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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



DATE: **JUN 03 2013**

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:

SELF-REPRESENTED

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Michael T. Keely

Ron Rosenberg
Acting 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 be denied.

On the Form I-129 visa petition, the petitioner describes itself as music education business established in 1994. In order to continue its employment of the beneficiary in what it designates as a music teacher position, the petitioner seeks to extend her classification 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 on the basis of her 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 (RFE); (3) counsel's response to the director's RFE; (4) the director's letter 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, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

The AAO will first summarize, in chronological fashion, the salient facts most pertinent to this appeal.

The record reveals that this is an extension petition filed to continue the validity of the H-1B petition that had been previously approved for this beneficiary. Of course, by the same Form I-129 filed for extension of the validity of the petition, the petitioner was also applying for an extension of the beneficiary's stay in H-1B status. The pertinent entry on the Form I-129 and also the petitioner's express statement in its letter in support of that filing indicate that the expiration date of the beneficiary's H-1B status was April 30, 2010.

The record of proceeding further reflects that the petitioner attempted to file this extension petition on April 30, 2010, but failed: by a "Reject Notice" cover letter dated May 3, 2010 the service center rejected and returned the petition to the petitioner because the center's "initial screening" indicated that "a Labor Condition Application [(LCA)] was not submitted with [the petitioner's] I-129 H-1B filing." The petitioner does not dispute this fact; rather, the petitioner asserts that the failure to file an LCA with the Form I-129 was a result of unexpected delay by the U.S. Department of Labor in the LCA-certification process.

The Form I-129 petition specifies as the dates of intended employment "05/01/2010 to 4/30/2011," and – as already noted – it identifies April 30, 2010 as the expiration date of the beneficiary's H-1B status.

On June 18, 2010, the petitioner submitted - and the service center accepted for filing - the petition that is the subject of this appeal. The AAO notes, as does the director in the decision denying the petition, that the LCA submitted with the petition is, as stated therein, "certified for the period "06/06/2010 to 06/05/2011." This period does not encompass the period between the April 30, 2010 expiration of the beneficiary's status and the June 10, 2010 date on which the LCA was certified.

The petitioner filed the instant petition on April 30, 2010. Although the petitioner submitted evidence that an LCA was pending with the U.S. Department of Labor, the LCA submitted to support this extension petition was not certified until June 10, 2010, more than one month after the petition was filed.

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 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).

The petitioner's failure to procure a certified LCA prior to filing the H-1B petition precludes its approval. Although the petitioner argues on appeal that its delay in obtaining the certified LCA prior to the filing of the petition was caused by DOL delays, and requests that we make a "rational decision" by approving the petition, the regulations contain no provision for discretionary relief from the LCA requirements. Accordingly, the AAO cannot disturb the director's denial of this petition. Thus, the appeal will be dismissed, and the petition will be 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.

ORDER: The appeal is dismissed. The petition is denied.