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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 07 241 51922 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:



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 Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a design company specializing in packaging designs, advertising, and collateral material for businesses and retailers in the New York/Tri State metropolitan area. It seeks to employ the beneficiary as a graphic designer. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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).

On March 21, 2008, the director denied the petition determining that the petitioner had not provided a certified copy of the Form 9035E, Labor Condition Application (LCA) properly filed, completed and endorsed by the Department of Labor for the indicated employment location of Edgewood, New York; thus, the petitioner had not complied with the requirements for filing a Form I-129, Petition for a Nonimmigrant Worker.

The record of proceeding before the AAO contains: (1) Form I-129 filed August 22, 2007 and supporting documentation; (2) the director's December 7, 2007 request for evidence (RFE); (3) counsel for the petitioner's December 28, 2007 response to the director's RFE; (4) the director's March 21, 2008 denial decision; and (5) the Form I-290B and brief in support of the appeal.

The issue before the AAO is whether the petitioner submitted a valid LCA for the beneficiary's work location when the petition was filed.

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. § 103.2(a)(1) as follows:

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form

In matters where evidence related to filing eligibility is provided in response to a director's request for evidence, 8 C.F.R. § 103.2(b)(12) states:

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 regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must obtain a certified LCA 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 also specify that an H-1B petitioner must document the filing of an LCA with the Department of Labor when submitting the Form I-129.

In the instant matter, the petitioner submitted the Form I-129 to Citizenship and Immigration Services (CIS) on August 22, 2007. Documentation submitted with the petition established that the beneficiary's work location would be the petitioner's offices in Edgewood, New York. The petitioner also provided a copy of an LCA certified August 8, 2007 for the work location of Edgewater, New York. In the director's RFE, the director requested a certified copy of the LCA for the beneficiary's actual work location, Edgewood, New York. In response, counsel for the petitioner stated that the certified LCA appended to the petition contained a typographical error in section E and that the work location should have stated "Edgewood," not "Edgewater." Counsel submitted the same LCA as submitted with the petition but with the letters "water" crossed out and the letters "wood" handwritten above the crossed out portion in section E. Counsel asserted that the typographical error did not affect the validity of the approved LCA as the work location is at the petitioner's offices in Edgewood, New York.

The director found that the altered LCA was not a valid LCA for the beneficiary's actual work location and denied the petition. On appeal, counsel for the petitioner asserts that the director's decision is arbitrary, capricious, and an abuse of discretion and is clearly erroneous as a matter of law. Counsel contends that the petitioner clearly indicated that it wished to employ the beneficiary at their offices in Edgewood, New York, and that the typographical error should not bear on the validity of the LCA. Counsel points out that the fact New York State does not have a city or town entitled Edgewater is significant and that CIS in denying the petition is depriving the petitioner of a vital employee.

The purpose of the certified LCA is to establish that the Department of Labor concurs with the information relating to the work location listed on the LCA in terms of the prevailing wage. In this matter, the record does not contain an LCA certified by the Department of Labor relating to the beneficiary's work location in Edgewood, New York. CIS did not have information at the time the petition was filed that the Department of Labor concurred with the prevailing wage for the beneficiary's actual work location. The record was and is insufficient to establish that the submitted LCA is valid for the beneficiary's actual work location. Counsel has not submitted evidence of a certified LCA properly filed, completed, and endorsed by the Department of Labor for the indicated employment location of Edgewood, New York.

A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petitioner failed to comply with

the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B) and has not submitted evidence or argument sufficient to overcome the director's decision in this matter..

Thus, for the reasons discussed, the beneficiary is ineligible for classification as an alien employed in a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in this proceeding 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