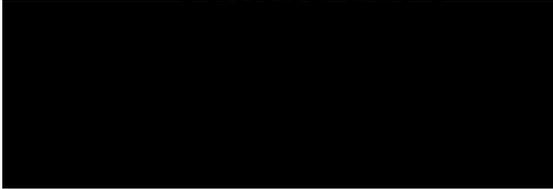




U.S. Citizenship
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FILE: WAC 04 020 50059 Office: CALIFORNIA SERVICE CENTER Date: NOV 10 2005

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 materials 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

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a manufacturer and wholesaler of wig and hair products. It seeks to employ the beneficiary as a market research analyst and to extend his 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 director denied the petition on the ground that the petitioner did not have an approved Labor Condition Application (Form ETA 9035) for the proffered position at the time its Petition for a Nonimmigrant Worker (Form I-129) was filed to continue the beneficiary's previously approved employment without change and to extend his stay in the United States.

As specified in 8 C.F.R. § 214.2(h)(4)(i)(B)(1):

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 record shows that the petitioner filed the instant Form I-129 petition on October 29, 2003, requesting H-1B classification for the beneficiary in the market research analyst position for a three-year employment period from November 30, 2003 to November 30, 2006. The petition was not accompanied by a Labor Condition Application (LCA) for the proffered position certified by the Department of Labor (DOL). On April 16, 2004, the director sent a request for evidence (RFE) to the petitioner which requested the submission, among other things, of a certified LCA. The petitioner responded to the RFE with a photocopy of a certified LCA bearing an approval date of May 7, 2004 and a validity period of May 7, 2004 through November 30, 2006. Thus, DOL's certification of the LCA postdated the filing of the H-1B petition by more than half a year. Since the petitioner did not obtain the requisite labor certification "[b]efore filing a petition for H-1B classification," as specified in 8 C.F.R. § 214.2(h)(4)(i)(B)(1), the director correctly denied the petition. CIS regulations require a petitioner to establish eligibility for the benefit at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12).

On appeal counsel asserts that the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) applies only to new H-1B petitions, not petitions to extend a beneficiary's H-1B classification for an additional period of time. Counsel's assertion is not correct. The foregoing regulation does not distinguish between original H-1B petitions and subsequent petitions to continue a beneficiary's H-1B status and extend his stay in the United States. Furthermore, the regulation at 8 C.F.R. § 214.2(h)(15)(ii)(B)(1) specifies that a request for extension of stay in H-1B visa status "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 petitioner did not have a certified LCA for the requested employment period of November 30, 2003 to November 30, 2006 at the time the instant petition was filed, in October 2003, requesting an extension of stay for the beneficiary.

For the reasons discussed above, the petitioner has failed to establish the beneficiary's eligibility for classification as a nonimmigrant worker employed in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Act.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

This dismissal is without prejudice to the petitioner's filing of a new petition accompanied by the proper documentation and requisite fee.

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