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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]

Office: VERMONT SERVICE CENTER

Date: JUL 01 2010

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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the 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 claims to be a chain of three retail convenience stores that sell gas and groceries and that have a total of eleven employees. It seeks to employ the beneficiary as an accountant. 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 November 21, 2008, the director denied the petition determining that 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) the Form I-129 filed April 2, 2008 and supporting documentation; (2) the director's July 18, 2008 request for additional evidence (RFE); (3) the petitioner's submission in response to the RFE; (4) the director's November 21, 2008 denial decision; and (5) the Form I-290B submitted by counsel for the petitioner. The AAO has considered the record in its entirety before issuing 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) on April 2, 2008.

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 that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

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. An application or petition shall be denied where any application or petition upon which it was based was filed subsequently.

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must obtain a certified Labor Condition Application (LCA) from the U.S. Department of Labor (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 Department of Labor when submitting the Form I-129.

In the instant matter, the petitioner requested H-1B employment, but submitted an LCA in support of this request that did not cover even one day of the requested period of time listed in the petition. Specifically, the requested dates of employment in the petition were October 1, 2008 to September 30, 2011, while the certified period of employment in the LCA submitted with the petition was March 30, 2008 to September 30, 2008. In response to the director's RFE issued July 18, 2008, which requested evidence of the petitioner's certified LCA along with other documentation, the petitioner submitted a second LCA covering a period of employment from October 9, 2008 to September 30, 2011. However, this second LCA was not certified until October 9, 2008, after the petition was filed. Therefore, the petitioner did not demonstrate eligibility at the time of filing as required by 8 C.F.R. § 103.2(b)(1).

As an explanation for why the initial LCA was submitted with a period of time that did not correspond with the petition, counsel stated as follows in the response to the RFE:

With regard to the Labor Condition Application, the dates of March 30, 2008 through September 30, 3008 [sic] were used only because the petition was filed by the Petitioner on March 30, 2008 in order to be considered timely filed and to merit consideration as a cap case. As the service is aware, the DOL will not allow a Labor Condition Application to be certified with validity dates which exceed six months from the date of certification. Thus, the Petitioner, in order to have the form certified was forced to use the validity dates in question. Again, this was only done for the purpose of ensuring that the application would be considered properly filed.

To account for the defect that the Service now alleges, the Petitioner hereby submits a Labor Condition Application which has been properly certified. The Petitioner asserts that the alleged defect in the LCA is a mere clerical error, is technical in nature, is through no fault of the employer, has been duly corrected, and should not disturb the adjudication of the case. If the Service is concerned about the validity dates on the LCA versus the I-129, the Petitioner has submitted an amended Form I-129 with validity dates which mirror those of the LCA submitted with this packet. . . .

As the petitioner did not provide an LCA certified as of the date the petition was filed, the director denied the petition.

On appeal, the petitioner and counsel assert that USCIS abused its discretion by not addressing the argument made in the petitioner's response to the RFE that the defect in the LCA is a technical clerical error made through no fault of the petitioner. Counsel did not submit a brief in support of the appeal.

Contrary to counsel's argument on appeal, the AAO finds that the errors made in the first LCA were not inadvertent, but intentional, as the petitioner and counsel mistakenly assumed that the only way to file the petition in time to be considered under the H-1B cap for Fiscal Year 2008 (FY08), was to obtain an LCA with a requested validity period that ended prior to October 1, 2008. The AAO acknowledges that counsel wanted to file the petition by April 1, 2008 as a strategy to increase the chance of the petition being accepted under the H-1B cap for FY08. However, this was unnecessary as the regulations were amended on March 24, 2008 to provide an equal opportunity for a petition filed within the first five business days during which such cap subject petitions may be filed to be granted one of the available numbers of the next, upcoming fiscal year (FY 2009). 8 C.F.R. § 214.2(h)(8)(ii)(B); 73 Fed. Reg. 15389, 15394-15395 (Mar. 24, 2008). Given this, the petitioner could have filed an LCA on April 1, 2008 to cover the period of requested time beginning October 1, 2008 and would likely have received the certified LCA the same day, in time to file the present petition within the first five business days during which these petitions may be received.

Alternatively, the petitioner could have requested that the period of time covered in the LCA begin prior to October 1, 2008. This would have meant that the petition's requested validity period, which could not have started earlier than October 1, 2008 to be considered for FY 2009, would have ended prior to September 30, 2011, but it would have enabled the petitioner to file on April 1, 2008 for a petition that would cover nearly three years, beginning on October 1, 2008, and ending on the date through which the LCA is valid.¹

Additionally, accepting a petition without an LCA certified at the time the petition was filed and covering the dates requested in the petition would be contrary to the fairness provision of the Act which limits the number of eligible H-1B aliens to 65,000 per year and requires that the visas shall be issued in the order in which petitions are filed. *See* 8 C.F.R. § 214.2(h)(8)(ii)(B); 73 Fed. Reg. 15389. To do otherwise would not be fair to those petitioners whose petitions were properly submitted under 8 C.F.R. §103.2.

In summary, USCIS does not require that an H-1B petition be filed by April 1st of a given fiscal year and, moreover, there are strategies that the petitioner and counsel could have used in obtaining an LCA certified as of the date the petition was filed. Consequently, the AAO finds that the director did not err in denying the petitioner based on counsel and the petitioner's failure to submit an LCA certified at the time the petition was filed and covering at least a portion of the requested employment dates.

As referenced above, the regulations require that before filing a Form I-129, a petitioner must obtain a certified-LCA from DOL and the LCA must correspond to the beneficiary's anticipated employment. *See* 8 C.F.R. § 214.2(h)(4)(i)(B); 20 C.F.R. § 655.705(b). The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. In this matter, the petition initially failed to provide an LCA covering the petition's requested validity dates and, further, in response to the director's RFE, submitted an LCA certified after the date the petition was filed, thereby failing to establish that it had complied with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). The non-existence or unavailability of evidence material to an eligibility determination creates a presumption of ineligibility. *See* 8 C.F.R. § 103.2(b)(2)(i).

¹ DOL regulations only require that an LCA not be filed "earlier than six months before the beginning date of the period of intended employment shown on the LCA." 20 C.F.R. § 655.730. They do not require that the period of intended employment coincide with the date the LCA is filed with DOL. *See id.*

Thus, the record does not show that, at the time of filing, the petitioner had obtained a certified LCA in the occupational specialty. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). 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 has failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). The record establishes that, at the time of filing, the petitioner had not obtained a current certified LCA in the occupational specialty and, therefore, as determined by the director, had failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

For the reason discussed above, 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.