

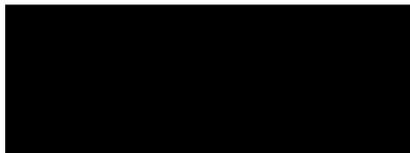
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U.S. Citizenship  
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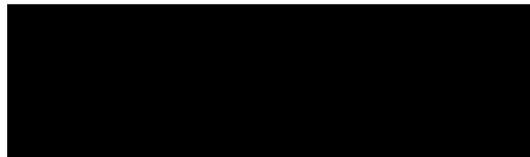
FILE: [REDACTED] Office: VERMONT SERVICE CENTER

SEP 02 2010  
Date:

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:

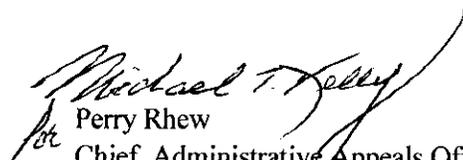


INSTRUCTIONS:

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 service center director denied the instant 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.

On the Form I-129 visa petition the petitioner stated that it is a computer service firm. To employ the beneficiary in a position designated as a network engineer, the petitioner endeavors to classify him 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).

On December 10, 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, in that the petition was not accompanied by a certified Labor Condition Application (LCA) when it was submitted. On appeal, the petitioner noted that a certified LCA had subsequently been submitted.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

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 February 12, 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), which states in pertinent part:

An applicant or petitioner must establish eligibility 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 . . . .

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 from the 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 DOL when submitting the Form I-129.

In the instant matter, the visa petition requested an extension of the beneficiary's H-1B classification, but was not accompanied by a certified LCA in support of the extension request. The LCA that the petitioner did then submit was uncertified. In response to an RFE, the petitioner submitted an LCA that had been DOL-certified on August 7, 2008 for employment beginning August 7, 2008 and ending January 20, 2011. The director determined that the LCA submitted was not a current approved LCA on the date the petitioner submitted the visa petition and denied the visa petition, accordingly.

The AAO acknowledges counsel's assertion that the failure to have the previous LCA certified was an oversight on counsel's part. However, as referenced above, the regulations require that before filing a Form I-129, a petitioner must obtain a certified LCA from the DOL. A good faith effort does not satisfy the regulations. 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 petitioner, when the visa petition was filed, did not submit, nor even possess, a current LCA to establish compliance with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

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