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Dr

FILE: WAC 07 038 53561 Office: CALIFORNIA SERVICE CENTER Date: **MAR 03 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 an apparel manufacturer. It seeks to employ the beneficiary as a computer operations supervisor and endeavors to classify her 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 Form I-129 petition was filed on November 20, 2006, listing thereon intended dates of employment from December 20, 2003 to December 19, 2006. The director issued a Notice Of Intent To Deny (NOID) noting that a previous H-1B petition had been approved for the petitioner and this beneficiary for the intended dates of employment. The director asked that the petitioner clarify the dates of intended employment and to submit a properly certified LCA covering those dates. In response to the director's NOID, the petitioner amended its Form I-129 petition which now states that the intended dates of employment for the beneficiary are from December 21, 2006 – December 21, 2007. The petitioner also submitted an LCA certified on February 27, 2007 (subsequent to the filing of the petition) covering employment from February 27, 2007 – December 21, 2007.

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. . . ." As previously noted, the Form I-129 petition was filed November 20, 2006. In response to the director's NOID, the petitioner submitted an LCA which was certified February 27, 2007, subsequent to the filing of the present petition. The petition must, accordingly, be denied because certification was not obtained prior to the filing of the H-1B petition.

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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.