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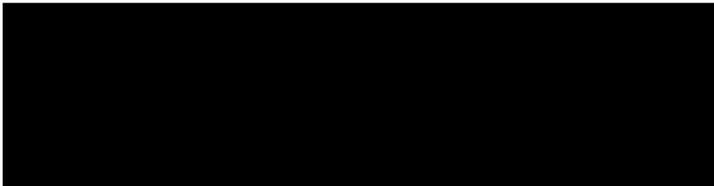
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: SRC 05 114 50813 Office: TEXAS SERVICE CENTER Date: DEC 04 2006

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:



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 director of the Texas Service Center denied the nonimmigrant visa petition and the matter is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a real estate company engaged in residential and commercial sales, marketing services, property management and financing. The petitioner seeks to employ the beneficiary as a marketing specialist, and 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 failed to meet the requirements for filing a Form I-129, Petition for a Nonimmigrant Worker (Form I-129).

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) documentation submitted in response to the director's request; and (4) Form I-290B, Notice of Appeal to the Administrative Appeals Office (Form I-290B). The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the petitioner established filing eligibility at the time the Form I-129 was received by U.S. Citizenship and Immigration Services (CIS).

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1), and provide in pertinent part that:

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1), which states:

An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form

In cases where evidence related to filing eligibility is provided in response to a director's request for evidence, 8 C.F.R. § 103.2(b)(12) states:

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 regulation requires that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must obtain a certified labor condition application (LCA) from the Department of Labor (DOL) in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B).¹

In the instant case, the petitioner filed the Form I-129 with CIS on March 9, 2005. Although it provided an LCA with that filing, this document did not indicate that it had been certified by the Department of Labor. In response to the director's request for evidence of certification, the petitioner provided another copy of the LCA, DOL-certified on March 10, 2005, one day after the petitioner filed the Form I-129 with CIS. The record thus establishes that, at the time of filing, the petitioner had not obtained a certified LCA in the occupational specialty and, therefore, as indicated by the director, had failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

On appeal, counsel submits a fax transmittal sheet and contends that she faxed the LCA in question to the Department of Labor on March 7, 2005, before the Form I-129 was filed with CIS, and that Form I-129 filing requirements have therefore been met. The AAO is unpersuaded by counsel's assertions.

The Form I-129 filing requirements imposed by regulation clearly state that the petitioner must submit evidence of a certified LCA at the time of filing. A 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). In the present matter, the petitioner failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). The beneficiary is thus ineligible for classification as an alien employed in a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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

¹ Pursuant to 8 C.F.R. § 214.2(h)(4)(i)(B), 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.