U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

Date: JUN 2 8 2013 Office: VERMONT SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

James Blinzinger, for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The petitioner filed a motion to reconsider and, upon reconsideration, the director affirmed his earlier decision denying the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner describes itself on the Form I-129 visa petition as a radio broadcasting company. To employ the beneficiary in a position it designates as a management analyst, the petitioner endeavors to classify him 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, finding that the petitioner failed to submit a valid Labor Condition Application (LCA) certified on or before the date the visa petition was filed, and which was valid for the period of employment requested in the visa petition. In his decision on the petitioner's subsequent motion, the director affirmed his previous decision denying the petition on the same basis.

Although counsel indicated on the Form I-290B that a brief and/or evidence would be submitted within 30 days, the AAO has received neither. Accordingly, the record of proceeding is deemed complete and ready for adjudication.

In the instant case, the petitioner filed the Form I-129 on June 27, 2011, and requested a period of approval beginning September 30, 2011 and ending September 29, 2012. However, the LCA submitted by the petitioner, which was certified on October 8, 2009, was only valid from October 2, 2009 through September 30, 2011.

On October 27, 2011, the service center issued an RFE in this matter. In pertinent, part, the service center stated the following:

> The validity dates on the [LCA] from the Department of Labor that you have submitted expired on September 30, 2011. Since you have requested a validity period through September 29, 2012, it appears that you submitted the wrong LCA.
>
> Please submit evidence of an approved LCA for the beneficiary's specialty occupation, valid for the period of intended employment. Eligibility for H1B employment must be established as of the date of filing the Petition for a Nonimmigrant Worker (Form I-129); therefore, the LCA must be certified **prior to** the filing of the Form I-129.

In response, counsel submitted an LCA valid for employment from January 4, 2012 to September 29, 2012. That LCA, however, was certified on January 9, 2012, more than six months after the petition was filed.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(*1*) states 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 an 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, United States Citizenship and Immigration Services (USCIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. 8 C.F.R. § 103.2(b)(1).

The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of an LCA with DOL when submitting the Form I-129.

On appeal, counsel asserts that the petitioner's failure to submit an LCA in accordance with the salient regulations could have been corrected if the RFE had been issued sooner. However, as noted above the regulations require the petitioner to obtain a certified LCA *prior to* filing the Form I-129. The RFE could not have been issued prior to the date on which the petitioner filed this petition and, as such, the petitioner could not have cured this petition's central deficiency – the petitioner's failure to submit an LCA certified prior to the petition's filing – no matter how soon after the petition's filing the RFE had been issued. While counsel's assertions regarding the beneficiary and his family are noted, counsel has identified no provision for discretionary relief from the LCA requirements set forth above.

The denial of the petition due to the petitioner's failure to provide a corresponding LCA certified on or before June 27, 2011, renders any remaining ineligibility issues in this proceeding moot. Therefore, the AAO need not and will not address any other evidentiary deficiencies it has observed in this matter.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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