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U.S. Citizenship
and Immigration
Services

JAN 26 2005

FILE: WAC 03 227 51824

Office: CALIFORNIA SERVICE CENTER

Date: JAN 20 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:

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 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 public school district that seeks to employ the beneficiary as a speech pathologist. The petitioner 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 because the beneficiary was not qualified for the proffered position and because the petitioner filed the petition before obtaining a certification from the Department of Labor that the petitioner has filed a labor condition application in the specialty in which the beneficiary was to be employed.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation if required, and must show completion of a degree in the specialty required for the occupation. If the alien lacks the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to such a degree, and must show recognition of the beneficiary's expertise in the specialty built on the experience from progressively responsible positions in the specialty occupation.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The record of proceeding before the AAO contains, in part: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a speech pathologist. The petitioner indicated in a July 15, 2003 letter that it wished to hire the beneficiary but would require her to have a bachelor's degree in speech pathology along with a California teaching credential.

First, counsel contends Citizenship and Immigration Services (CIS) should approve the petition because the director has previously approved a Form I-129 petition that classified 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). This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the position offered in the prior case was similar to the position in the instant petition.

Each nonimmigrant petition 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 were approved based on evidence substantially similar to the evidence contained in this record of proceeding, however, the approval of the 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).

The director found that the beneficiary was not qualified for the proffered position because the beneficiary's education, experience, and training were not equivalent to a master's degree in speech-language pathology or audiology and because she did not have a state license to practice. The director found unpersuasive the petitioner's evidence that the beneficiary had plans to get a master's degree from a California college. On appeal, counsel states that the beneficiary is qualified for the position because a bachelor's degree is the minimum entry requirement for the position. Counsel contends the beneficiary currently possesses a credential waiver from the Commission on Teacher Credentialing allowing her to practice as a public school speech pathologist without the usual state license. Counsel cites section 2530.5(c) of the State Licensure Act, which exempts from state licensure a speech pathologist holding the appropriate credential from the Commission on Teacher Credentialing.

The Department of Labor's *Occupational Outlook Handbook* indicates that of the 46 states that regulate licensing of speech pathologists, almost all require a master's degree or the equivalent. The record reflects that licensure requirements for the state of California include a minimum of a master's degree in speech-language pathology or audiology or evidence of completion of at least 30 units toward a master's degree while registered as a graduate student in speech-language pathology or audiology. The California licensing board exempts from licensure a person holding the appropriate credential from the Commission on Teacher

Credentialing, as long as the practice of speech-language pathology is confined to the jurisdiction of a public preschool, public elementary school or public secondary school.

Upon review of the record, the petitioner has failed to establish that the beneficiary was exempt from licensure at the time of filing the petition, or that she held a license or the minimum requirements for licensure as a speech pathologist at the time of the filing of the petition.

On appeal, counsel submits an evaluation from the International Education Research Foundation, Inc., a company that specializes in evaluating academic credentials. The AAO accepts the evaluator's conclusions that the beneficiary possesses the equivalent of a Bachelor of Science degree in speech pathology from an accredited U.S. college or university. However, as previously stated, in order to be eligible for licensure, a master's-level degree or at least 30 hours of work toward a master's degree plus enrollment in a master's program, is required by the state of California. Thus, the beneficiary is not licensed or eligible for licensure.

While the petitioner indicates that the beneficiary is currently enrolled in a master's degree program for speech pathology, the evidence does not indicate how many hours the beneficiary has completed. Thus the beneficiary cannot be deemed minimally qualified to practice as a licensed speech pathologist in the state of California.

As indicated above, counsel states that the beneficiary is exempt from licensure by virtue of her being a speech pathologist for the public school system with the appropriate credentials from the Commission on Teacher Credentialing. Counsel submits a letter on appeal dated October 6, 2003, indicating that the beneficiary was granted the credential waiver for the period August 1, 2003 – August 1, 2004. However, CIS "cannot consider facts that come into being only subsequent to the filing of the petition." *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The petitioner filed the Form I-129 on the beneficiary's behalf on August 1, 2003, at which time the beneficiary had neither a state license nor the minimum education qualifications to practice her profession or exemptions. At the time of the filing of the petition, the beneficiary was not qualified in the specialty occupation. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The AAO notes that, had the beneficiary possessed an exemption from licensure required by the state of California, she would have possessed the minimal educational requirements. The record indicates that the petitioner needs a bachelor's degree in speech pathology and the waiver from the credentialing authority. The beneficiary possesses the minimum education to practice speech pathology within the confines of the public school system in California.

As related in the discussion above, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position. Accordingly, the AAO shall not disturb the director's denial of the petition.

The director also denied the petition because the petitioner failed to file a Labor Condition Application prior to filing the Form I-129 petition.

Before a petition is filed under this section, the petitioner must obtain a Labor Condition Application for H-1B Non-immigrants (LCA), Form ETA 9035, that has been certified by the United States Department of Labor. 8 C.F.R. § 214.2(h)(4)(i)(B) lists the requirement of a certified LCA, in the specialty occupation, obtained prior to the filing of a petition, as follows:

- (1) 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 occupation specialty in which the alien(s) will be employed.

The present petition was filed August 1, 2003, after which the director requested that the petitioner submit evidence of having obtained a certified LCA from the Department of Labor that preceded the filing of the petition. However, the Form ETA 9035 included in the petitioner's response showed it had only been certified by the Department of Labor on September 16, 2003, approximately six weeks after the filing date of the petition. Consequently, the petitioner did not provide evidence that the Department of Labor had certified the LCA before the present petition was filed. For this reason also, the beneficiary is ineligible for classification as an alien employed in a specialty occupation and the petition must 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. Accordingly, the decision of the director will not be disturbed.

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