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U.S. Citizenship
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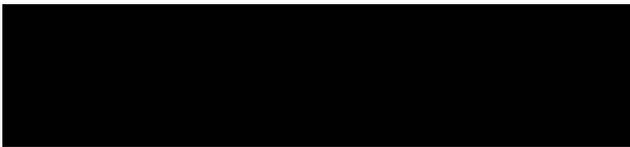
FILE: EAC 07 136 51566 Office: CALIFORNIA SERVICE CENTER Date: MAR 04 2009

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.

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, as required by 8 C.F.R. 103.5(a)(1)(i).

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom, Acting 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 IT (information technology) service company. To employ the beneficiary in a position it designates as a software engineer, the petitioner 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 director denied the petition on the ground that the petitioner failed to provide a timely certified Labor Condition Application (LCA) for the work location indicated on the Form I-129. The director noted that the LCA filed with the petition specified the work location as Allen, Delaware, while the Form I-129 specified the work location as Allen, Texas. The director acknowledged that, in response to the service center's request for evidence (RFE), the petitioner submitted another LCA, which bears the same Allen, Texas address that appears on the Form I-129. However, as noted by the director, this second LCA was certified after the filing of the Form I-129.

On appeal, counsel contends that denial of the petition was an abuse of discretion because the work-location discrepancy is the product of a typing mistake on the initial LCA that "did not in any way diminish the integrity of the process."

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's denial letter; and (3) the Form I-290B and counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

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." Thus, in order for a petition to be approvable, the LCA must have been certified before the H-1B petition was filed. The submission of an 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 the petition is filed. *See* 8 C.F.R. § 103.2(b)(12).

The record reflects the following facts. The Form I-129 was filed on April 2, 2007. It indicates that the beneficiary would work at the location that the Form I-129 specified as the petitioner's mailing

address, that is, [REDACTED]. The first LCA filed with regard to this petition also identified the petitioner's address as [REDACTED], but it identified [REDACTED] as the beneficiary's work location. This LCA was certified by the Department of Labor on March 23, 2007, a date prior to the April 2, 2007 filing of the Form I-129. On May 18, 2007, the service center issued an RFE that, in part, noted that the LCA certified in March 2007 did not accord with the Form I-129's information about the state in which the petitioner would work, and it requested an LCA, with the correct work-location, that was certified prior to the filing of the Form I-129. In response to the RFE, the petitioner submitted another LCA. It specifies the same work-location state, Texas, as appears on the Form I-129. However, it was certified by the Department of Labor on August 8, 2007, a date after the April 2007 filing of the Form I-129.

There is no provision in the regulations for discretionary relief from the LCA requirements. The petitioner's failure to procure a certified LCA for the correct worksite prior to filing the H-1B petition precludes its approval, and the AAO will not disturb the director's denial of the 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 not sustained that burden.

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