

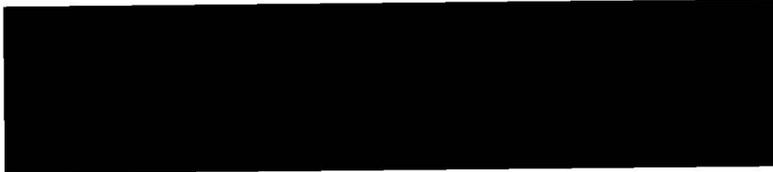
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U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Room 3000
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U.S. Citizenship
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FILE: EAC 07 148 52473 Office: VERMONT SERVICE CENTER Date: OCT 01 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

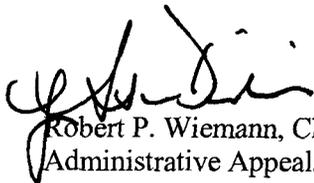
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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, Vermont Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1) as untimely filed.

The petitioner is in the sports industry and seeks to employ the beneficiary as a program coordinator. The petitioner, therefore, seeks 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 record includes: (1) the Form I-129 and supporting documents; (2) the director's request for evidence (RFE); (3) counsel's response to the RFE; (4) the director's decision denying the petition; and (5) the Form I-290B and counsel's brief in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

The instant petition was received at the service center on April 2, 2007, but it did not contain a certified Form ETA 9035 Labor Condition Application (LCA). As such, the director requested a certified LCA in a July 30, 2007 request for evidence. In response, the petitioner submitted an uncertified LCA on October 24, 2007. The director denied the petition on the basis of the petitioner's failure to obtain a certified LCA prior to filing 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.

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." Therefore, 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 that the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). As such, the AAO finds that the director's denial of the petition was proper.

In response to the director's RFE, the petitioner submitted an LCA, case number [REDACTED], certified on October 23, 2007. On appeal, counsel states the following:

The LCA application was filed at a later day after the I-129 form was sent to USCIS because of an emergency Our experience with other USCIS Service Centers was different. Indeed even though the LCA was approved during the process of the [Form] I-129, [] USCIS approved the petition.

The petitioner's submission of a certified LCA has not satisfied the regulation. The petitioner's failure to procure a certified LCA prior to filing the H-1B petition precludes its approval, 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), there is no provision for discretionary relief from the LCA requirements. Accordingly, the AAO will not disturb the director's denial of the petition.

In addition, counsel asserts that Citizenship and Immigration Services (CIS) has previously approved other, similar petitions in the past in which the LCA was certified after the Form I-129 was filed. 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 case referred to by counsel was similar to 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 instant petition 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 on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition would have been erroneous. Citizenship and Immigration Services (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 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.