(b)(6)

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

U.S. Citizenship and Immigration Services

DATE: AUG 2 6 2015

PETITION RECEIPT #:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(15)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO**.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

I. PROCEDURAL BACKGROUND

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner describes itself as a 21-employee "Computer image processing products and technology provider" established in In order to continue the employment of the beneficiary in a position it designates as an "Algorithm Engineer 1," the petitioner seeks 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).

The Director denied the petition, determining that the petitioner had not met the requirements for filing a Form I-129 because the record did not include a Labor Condition Application (LCA) that was certified prior to the filing of the petition. On appeal, the petitioner asserts that the Director's basis for denial of the petition was erroneous and contends that a petition for extension of H-1B status should be allowed more procedural flexibility than a petition for initial H-1B classification.

The record of proceeding includes: (1) the petitioner's Form I-129 and supporting documentation; (2) the service center's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the Director's denial letter; and (5) the Form I-290B, Notice of Appeal or Motion, and a brief. We reviewed the record in its entirety before issuing our decision.[1]

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the Director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

II. LAW AND ANALYSIS

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. § 103.2(a)(1) in pertinent part as follows:

> Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into 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):

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[1] We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

> *Demonstrating eligibility.* An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other [U.S. Citizenship and Immigration Services (USCIS)] instructions. Any evidence submitted in connection with a benefit request is incorporated into and considered part of the request.

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

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(*1*) stipulates 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.

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 in pertinent part:

> [A] benefit request shall be denied where evidence submitted in response to a request for evidence does not establish filing eligibility at the time the benefit request was filed.

As set out above, before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must obtain a certified LCA from DOL in the occupational specialty in which the H-1B worker will be employed. The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of a labor condition application with DOL when submitting the Form I-129.

In the instant matter, the petitioner filed the Form I-129 with USCIS on August 18, 2014, seeking to extend the beneficiary's employment from September 14, 2014 to September 13, 2017. The petitioner submitted an LCA, certified on March 31, 2011 for a validity period from September 14, 2011 to September 13, 2014.[2] An LCA certified by DOL prior to the filing of the petition was not

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[2] The March 31, 2011-certified LCA identified the occupational classification for the position as "Mechanical Engineers," SOC (ONET/OES) Code 17-2141, at a Level I (entry) wage. The LCA identified the prevailing wage for the position in the County, Washington as $62,600 as published by the OFLC Online Data Center in 2010. According to section 212(n)(1)(A) of the Act, an employer must attest that it will pay a holder of an H-1B visa the higher of the prevailing wage in the "area of employment" or the

submitted to USCIS with the petition. In response to the RFE, the petitioner provided a newly certified LCA. The new LCA was certified on November 7, 2014 for a validity period from November 28, 2014 to September 13, 2017 for the occupational classification of "Mechanical Engineers," SOC (ONET/OES) Code 17-2141, at a Level I (entry) wage. The LCA identified the prevailing wage for the position in the County, Washington geographical area as $65,000.

A review of the record demonstrates that the petitioner did not submit evidence of an LCA certified on or before the date the instant petition was filed with USCIS. 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 did not satisfy this requirement and, instead, submitted an LCA that was both filed and certified after the petition was filed in this matter. 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'l Comm'r 1978). The petitioner did not comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B)(*1*), and the appeal must be dismissed and the petition denied for this reason.[3]

III. CONCLUSION

As set forth above, we find that the evidence of record does not establish eligibility for this visa petition. Accordingly, the appeal will be dismissed and the petition denied.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

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amount paid to other employees with similar experience and qualifications who are performing the same services. Here, the petitioner's offered wage of $62,600 to the beneficiary is *below* the prevailing wage level for the occupational category in the area of intended employment and for the time period of employment, which is $65,000. For more information regarding the wages for "Mechanical Engineers" – OES/SOC Code 17-2141, in WA MSA, for the periods 7/2010 – 6/2011 and 7/2014 – 6/2015, *see* http://www.flcdatacenter.com/OesQuickResults.aspx?code=17-2141&area=42644&year=11&source=1 and http://www.flcdatacenter.com/OesQuickResults.aspx?code=17-2141&area=42644&year=15&source=1 (last visited Aug. 17, 2015). Thus, at the time of filing the petition, the petitioner did not attest that it would pay the beneficiary an adequate wage for his work if the petition were approved. For this additional reason, the petition is not approvable.

[3] USCIS records indicate that the petitioner filed an H-1B petition on behalf of the beneficiary on April 13, 2015. The petition was approved on April 15, 2015 for a validity period from July 1, 2015 to September 30, 2017.