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20 Mass. Ave., N.W., Rm. A3000  
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U.S. Citizenship  
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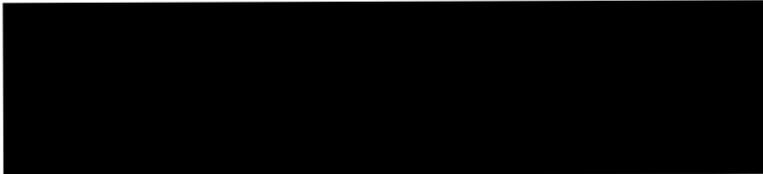
FILE: WAC 07 131 51707 Office: CALIFORNIA SERVICE CENTER Date: OCT 30 2008

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, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a medical, drug, and consulting services provider. It seeks to employ the beneficiary as a pharmacist intern. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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).

On August 7, 2007, the director denied the petition determining that the petitioner had not complied with the requirements for filing a Form I-129, Petition for a Nonimmigrant Worker.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation filed April 2, 2007; (2) the director's April 24, 2007 request for evidence (RFE); (3) the July 16, 2007 response to the director's RFE; (4) the director's August 7, 2007 denial decision; and (5) the Form I-290B and brief in support of the appeal.

The issue before the AAO is whether the petitioner had established filing eligibility when the Form I-129 was filed with U.S. Citizenship and Immigration Services (CIS).

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

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of 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):

An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form . . . .

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:

An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed . . . .

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must obtain a certified labor condition application (LCA) from the Department of Labor 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 document the filing of an LCA with the Department of Labor when submitting the Form I-129. The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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. Comm. 1978). In addition, as stated in *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), "[t]he AAO cannot consider facts that come into being only subsequently to the filing of the petition."

In the instant matter, the petitioner did not submit a certified LCA with the Form I-129 filed with CIS on April 2, 2007. In response to the director's RFE requesting that the petitioner demonstrate that the LCA had been properly filed, the petitioner submitted an LCA dated and certified on July 16, 2007, more than three months after the Form I-129 petition was submitted.

On appeal, counsel for the petitioner asserts that as the petitioner did not intend to employ the beneficiary until October 1, 2007, the LCA submitted in response to the director's RFE is sufficient. Counsel also contends that issuing an RFE and then denying the petition despite the petitioner's submission of an LCA defeats the purpose of the RFE. Counsel further claims that the CIS requirement to submit an LCA certified prior to the filing date of the petition contradicts CIS prior practice. Counsel provides a copy of an RFE and response in another matter in support of this claim.

Counsel's assertions are not persuasive. CIS consistently requires that a petitioner comply with the filing requirements cited above. The record shows that the petitioner did not request a certified LCA until July 16, 2007, after the director had requested a copy of the LCA. Thus, the petitioner had not obtained a certified LCA in the occupational specialty when the petition was filed. The director in this matter properly requested a certified LCA as the LCA was not initially submitted. As the LCA was not initially submitted, the director had no way of knowing whether the petitioner had timely obtained an LCA. The AAO acknowledges counsel's claim that the director has allowed untimely LCAs in the past. Although counsel has submitted an RFE and response regarding the other matter, counsel has not submitted the entire record of proceeding in that matter. In addition, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). When 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). Moreover, if that record contained the same evidence as submitted with this petition, the CIS would have erred in approving the previously filed petition. CIS 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).

For the reasons discussed above, the petitioner has not established that it properly and timely filed the required documentation in support of its petition. The beneficiary is ineligible for classification as an alien

employed in a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in this proceeding 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