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U.S. Citizenship
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FILE: WAC 06 160 52001 Office: CALIFORNIA SERVICE CENTER Date: **SEP 29 2008**

IN RE: Petitioner:
Beneficiary:

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.

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 is a residential care facility that seeks to continue its employment of the beneficiary as an industrial engineering technician. The petitioner, therefore, seeks to extend the beneficiary's classification 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation, received at the service center on April 11, 2006; (2) the director's first request for additional evidence, dated June 6, 2006; (3) the petitioner's response to the director's request, dated August 4, 2006; (4) the director's second request for additional evidence, dated December 7, 2006; (5) the petitioner's response to the director's request, received at the service center on February 12, 2007; (6) the director's third request for additional evidence, dated May 22, 2007; (7) the petitioner's response to the director's request, dated August 8, 2007; (8) the director's denial letter, dated October 5, 2007; and (9) the Form I-290B and supporting documentation, received at the service center on October 29, 2007. The AAO reviewed the record in its entirety before issuing its decision.

The instant petition was received at the service center on April 11, 2006, but it did not contain a certified labor condition application (LCA). In her May 22, 2007 request for additional evidence the director requested, among other items, a certified LCA. In response to the director's request, the petitioner submitted an LCA certified for a period of employment beginning on November 1, 2003 and ending November 1, 2006. Accordingly, the director denied the petition on the basis of the petitioner's failure to obtain a certified LCA prior to filing the petition.

The petitioner submits a certified LCA on appeal. However, the AAO notes that this LCA was certified on October 24, 2007. The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

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 regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition "[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary." Thus, in order for a petition to be approvable, the LCA must have been certified before the H-1B petition was filed. The submission of a certified LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). Further, CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). As such, this petition may not be approved.

The petitioner's failure to procure a certified LCA prior to filing the H-1B petition precludes its approval, and the regulations contain no provision for the AAO to provide discretionary relief from the LCA requirements. Accordingly, the AAO cannot 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.