

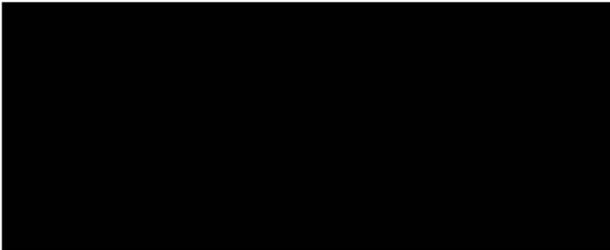
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U.S. Citizenship
and Immigration
Services



D2

FILE: WAC 07 140 50791 Office: CALIFORNIA SERVICE CENTER Date: **FEB 02 2009**

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: 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition, and the matter is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is engaged in the electronic test equipment industry. It seeks to employ the beneficiary as a calibration metrology technician. The petitioner, therefore, endeavors 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 director denied the petition because the petitioner failed to meet the requirements for filing a Form I-129, Petition for a Nonimmigrant Worker. Specifically, the director found that the petitioner had failed to comply with the requirements of 8 C.F.R. § 214.2(h)(4)(i)(B)(I), which requires the petition to be accompanied by a Labor Condition Application (LCA) certified by the Department of Labor (DOL).

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) documentation submitted in response to the director's request; and (4) Form I-290B accompanied by copies of the petitioner's previously submitted evidence. The petitioner indicated on the Form I-290B that it would submit a brief or other evidence to the AAO within 30 days. To date, however, no further documentation has been received. Thus, the record is now considered complete. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the petitioner established filing eligibility at the time the Form I-129 was received by U.S. Citizenship and Immigration Services (USCIS).

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 cases 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 obtain a certified LCA from the DOL 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 a labor certification application with the DOL when submitting the Form I-129.

In the instant case, the petitioner filed the Form I-129 with USCIS on April 9, 2007. The petitioner did not submit a certified LCA with the petition; therefore, the director issued a request for evidence on September 27, 2007 requesting evidence of certification. In response, the petitioner provided a copy of an LCA, certified by the DOL on October 26, 2007, over six months after the petitioner filed the Form I-129. Moreover, the dates of intended employment included on the LCA (October 26, 2007 to May 16, 2010) differed from the intended dates of employment set forth on Form I-129 (May 16, 2007 to May 16, 2010). Therefore, the record establishes that, at the time of filing, the petitioner had not obtained a certified LCA in the occupational specialty and, therefore, as indicated by the director, had failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

On appeal, the petitioner does not address the requirement to submit a certified LCA at the time of filing. Rather, it contends that it submitted a certified LCA in response to the director's request for evidence, and claims that the contrast between the original intended dates of employment and the updated dates of employment are the result of the DOL's computer system prohibiting the backdating of applications. The petitioner has not overcome the basis for the denial in this matter.

The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. 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).

Therefore, for the reasons already 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.

Beyond the decision of the director, the petitioner has failed to establish that the proffered position is a specialty occupation.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The proffered position in this matter is identified as “calibration metrology technician.” According to the job duties identified on ETA Form 9089, Application for Permanent Employment Certification, the beneficiary’s duties would include “calibration and repair of electronics testing and measuring equipment.” Based on this description of duties, it appears that the beneficiary’s proffered position is that of an electrical and electronics installer or repairer. According to the DOL’s *Occupational Outlook Handbook (Handbook)*, 2008-2009 edition, the minimum requirement for entry into the position is not a baccalaureate degree or its equivalent in a specific specialty. Rather, an associate degree from a community college or technical school is preferred, although a high school diploma may be sufficient for some jobs.

The petitioner has failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A); therefore, the proffered position is not a specialty occupation. For this additional reason, the petition may not be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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