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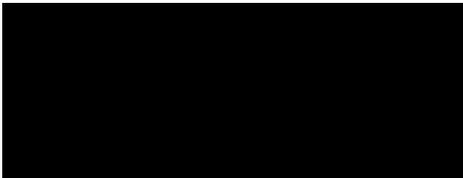


FILE: SRC 03 221 51644 Office: TEXAS SERVICE CENTER Date: NOV 23 2005

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:



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

**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 imports marble carvings and cast iron products. It seeks to employ the beneficiary as an importer. 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 ground that: (1) the petitioner failed to furnish a certified labor condition application (LCA); and (2) the proposed position did not qualify as a specialty occupation. On appeal, counsel states that the petitioner submitted a certified LCA in response to the request for additional evidence, and that the proposed position qualifies as a specialty occupation.

The AAO will first address the director's finding that the petitioner failed to submit a certified LCA.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. Evidence that the alien qualifies to perform services in the specialty occupation.

The record in this proceeding contains: (1) an LCA that the Department of Labor (DOL) certified on May 13, 2004; (2) an uncertified LCA; (3) the I-129 petition and supporting documentation that CIS received on August 8, 2003; (4) the director's request for additional evidence; (5) the petitioner's response to the director's request; (6) the director's denial letter; (7) Form I-290B; and (8) a brief. The AAO reviewed the record in its entirety before issuing its decision.

CIS 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 regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) provides that the petitioner shall submit with the H-1B petition a certification from the Secretary of Labor that it has

filed an LCA. Based on the regulations, it is incumbent upon the petitioner to file the proper documents in order to establish eligibility for a benefit. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at the future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The record reflects that the petitioner's I-129 petition was received by CIS on August 8, 2003, and the LCA has a May 13, 2004 certification date. Because the petitioner seeks to submit an LCA with a May 13, 2004 certification date, which is subsequent to the filing of the H-1B petition on August 8, 2003, the petitioner fails to comply with CIS regulations set forth at 8 C.F.R. § 103.2(b)(12) and 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). For this reason, the petition will be denied.

Since the record reflects that the petitioner failed to submit a timely LCA, it is inconsequential whether or not the proposed position qualifies as a specialty occupation.

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.