



U.S. Citizenship
and Immigration
Services

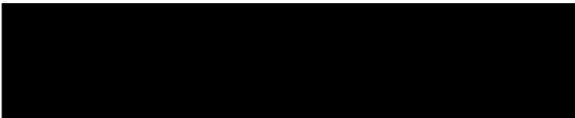
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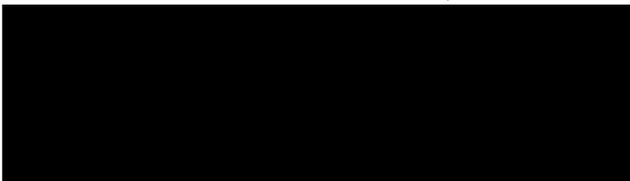
FILE: SRC 05 131 50324 Office: TEXAS SERVICE CENTER Date: **NOV 28 2006**

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, Chief
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 Montessori school that seeks to employ the beneficiary as a teacher. The petitioner, therefore, endeavors to extend the classification of 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 instant petition was received at the service center on April 5, 2005, but it did not contain a certified labor condition application (LCA).¹ As such, the director requested a certified LCA in a May 6, 2005 request for evidence. In response, the petitioner submitted an LCA that had been certified on May 26, 2005. The director denied the petition on the basis of the petitioner's failure to obtain a certified LCA prior to filing the petition.

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 a note attached to her April 4, 2005 letter of support, counsel stated the following:

Since, by regulation, H-1B visa petitions can be filed with evidence of filing the ETA 9035 rather than the approved ETA-9035, we respectfully request that you accept this petition with the attached copy and with the confirmation of facsimile transmission.

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 a certified 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). 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).

On appeal, counsel states the following:

[The denial] is setting new policy for the Texas Service Center which has, dating as far back as when the LCA system was conducted by mail, been accepting exactly the "confirmation" of DOL receipt as included in the instant case—that is, a memo explaining that the ETA-9035 had been filed (in this instance, by facsimile), documentation that the ETA-9035 had been submitted (in this case, a facsimile confirmation sheet), and a copy of the ETA-9035.

¹ The record contains a facsimile cover sheet that indicates the petitioner submitted the labor condition application to the Department of Labor on April 4, 2005.

However, the regulation specifically requires certification from the Department of Labor prior to the filing of the H-1B petition, and submission of a facsimile transmission sheet will not substitute for certification.

Moreover, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.2(b)(16)(ii). If the previous petitions were approved based upon the same evidence contained in this record, their approval would constitute error on the part of the director. The AAO is not required to approve applications or 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). It would be absurd to suggest that CIS or any 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).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director did approve a nonimmigrant petition similar to the one at issue here, the AAO would not be bound to follow the contradictory decision of a service center. *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).

As noted previously, and pursuant to 8 C.F.R. § 214.2(h)(4)(i)(B)(1) and 8 C.F.R. § 214.2(h)(4)(iii)(B)(1), the late-filed and certified LCA precludes the approval of the petition. The AAO has no authority to re-write or ignore the regulations, and there is no provision in the regulations for discretionary relief from the LCA requirements.

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

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.