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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: EAC 07 265 51556 Office: VERMONT SERVICE CENTER

Date: OCT 01 2008

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:

SELF-REPRESENTED

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 Director, Vermont 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 an automobile sale, service and restoration business that seeks to employ the beneficiary as an automobile systems specialist. The petitioner, therefore, seeks 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 record includes: (1) the Form I-129 and supporting documents; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision denying the petition; and (5) the Form I-290B and supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

The petition for an extension of the beneficiary's H-1B status for employment from November 1, 2007 to November 1, 2010 was received at the service center on September 6, 2007, but it did not contain a certified Form ETA 9035 Labor Condition Application (LCA). As such, the director requested a certified LCA in a July 24, 2007, August 29, 2007, and a December 18, 2007 request for evidence. In response, **the petitioner submitted an LCA, case number [REDACTED] certified on December 26, 2007.** The director denied the petition on the basis of the petitioner's failure to obtain a certified LCA and noted that the LCA must be certified prior to the filing of the Form I-129.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

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.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition "[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary." Therefore, in order for a petition to be approvable, the LCA must have been certified *before* the H-1B petition was filed. The submission of a certified LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time that the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). As such, the AAO finds that the director's denial of the petition was proper.

On appeal, the petitioner states that it did not understand that the LCA was Form ETA 9035 and that once it understood the requirement for an LCA, it was not possible to obtain an LCA certified before the Form I-129 filing date. The petitioner has also submitted a new Form I-129 on appeal.

The petitioner's submission of a certified LCA has not satisfied the regulation. The petitioner's failure to procure a certified LCA prior to filing the H-1B petition precludes its approval, and pursuant to 8 C.F.R. § 214.2(h)(4)(i)(B)(1) and 8 C.F.R. § 214.2(h)(4)(iii)(B)(1), there is no provision for discretionary relief from the LCA requirements. Further, the petitioner's submission of a new Form I-129 on appeal does not provide the petitioner with a new filing date. Accordingly, the AAO will not disturb the director's denial of the 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 not sustained that burden.

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