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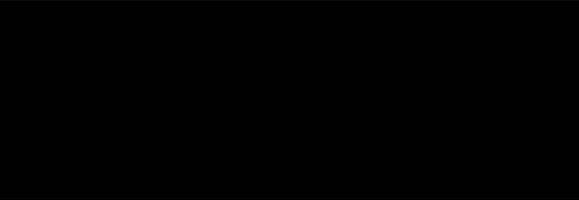
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship and Immigration Services

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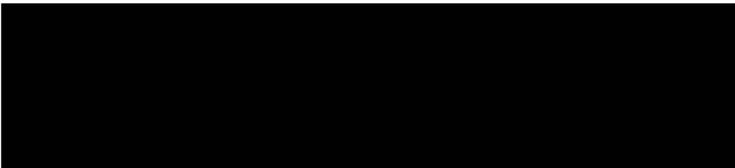


FILE: WAC 06 244 50435 Office: CALIFORNIA CENTER Date: **MAR 20 2008**

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 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 sustained. The petition will be approved.

The petitioner is an industrial packaging company. It seeks to employ the beneficiary as a mechanical engineer, and 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 because a certified labor condition application (LCA) for the length of intended stay noted in the petition (January 1, 2007 – January 1, 2010) was not obtained prior to the filing of the Form I-129. The present petition was filed on August 7, 2006, and is a petition for continuation of previously approved employment without change, and with the same employer. The petitioner submitted with the petition a copy of the LCA submitted with its previous petition. That LCA was valid when the present petition was filed. The director then submitted a request for evidence asking that the petitioner submit an LCA valid for the intended dates of employment listed in the extension petition. In response to the director's request for evidence, the petitioner submitted an LCA that was certified on November 27, 2006.

The issue to be discussed in this proceeding is whether a certified LCA was obtained prior to the filing of the Form I-129 petition.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 101(a)(15)(H) of the Act defines an H-1B nonimmigrant as:

[A]n alien who is coming temporarily to the United States to perform services . . . in a specialty occupation . . . and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary of Labor an application under section 212(a)(n)(1)

Title 8, Code of Federal Regulations, part 214.2(h)(4)(iii)(B)(1) provides that the petitioner shall submit with an H-1B petition "a certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary." The regulations further provide:

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.

8 C.F.R. § 214.2(h)(4)(i)(B)(1).

The regulation at 8 C.F.R. § 214.2(h)(15)(ii)(B)(1) states that any 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 an LCA valid for the period of requested employment.

Pursuant to 8 C.F.R. § 103.2(b)(12), "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. . . .” As stated above, the Form I-129 petition was filed on August 7, 2006. A properly certified LCA for the beneficiary’s intended work location covering the dates of intended employment was not submitted at the time of filing. The director then issued a request for evidence (RFE) requesting that the petitioner submit a properly certified LCA for the dates of intended employment (January 1, 2007 – January 1, 2010). In response to that request the petitioner submitted an LCA certified on November 27, 2006, valid from November 27, 2006 through November 27, 2009, accompanied by an amended petition listing intended dates of employment of November 27, 2006 – November 27, 2009. The initial LCA obtained by the petitioner and filed with its initial Form I-129 was valid from January 1, 2004 – January 1, 2007. The amended petition submitted by the petitioner shall not be treated as an amended petition under Title 8 Code of Federal Regulations, part 214.2(h)(2)(i)(E) because it was not accompanied by an appropriate filing fee. The referenced regulation provides as follows:

The petitioner shall file an emended petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien’s eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

The petition filed in response to the director’s request for evidence shall be viewed as a request by the petitioner to change the dates of intended employment subject to the extension petition. The new employment dates of the extension petition shall be, as requested by the petitioner, from November 27, 2006 – November 27, 2009. The petitioner submitted with its request a properly certified LCA for those dates. The director’s decision shall accordingly be withdrawn, and the petition shall be approved.

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 sustained that burden.

ORDER: The appeal is sustained. The petition is approved.