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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: **FEB 09 2012** Office: CALIFORNIA 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,

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Chief, Administrative Appeals Office

**DISCUSSION:** The director of the California 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 residential care facility with 63 employees and a gross annual income of \$3,900,000. It seeks to continue to employ the beneficiary as a manager, human resources 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 March 1, 2010, 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. On appeal, counsel for the petitioner submits emails from the U.S. Department of Labor (DOL) as evidence that the petitioner filed a DOL Form 9035 & 9035E Labor Condition Application for Nonimmigrant Workers (LCA) with DOL prior to filing the Form I-129 with the U.S. Citizenship and Immigration Services (USCIS). However, counsel states that the petitioner experienced technical problems with the iCERT system and was not able to include a certified LCA with the Form I-129.

The record of proceeding before the AAO contains: (1) the Form I-129 filed on October 23, 2009 and supporting documentation with a requested employment start date of October 25, 2009; (2) the director's December 1, 2009 request for additional evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's January 25, 2010 RFE; (5) the LCA certified on February 12, 2010 for employment starting February 9, 2010 and ending October 24, 2010; (6) the director's March 1, 2010 denial decision; and (7) the Form I-290B and supporting documentation. 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 the United States Citizenship and Immigration Services (USCIS) on October 23, 2009.

The 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 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 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 June 12, 2009 version of the instructions that accompanied the Form I-129 filed in this matter also specify that an H-1B petitioner must document the filing of an LCA with the DOL when submitting the Form I-129.

In the instant matter, the petitioner requested an extension of the beneficiary's H-1B classification for another year from October 25, 2009 to October 24, 2010 upon the expiration of the beneficiary's classification on October 25, 2009, but it did not submit a Form 9035E LCA in support of the extension request. On January 25, 2010, the director issued an RFE requesting the petitioner to submit a certified LCA for the period of October 25, 2009 to October 24, 2010. On February 22, 2010, the director received the response to the RFE, and it included an LCA certified on February 12, 2010 for the beneficiary and covering the period of employment from February 9, 2010 to October 24, 2010. On March 1, 2010, the director denied the petition on the ground that the petitioner failed to comply with the requirement at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) for an LCA certified by DOL for the period of employment for which the petitioner sought to continue the beneficiary's H-1B status.

The AAO acknowledges that the petitioner submitted an LCA certified on February 12, 2010 for the beneficiary for the period of employment from February 9, 2010 to October 24, 2010 in response to the RFE. However, as referenced above, the regulations require that before filing a Form I-129, a petitioner must obtain a certified LCA from the DOL and the LCA must include the beneficiary's entire anticipated employment period. 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 initially failed to provide a valid LCA and further in response to the director's RFE did not submit an LCA certified on or before the date the petition was filed to establish that it had complied with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

Furthermore, as the LCA submitted in response to the RFE was certified nearly four months after the petitioner filed the Form I-129, the petitioner failed to establish that it was eligible for the benefit sought at the time the petition was filed. Again, 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). Thus, the record does not show that, at the time of filing, the petitioner had obtained a certified LCA in the claimed occupational specialty. The petitioner has failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

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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.