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U.S. Citizenship
and Immigration
Services

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FILE: EAC 04 201 50130 Office: VERMONT SERVICE CENTER Date: JUN 28 2005

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the 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 is a secondary school that seeks to employ the beneficiary as a faculty member. 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 on two grounds: (1) that the petitioner had failed to submit a copy of the beneficiary's teaching license, or evidence that such a license is not required; and (2) that the petitioner had failed to submit a certified labor condition application (LCA) with the petition. The AAO notes that both of these items were requested in the director's request for evidence (RFE).

On appeal, the petitioner requests 60 additional days to submit a brief and/or evidence to the AAO, so that it can obtain a certified LCA. The petitioner also asserts that the District of Columbia does not require licensure in order to teach at a private school. Finally, the petitioner asserts that the beneficiary has been previously granted H-1B classification based upon evidence identical to that contained in the record.

As a preliminary matter, the AAO notes that the petitioner's letter requesting 60 additional days to submit a brief and/or evidence is dated November 19, 2004. More than 60 days have passed since that date, and the AAO has received no additional evidence to supplement the record. Thus, the AAO deems the record complete and ready for adjudication.

The AAO accepts the petitioner's assertion that licensure is not required in order to teach at a private school in the District of Columbia. Thus, the first ground of the denial has been overcome.

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.

The instant petition was received at the service center on June 25, 2004, but it did not contain a certified LCA. The certified LCA was requested in the RFE, but in response the petitioner submitted an uncertified LCA.

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. If the petitioner were to submit a newly-certified LCA at this time, the petition would be still be denied, as it would satisfy 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, Citizenship and Immigration Services (CIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12).

CIS regulations contain no provision for discretionary relief from the LCA requirements.

The petition may not be approved because of the late filed and certified LCA, and the petitioner's further contentions are therefore not material to the outcome of the appeal.

Finally, the petitioner states that the beneficiary was previously granted H-1B status based upon evidence identical to that contained in the record. However, each nonimmigrant proceeding is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior case was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based upon evidence substantially similar to the evidence contained in this record of proceeding, however, the approval of that prior petition would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988). Moreover, the AAO is never bound by a decision of a service center or district director. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The AAO will not disturb the director's denial of the petition, as the petitioner's failure to procure a certified LCA prior to filing the H-1B petition precludes its approval.

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.