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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: WAC 04 142 50802 Office: CALIFORNIA SERVICE CENTER Date: JUL 03 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 THE 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.

for Michael T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the 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 provides software consulting services and staffing and seeks to employ the beneficiary as a computer programmer analyst. The petitioner, therefore, 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 provide evidence of a certified labor condition application (LCA) that was filed with and certified by the Department of Labor prior to the filing of the instant petition. On appeal, the petitioner submits the Form-290B and a letter.

The AAO will discuss the director's determination that the petitioner failed to provide a certified LCA for the proffered position.

When a petition is filed under this section the petitioner must provide evidence of an approved Labor Condition Application for H-1B Nonimmigrant (ETA Form 9035). Pursuant to 8 C.F.R. § 214.2(h)(4)(i)(B), petitions involving a specialty occupation require the following:

- (1) 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 record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

On or about April 21, 2004, the petitioner submitted the instant H-1B petition. The petitioner submitted a certified LCA for the position of computer programmer analyst for one H-1B nonimmigrant with employment dates of 04/19/2004 until 04/18/2007. The LCA Form ETA 9035E was certified April 17, 2004 and assigned a case number [REDACTED]

The director issued a request for evidence and specifically stated that a review of CIS records showed that the petitioner submitted a copy of an approved LCA Form ETA 9035 no. [REDACTED] that had been used with another petition, WAC 04 142 50782. The director requested an explanation of the discrepancy and requested that the petitioner submit the original approved Form ETA 9035.

In response to the director's request, the petitioner stated that the LCA Form ETA 9035 no. 1-04108-1055657 which was used with the petition WAC 04 142 50782 was mistakenly submitted with both petitions. The petitioner stated that it was submitting a new approved LCA. The petitioner submitted an LCA Form ETA 9035E no. [REDACTED] that was certified on October 18, 2004.

The director found that the petitioner did not provide evidence of a certified LCA that was filed with the Department of Labor prior to the filing of the H-1B petition and denied the petition.

On appeal, the petitioner asserts that the LCA Form ETA 9035 No. [REDACTED] was certified for the instant case, WAC 04 142 50802 but was mistakenly submitted with the petition that became WAC 04 142 50782. The petitioner requests that LCA No. [REDACTED] be applied to the instant petition.

The AAO is required to adhere to the above cited regulation and cannot substitute LCA's as requested by the petitioner. Furthermore, in response to the director's request for evidence and for an explanation of the discrepancy, the petitioner submitted an LCA that was certified more than six months after the filing date of the instant H-1B petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The Form I-129 filing requirements imposed by regulation require that the petitioner 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). The petitioner failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B)(1).

Therefore, for the reasons already discussed, the beneficiary is ineligible for classification as an alien employed in a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.