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FILE: WAC 05 001 51248 Office: CALIFORNIA SERVICE CENTER Date: JUN 06 2006

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 is a real estate developer that seeks to employ the beneficiary as a cost estimator, and endeavors to classify him 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, finding the petitioner failed to furnish a certified labor condition application (LCA). On appeal, counsel submits a timely brief and additional evidence.

The record in this proceeding contains: (1) an uncertified LCA with the page link number of 748913; (2) the Form I-129 petition and supporting documentation that CIS received on September 29, 2004; (3) the director's denial letter; (4) the Form I-290B and the brief; and (5) a document entitled "Activity Report," which shows a fax transmittal. The AAO reviewed the record in its entirety before issuing its decision.

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.

Regulation requires that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified 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 petition also specify that an H-1B petitioner must document the filing of a labor certification application with the DOL when submitting the Form I-129 petition.

Counsel contends on appeal that the director violated 8 C.F.R. § 103.2(b)(8) by failing to request further evidence before denying the petition. The cited regulation requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is

missing." *Id.* The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. Furthermore, even if the director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has an opportunity to supplement the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

On appeal, counsel contends that CIS will accept H-1B petitions for filing with proof that the LCA was filed with the Department of Labor (DOL) under existing CIS practice, and he submits an excerpt from the *H-1B Handbook* written by Austin T. Fragomen, Jr. and Steven C. Bell to support his contention. Counsel's statement and the supporting evidence is not persuasive, however, in light of the regulations relating to the H-1B petition and the LCA. 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 LCA contained in the record is uncertified. Although counsel claims that an LCA was certified by the DOL prior to the September 29, 2004 filing date of the H-1B petition, no such LCA was submitted on appeal. Thus, based on the evidence of record, the petitioner has not complied with the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1), 8 C.F.R. § 214.2(h)(4)(i)(B), and 8 C.F.R. § 103.2(b)(12). For this reason, the petition will be 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.

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