

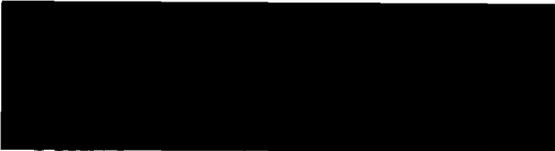
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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

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Date: **MAR 01 2012** Office: CALIFORNIA SERVICE CENTER FILE: WAC 10 009 50188

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 director of the California Service Center (CSC) denied the nonimmigrant visa petition and the matter is before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the record remanded for entry of a new decision based upon all of the evidence currently in the record.

The petitioner is an information technology consulting and software development company that seeks to employ the beneficiary as a business analyst. 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, finding 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) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) documentation submitted in response to the RFE; and (4) Form I-290B and supporting documentation.

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).

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):

Demonstrating eligibility at time of filing. 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. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition.

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner 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 an LCA with the DOL when submitting the Form I-129.

The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. The petition in this matter was received on October 8, 2009, but was not accompanied by a certified LCA. However, subsequent to the petition's filing but prior to its adjudication, the petitioner submitted a copy of an LCA certified on October 7, 2009, one day prior to the filing of the petition. Although the certified LCA did not accompany the petition when initially filed, counsel subsequently supplemented the record with a copy of the required LCA.

Upon review of counsel's assertions and the documentation submitted on appeal, it appears that, at the time of filing, the petitioner had obtained a certified LCA that corresponded to the petition. Consequently, the record will be remanded to the director to enter a decision based upon the LCA submitted by counsel on October 27, 2009.

The appeal cannot be sustained and the petition approved, however, because eligibility for the benefit sought has not otherwise been established. Specifically, the petitioner has not established the following: (1) the proffered position qualifies as a specialty occupation, especially given the entry-level, Level I designation of the position on the certified LCA; and (2) the beneficiary qualifies to perform the duties of a specialty occupation as the record lacks an evaluation of the beneficiary's education by a reliable credential evaluation service which equates the beneficiary's Canadian certificate to a U.S. bachelor's or higher degree in a specific specialty.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. That burden has been satisfied in part.

ORDER: The director's decision dated January 5, 2010 denying the petition shall be withdrawn and the record remanded for the entry of a new decision. Before issuing a new decision, however, the director shall issue another RFE providing the petitioner an additional opportunity to establish (1) that the proffered position qualifies as a specialty occupation and (2) that the beneficiary qualifies to perform the duties of a specialty occupation.