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FILE: WAC 03 129 54475 Office: CALIFORNIA SERVICE CENTER Date: JUL 26 2005

IN RE: Petitioner: [REDACTED]  
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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director  
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 private elementary school that seeks to extend employment of the beneficiary as a teacher. The petitioner endeavors 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 director denied the petition because the petitioner did not submit a certified labor condition application (LCA) that was valid at the time the petition was filed.

On appeal, the petitioner states that it was unaware of the requirement to submit a new LCA when filing for an extension of the original petition.

The petitioner filed its petition on March 26, 2003. The director issued a request for evidence on September 27, 2003, asking the petitioner to submit a certified copy of the LCA. The petitioner replied on December 4, 2003 with an uncertified copy of an LCA application dated March 4, 2002. On January 29, 2004, the director issued a second request for evidence, again requesting a certified copy of the LCA. On February 17, 2004, the petitioner replied with an LCA certified on February 5, 2004. The director issued his decision on March 8, 2004 denying the petition because the certified LCA was dated after the date the petition was filed.

The regulations state, “[B]efore 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)(i)(4)(B)(I). The regulation at 8 C.F.R. § 214.2(h)(15)(ii)(B)(I) states that “[t]he request for extension must be accompanied by either a new or a photocopy of the prior certification from the Department of Labor that the petitioner continues to have on file a labor condition application valid for the period of time requested for the occupation.”

The petitioner obtained certification for the proffered position more than ten months after the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The regulations require that the petition be denied due to the late labor condition application. “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.” 8 C.F.R. § 103.2(b)(12).

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. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.