained in 2003 was valid at the time of filing the current [Form] I-129 petition," the petition should be approved.

The LCA certified in 2003 was valid from August 25, 2003 through August 25, 2006. Although the petitioner did not indicate the intended dates of employment on the Form I-129, the LCA certified on June 27, 2006 is valid from November 1, 2006 through October 31, 2009. Therefore, the AAO assumes that the petitioner intended to employ the beneficiary from November 1, 2006 through October 31, 2009. Pursuant to 8 C.F.R. § 214.2(h)(15)(ii)(B) the request for extension must be accompanied by either a new or a photocopy of the prior certified LCA that is "valid for the period of time requested for the occupation." The LCA certified in 2003 is not valid for the entire period of time requested for the occupation and, therefore, does not fulfill the requirements of 8 C.F.R. § 214.2(h)(15)(ii)(B).

The petitioner's submission of second certified LCA has not satisfied the regulation. The petitioner's failure to procure a certified LCA for the entire period of time requested for the occupation 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.

In her decision, the director also noted that the beneficiary departed the U.S. while the petition was still pending and as such, the request for extension of stay would be considered abandoned. The petitioner has not addressed this issue on appeal, and it is not subject to appeal. The regulation at 8 C.F.R. § 214.1(c)(5) states:

> Decision in Form I-129 or I-539 extension proceedings. Where an applicant or petitioner demonstrates eligibility for a requested extension, it may be granted at the discretion of the Service. There is no appeal from the denial of an application for extension of stay filed on a Form I–129.

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.