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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: EAC 07 199 52611 Office: VERMONT SERVICE CENTER Date: NOV 09 2009

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)

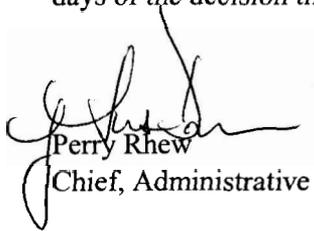
ON BEHALF OF PETITIONER:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont 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.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it is a non-profit Christian Church, that it was established in 1902, and that it employs less than 25 persons. It seeks to employ the beneficiary as an IT Specialist from July 1, 2007 to June 30, 2010. Accordingly, the petitioner 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).

On March 17, 2008, the director denied the petition, determining that the petitioner failed to comply with the requirement at 8 C.F.R. 214.2(h)(4)(i)(B)(1) by submitting a Department of Labor Form ETA 9035E, Labor Condition Application (LCA) for the period of employment for which it intended to employ the beneficiary that had been certified prior to filing the Form I-129, Petition for a Nonimmigrant Worker.

On appeal, the petitioner's lead minister indicates his belief that he inadvertently submitted an LCA that had been generated previous to the certified copy. The minister acknowledges that the LCA submitted in response to the director's request for further evidence is dated July 10, 2007, a date subsequent to the date the filing date of the petition. The petitioner, through its lead minister, notes that it was not up against an imminent deadline when it filed the petition and thus could have waited for the certification.

The record includes: (1) the Form I-129 and supporting documentation filed with U. S. Citizenship and Immigration Services (USCIS) on June 29, 2007; (2) the director's RFE; (3) the petitioner's response to the director's RFE, including an LCA certified by the Department of Labor on July 10, 2007; (4) the director's denial decision; and, (5) the Form I-290B and the petitioner's statement submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the petitioner established filing eligibility at the time the Form I-129 was received by USCIS.

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

[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):

Demonstrating eligibility at time of filing. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. . . .

In matters 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 regulations require 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). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of an LCA with the Department of Labor when submitting the Form I-129.

In the instant matter, the petitioner filed the Form I-129 with USCIS on June 29, 2007. The LCA provided at the time of filing indicated it was still pending. In response to the director's RFE, the petitioner submitted a Form ETA 9035E, certified by the Department of Labor on July 10, 2007 for the requested employment period of July 10, 2007 to July 10, 2010. Thus, the record establishes that, at the time of filing, the petitioner had not obtained a certified LCA in the occupational specialty for the requested employment period and, therefore, as determined by the director, had failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

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).

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 petition will be denied and the appeal dismissed for the above stated reason. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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