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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  
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FILE: EAC 08 120 51564 Office: VERMONT SERVICE CENTER

Date: **OCT 06 2009**

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:

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew  
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 software development and consulting company that 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 on the basis of his determination that the petitioner had failed to establish: (1) that the proposed position qualifies for classification as a specialty occupation; and (2) that it had submitted a valid labor condition application (LCA).

The record of proceeding before the AAO contains (1) the 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) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The instant petition was received at the service center on March 21, 2008. Although the petitioner submitted a certified labor condition application certified for employment in Houston, Texas, at that time, the petitioner later stated in its May 8, 2008 letter that the beneficiary would actually be working in Stamford, Connecticut. With that letter, the petitioner submitted a second LCA certified for employment in Stamford, Connecticut on May 8, 2008. The LCA for employment in Stamford, Connecticut, therefore, was certified subsequent to the petitioner's filing of the petition on March 21, 2008.

On appeal, the petitioner states that "when [the beneficiary] was selected to work at this particular project," it "submitted a new LCA for the new location." As a preliminary matter, the AAO notes that the evidence of record does not back the petitioner's assertion. The document referred to by the petitioner as an "engagement letter," which states that the beneficiary would work on the Stamford project, is dated February 28, 2008, nearly a full month before the petition was filed on March 21, 2008. The petitioner, however, did not obtain an LCA certified for employment in Stamford, Connecticut until May 8, 2008, nearly three months after the engagement letter was issued. The record, therefore, does not support the petitioner's assertion that it "submitted a new LCA" for the Stamford location "when she was selected to work at this particular project."

However, even if the petitioner's assertion with regard to the timeframe during which it obtained the certified LCA was supported by the evidence of record, the petition could still not be approved. 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, United States Citizenship and Immigration Services 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).

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. As the late-filed LCA precludes approval of this petition, the AAO affirms, but will not discuss, the remaining grounds of the director’s decision.

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.