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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



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DATE: **DEC 16 2011** OFFICE: VERMONT SERVICE CENTER FILE:

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:

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 \$630. 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 nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain denied.

The petitioner represented itself on the Form I-129 as an import-export business with one employee and a gross income of \$112,354. It seeks to employ the beneficiary as a part-time import-export manager 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 basis of his determination that the petitioner had failed to submit a valid labor condition application (LCA).

The record of proceeding before the AAO contains the following: (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 for additional evidence; (4) the director's decision denying the petition; and (5) the Form I-290B and supporting documentation. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review of the entire record, we find that the petitioner has failed to overcome the director's ground for denying this petition.

The petitioner filed the instant petition on June 15, 2009 so that it could continue its employment of the beneficiary. However, it did not submit an LCA certified for the period of employment requested by the petitioner. As such, the director issued a request for additional evidence on June 24, 2009, and requested a certified LCA. In response, the petitioner submitted an LCA certified by the Department of Labor (DOL) on July 17, 2009, more than one month after the filing of the instant petition.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) states 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 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 (USCIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. 8 C.F.R. § 103.2(b)(1).

On appeal, counsel submits evidence indicating that another employer filed an application for alien labor certification (ALC) on behalf of the beneficiary on October 19, 2008, and notes delays in ALC processing. However, whether an ALC has been filed on behalf of the beneficiary is not

relevant to the issue on appeal, which is whether or not the petitioner obtained an LCA certified for the period of requested employment (June 26, 2009 through June 26, 2011) prior to the filing of the instant H-1B petition. Counsel also notes on appeal that the petitioner obtained a certified LCA in 2006 prior to its filing of its previous H-1B petition on behalf of the beneficiary. However, that LCA, which was certified for employment from June 28, 2006 through June 27, 2009, does not pertain to the instant petition and is not relevant to the issue on appeal, either.

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 discretionary relief from those requirements. Accordingly, the AAO cannot disturb the director's denial of the petition and this petition must remain denied.

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 and the appeal will be dismissed.

ORDER: The appeal is dismissed.