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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: WAC 08 130 51256 Office: CALIFORNIA SERVICE CENTER Date: **OCT 29 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, California 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 an insurance agency in the State of California, that it was established in 1914, that it employs 8,150 persons, and has over 2 billion dollars in estimated gross annual income. It seeks to extend the employment of the beneficiary as an actuary from April 5, 2008 to April 5, 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 September 4, 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 representative indicated that he did not know that a petition to extend an H-1B visa required the submission of an updated LCA. The representative notes that the petitioner's delay in responding to the director's Notice of Intent to Deny (NOID) the petition for failure to submit an updated LCA was due to his extended three-week vacation and a delay in delivery of an updated LCA by the United States Post Office to U.S. Citizenship and Immigration Services (USCIS).

The record includes: (1) the Form I-129 and supporting documentation filed with U. S. Citizenship and Immigration Services (USCIS) on April 3, 2008; (2) the director's NOID; (3) the petitioner's response to the director's NOID; (4) the director's denial decision; and, (5) the Form I-290B, the petitioner's statement, and documentation 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):

An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form . . .

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

Regulation requires 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 April 3, 2008. The petitioner did not provide a certified LCA in that filing. In response to the director's NOID noting the lack of a certified LCA filed with the Form I-129 petition, the petitioner submitted a Form ETA 9035E, certified by the Department of Labor on December 29, 2005 for the requested employment period of December 29, 2005 to April 4, 2008. 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).

On appeal, the petitioner through its representative acknowledges that a certified LCA had not been filed and noted that the subsequent delay in responding to the director's NOID was due to an extended vacation and a delay in delivery of the new LCA. The petitioner submits an LCA certified by the Department of Labor on August 18, 2008 for a period of employment beginning August 18, 2008 to April 5, 2010.

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.