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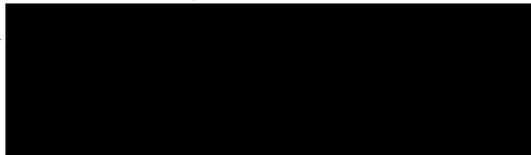
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: EAC 03 183 51053 Office: VERMONT SERVICE CENTER Date: FEB 05 2007

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, Vermont Service Center, denied the nonimmigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequently filed appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be denied. The previous decision will be affirmed and the petition will be denied.

The petitioner is a construction company. It seeks to employ the beneficiary as a civil engineer 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 determining that: (1) the petitioner failed to submit a certified Labor Condition Application (LCA), Form ETA 9035, from the Department of Labor (DOL); and (2) the record did not include a SEVIS version of the beneficiary's Form I-20, Certificate of Eligibility, from the U.S. school presently or most recently attended by the beneficiary.

The AAO concurred in the director's decision, observing that: (1) the record contained only page one of the petitioner's three-page LCA allegedly filed with the DOL in February 2002 and did not include evidence of the DOL's certification; and (2) the director's denial of the petition on the ground that the beneficiary was not in proper status at the time of filing the petition was not a matter within the AAO's jurisdiction.

On motion, counsel for the petitioner recites the lengthy history of the matter and acknowledges that while the petitioner believes that the LCA was filed prior to the submission of the petition, it was unable to locate copies of the additional two pages of the form or the DOL's certification. Counsel indicates that he and the petitioner initiated an inquiry from the DOL to confirm the filing of the LCA but have been unsuccessful in obtaining confirmation. Counsel further indicates that the petitioner filed another LCA that has been certified by DOL but that the cap for H-1B applications had been met and the petitioner is unable to re-file the petition. Finally counsel requests that Citizenship and Immigration Services (CIS) exercise its discretion as the petitioner has attempted to rectify the matter and that it is patently unfair to deny the beneficiary the classification because of the administrative failures of others. Counsel also submits the petitioner's affidavit stating its belief that the LCA, Form ETA 9035, had been duly filed and certified.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Although the petitioner has presented an explanation for the failure to provide evidence of the DOL's certification, the petitioner has not presented adequate secondary evidence to establish that it had filed and received the DOL's certification prior to filing the petition. The petitioner's affidavit indicates the petitioner's belief that the LCA was timely filed and certified but does not provide documentary evidence to establish the timely filing. The record

does not contain new facts supported by affidavits or other documentary evidence, but rather the petitioner's opinion on this issue. Neither has the petitioner submitted any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or CIS policy based on the evidence of record at the time of the initial decision. The petitioner fails to establish that the decision was an incorrect application of the law by pertinent precedent decisions, or establish that the director or the AAO misinterpreted the evidence of record. The evidence fails to satisfy the requirements of a motion to reconsider.

The AAO acknowledges counsel's plea that denying the petition is patently unfair to the beneficiary; however, as specified in 8 C.F.R. § 214.2(h)(4)(i)(B)(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 Administrative Appeals Office, like the Board of Immigration Appeals, is without authority to impose its discretion so as to preclude a component part of CIS from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). Equitable forms of relief are available only through the courts. The jurisdiction of the Administrative Appeals Office is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See DHS Delegation Number 0150.1* (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). The jurisdiction of the AAO is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). Accordingly, the AAO has no authority to address counsel's plea that the CIS denial is patently unfair.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The regulation at 8 C.F.R. § 103.5(a)(4) states: "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be denied, the proceedings will not be reopened, and the previous decision of the AAO will be affirmed.

ORDER: The decision of the AAO is affirmed. The petition is denied.