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20 Mass. Ave., N.W., Rm. 3000
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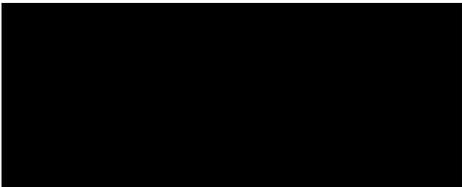
FILE: EAC 06 183 51293 Office: VERMONT SERVICE CENTER Date: NOV 30 2007

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 documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director 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 software development business. It seeks to employ the beneficiary as a radio frequency engineer 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 because a certified labor condition application (LCA) was not obtained prior to the filing of the Form I-129 petition. On appeal, the petitioner states that a properly certified LCA was obtained prior to the filing of the petition, but that the wrong work location was noted on the LCA due to clerical error.

The issue to be discussed in this proceeding is whether a certified LCA was obtained prior to the filing of the Form I-129 petition.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 101(a)(15)(H) of the Act defines an H-1B nonimmigrant as:

[A]n alien who is coming temporarily to the United States to perform services . . . in a specialty occupation . . . and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary of Labor an application under section 212(a)(n)(1)

Title 8, Code of Federal Regulations, part 214.2(h)(4)(iii)(B)(1) provides that the petitioner shall submit with an H-1B petition “a certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary.” The regulations further provide:

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.

8 C.F.R. § 214.2(h)(4)(i)(B)(1).

Pursuant to 8 C.F.R. § 103.2(b)(12), “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. . . .” The Form I-129 petition was filed May 26, 2006. An LCA was submitted with the petition noting that the work location for that LCA was Pittsburgh, TN. The Form I-129 petition sought H-1B qualification for a position in Pittsburgh, PA. The director issued a request for evidence (RFE) seeking clarification of the beneficiary’s work location, and asking that the petitioner submit a properly certified LCA for Pittsburgh, PA if that was, in fact, the correct work location. In response to that request the petitioner submitted an LCA for Pittsburgh, PA certified on December 1, 2006, subsequent to the filing of the initial petition. The petition must, accordingly, be denied because certification was not obtained prior to the filing of the H-1B petition. The petitioner asserts, on appeal, that the new LCA should be accepted because the initial LCA submitted with the petition noted the wrong location through clerical error. The relief sought by the petitioner is not permitted by regulation.

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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 failed to sustain that burden.

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