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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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FILE: WAC 08 099 51912 Office: CALIFORNIA SERVICE CENTER

Date: **JAN 08 2010**

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)

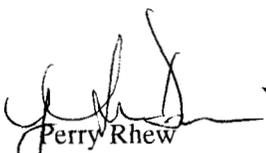
ON BEHALF OF PETITIONER:



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).

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The director of the 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 lists as its type of business on the H-1B petition: "industrial & military ruggedized portable computers." It claims to have been established in 1986 and to employ 14 persons. It seeks to employ the beneficiary as a financial manager. 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 submit a valid Labor Condition Application (LCA). On appeal, counsel submits a statement on the Form I-290B.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The instant petition was received at the service center on February 22, 2008. When filing the H-1B petition, the petitioner did not submit a LCA and, therefore, on April 30, 2008, the director issued an RFE requesting the submission of a certified LCA for the beneficiary's intended employment. In response, the petitioner submitted a *Prevailing Wage Request* form from the State of California's Employment Development Department, which was dated May 28, 2008.

When denying the petition, the director noted that she had asked the petitioner to submit a certified LCA, but instead, the petitioner submitted a *Prevailing Wage Request* form. The director concluded that, without a certified LCA, the petition could not be approved.

On appeal, counsel states that, as a result of an error by a clerical staff member, a *Prevailing Wage Request* form was submitted instead of an LCA. Counsel submits an LCA that was certified on October 31, 2008, and asks the AAO to not penalize the beneficiary for the petitioner's error.

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.

Here, the petitioner filed the H-1B petition on February 22, 2008 but submitted an LCA that was certified on October 31, 2008, more than eight months after filing the petition. The submission of an LCA that was 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). Further, United States Citizenship and Immigration Services 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)(1).

The petitioner’s failure to procure a certified LCA prior to filing the H-1B petition precludes its approval, and the regulations contain no provision for the AAO to provide discretionary relief from the LCA requirements. Accordingly, the AAO cannot 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.