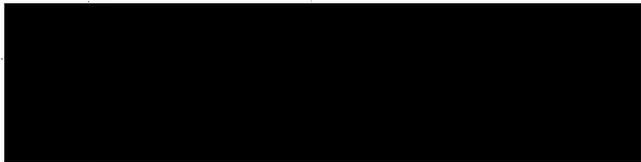




U.S. Citizenship
and Immigration
Services

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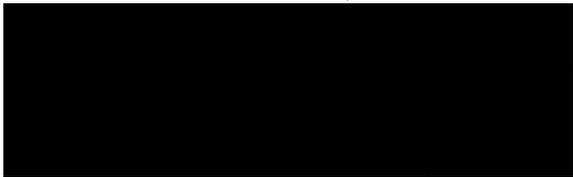
FILE: SRC 04 087 52345 Office: TEXAS SERVICE CENTER Date:

JAN 19 2005

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:



identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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, Director
Administrative Appeals Office

PUBLIC COPY

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 private corporation that provides jet services. It employs the beneficiary as a co-pilot/second-in-command for Falcon 10 corporate jet aircraft, in accordance with a previously approved petition to employ the beneficiary as an H-1B nonimmigrant worker in a specialty occupation 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). In order to continue this employment, the petitioner endeavors to continue the beneficiary's H-1B classification and extend his stay.

The director denied the petition on the basis that the petitioner had failed to file a certified labor condition application for H-1B Nonimmigrants (Form ETA 9035) (LCA) as required by Citizenship and Immigration Service (CIS) regulations. The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) states:

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 with the petition an H-1B petitioner shall submit “[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary.”

The regulation at 8 C.F.R. § 214.2(h)(15)(i)¹ states, in pertinent part:

General. The petitioner shall apply for extension of an alien's stay in the United States by filing a petition extension on Form I-129 accompanied by the documents described for the particular classification in paragraph (h)(15)(ii) of this section. . . .

The regulation at 8 C.F.R. § 214.2(h)(15)(ii)(B)(1) states that a request for an H-1B extension of stay “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 a labor condition application valid for the period of time requested for the occupation.”

The record reflects that the previous petition was approved for the period March 6, 2001 through March 1, 2004; that the present petition, filed on February 3, 2004, specified March 1, 2004 to March 1, 2007 as the period for which the petitioner intended to continue the beneficiary's employment; and that the LCA that the petitioner submitted with the instant petition had not been certified. In light of these facts, the director's decision to deny the petition accorded with the relevant CIS regulations, cited above. The petitioner failed to comply with the regulatory requirement for filing with the Form I-129 an LCA certified for the period for which the petitioner is applying to extend the beneficiary's stay.

¹ The director mistakenly cited this regulation as 8 C.F.R. § 214.2(h)(14).

Counsel acknowledges that the petitioner failed to submit the necessary certified LCA with the Form I-129 Petition for a Nonimmigrant Worker at issue in this case. Counsel indicates that the petitioner prepared and filed the Form I-129 without the assistance of any counsel, and the petitioner was not aware of the requirement to file a certified LCA with the Form I-129. The petitioner mistakenly believed that it had met its LCA obligation by filing the Form ETA-9035 with the State of Louisiana's Department of Labor. The petitioner received notice of the director's denial of the petition on or about July 29, 2004, and it retained counsel on August 27, 2004. Counsel worked to obtain a certified LCA as soon as possible, and received it on September 17, 2004.²

Counsel requests that the AAO make an exception to the regulatory LCA requirement because the petitioner made an honest mistake and acted in good faith, with neither malice nor intent to circumvent immigration law. Unfortunately, CIS regulations have no provision for discretionary relief from the LCA requirements. Accordingly, the director's decision shall not be disturbed.

Counsel's request for oral argument (in his August 27, 2004 letter accompanying the Form I-290B (Notice of Appeal), has been considered. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, CIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique facts or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique facts or issues of law to be resolved. The written record of proceedings fully represents the facts and issues in this case. Consequently, the request for oral argument is denied.

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. Accordingly, the appeal will be dismissed.

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

² The Service Center has been unable to locate the original copy of counsel's brief and exhibits. Counsel has provided the AAO a copy of the brief. For purposes of this appeal, the AAO accepts counsel's representations (1) that Exhibit 3 is a relevant certified LCA dated September 17, 2004; and (2) that Exhibit 4 documents that the petitioner has suffered economic loss due to the loss of services of the beneficiary; and that due to the beneficiary's absence, the petitioner has been forced to cut back on its normal operations.