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FILE: EAC 05 166 52169 Office: VERMONT SERVICE CENTER Date: FEB 08 2008

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, 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 construction company. It seeks to employ the beneficiary as an unlicensed engineer consultant 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 does not state that it obtained a certified LCA for the present Form I-129 petition covering the dates of intended employment (7/22/02 – 7/21/05), but that the petition was an extension petition and that a prior certified LCA was in effect when the present petition was filed on March 31, 2005. As such, the petitioner states that the director denied the petition in 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).

The petitioner indicated on the Form I-129 petition (Part 2, (2)), that the petition seeks a change in the beneficiary’s previously approved employment. The record indicates, however, that the petition is one for continuation of previously approved employment without change, and with the same employer. The record of proceeding indicates the following:

1. [REDACTED] prepared a Form I-129 petition on behalf of the beneficiary, executing same on March 16, 2000, and seeking the beneficiary’s services as an engineering consultant from October 1, 2000 to September 30, 2003;

2. In support of that petition, [REDACTED] obtained a certified LCA valid from October 1, 2000 – September 30, 2003;
3. The present petitioner, [REDACTED], obtained H-1B approval for the beneficiary valid from February 21, 2003 to July 21, 2005. The record does not establish that [REDACTED] (the present petitioner) obtained, or applied for, an LCA supporting the Form I-129 petition filed on behalf of the beneficiary;
4. On May 9, 2005, [REDACTED] filed an H-1B petition (the present petition) seeking H-1B approval for the beneficiary to work as an unlicensed engineer consultant from July 22, 2002 – July 21, 2005 (the listed dates appear to be in error as the beneficiary was already in approved H-1B status until July 21, 2005). The petitioner did not submit, in support of the petition, a certified LCA.
5. On September 15, 2005, the director submitted a request for evidence requesting, in part, that the petitioner provide a certified LCA supporting the Form I-129 petition filed on May 9, 2005.

The regulation at 8 C.F.R. § 214.2(h)(15)(ii)(B)(1) indicates that any request for extension 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 an LCA valid for the period of requested employment. The petitioner did not submit a copy of any previously certified LCA obtained by [REDACTED] that was valid for the intended dates of employment, or any portion of the intended dates of employment noted on the present petition.

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. . . .” As previously noted, the Form I-129 petition was filed May 9, 2005. A properly certified LCA for the beneficiary’s intended work location was not submitted at the time of filing. The director then submitted a request for evidence (RFE) requesting, in part, that the petitioner submit a properly certified LCA for the intended dates of employment. In response to that request the petitioner submitted an LCA certified on May 10, 2000, and valid from October 1, 2000 – September 30, 2003. The LCA submitted is from a different employer, and pertains to different employment than that covered by the present petition. It may not, therefore, be used to support the present petition. The petition must, accordingly, be denied because a properly certified LCA was not obtained prior to the filing of the H-1B petition.

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.