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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: WAC 08 167 50324 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



MAY 28 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California 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 clothing manufacturer. It seeks to continue to employ the beneficiary as a brand designer. 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 November 5, 2008, 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. On appeal, counsel for the petitioner asserts that because the request for additional evidence (RFE) was vague and ambiguous, the petitioner submitted the wrong document instead of evidence that the petitioner has a corresponding U.S. Department of Labor (DOL) Form ETA-9035E Labor Condition Application (LCA) in support of the petition. On appeal, counsel for the petitioner submits an LCA certified by the DOL on December 18, 2008, which she claims satisfies the petitioner's compliance with the regulations.

The record of proceeding before the AAO contains: (1) the Form I-129 filed May 29, 2008 and supporting documentation; (2) the director's October 3, 2008 RFE; (3) the petitioner's submission in response to the RFE; (4) the director's November 5, 2008 denial decision; and (5) the Form I-290B, counsel's brief, and an LCA certified December 18, 2008 in support of the appeal. The AAO has considered the record in its entirety before issuing its decision.

The issue before the AAO is whether the petitioner established filing eligibility at the time the Form I-129 was received by U.S. Citizenship and Immigration Services (USCIS) on May 29, 2008.

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 that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

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. An application or petition shall be denied where any application or petition upon which it was based was filed subsequently.

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must obtain a certified LCA from the DOL 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.

In the instant matter, the petitioner requested an H-1B employment extension from May 31, 2008 to May 31, 2011. The petitioner submitted an LCA in support of the petition, but the LCA's validity is from April 12, 2008 to May 31, 2008. Therefore, the initially submitted LCA does not cover any period of time requested in the petition. Additionally, Box 3 in Part 5 of the petitioner's Form I-129, which requests the LCA case number, has a different number listed than the one on the LCA submitted with the petition.

The director issued an RFE on October 3, 2008, which states that the following is required to demonstrate that the present petition meets the criteria for H-1B petitions involving a specialty occupation:

The Form ETA 9035E show[s] the ETA case number is [REDACTED] and on part 5 section 3 (LCA case number) show[s] ETA case number [REDACTED]. Please submit the correct paper with correct number to make clear the request dates of intended employment from May 31, 2008 to May 31, 2011.

In response to the RFE, counsel for the petitioner submitted an amended page of the Form I-129, with part 5 section 3 amended to show the ETA case number of [REDACTED], which corresponds with the LCA initially submitted with the petition. However, the petitioner did not submit evidence to demonstrate that it has an LCA, certified by the time of the petition's filing, covering any period of time requested in the petition. Therefore, the director denied the petition.

Counsel contends on appeal that the RFE did not specifically request a corrected LCA and, therefore, the petitioner's submission of the wrong document is not the fault of the petitioner. Although the AAO agrees that the language in the RFE should have been clearer regarding which document was being requested, it is not apparent what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

As referenced above and as indicated by 20 C.F.R. § 655.705(b), the regulations require that before filing a Form I-129, a petitioner must obtain a certified-LCA from the DOL, and the LCA must correspond to the beneficiary's anticipated employment. The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. In this matter, the petitioner initially failed to provide any LCA that corresponded with the dates of employment requested in the petition and, further, in response to the director's RFE, did not submit a certified LCA to establish that it had complied with the filing requirements at

8 C.F.R. § 214.2(h)(4)(i)(B). The non-existence or unavailability of evidence material to an eligibility determination creates a presumption of ineligibility. *See* 8 C.F.R. § 103.2(b)(2)(i).

Although the petitioner submits a copy of an LCA on appeal, the LCA is DOL-certified on December 18, 2008, a date subsequent to the filing of the Form I-129. Thus, the record does not show that, at the time of filing, the petitioner had obtained a certified LCA in the occupational specialty covering the requested period of time in the petition. 8 C.F.R. § 103.2(b)(1). 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). The record establishes that, at the time of filing, the petitioner had not obtained a current certified LCA in the occupational specialty covering any period of time requested in the petition and, therefore, as determined by the director, had failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

Therefore, the petitioner did not establish filing eligibility at the time the Form I-129 was received by USCIS on May 29, 2008. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the AAO finds that the petitioner did not submit sufficient evidence to demonstrate the beneficiary is qualified to perform the duties of a specialty occupation. The petitioner stated in the support letter that the beneficiary has a foreign certificate in commercial design as well as over nine years of employment experience that have been found equivalent to a bachelor's degree in graphic design from an accredited U.S. college or university, but did not submit any documentation to support this assertion, such as copies of education documents, employment letters, or a credential evaluation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Accordingly, the petition shall be denied on this additional ground.

Finally, the AAO notes that the record indicates that prior H-1B petitions have been approved for the beneficiary. The director's decision does not indicate whether she reviewed the prior approvals of the other nonimmigrant petitions. However, 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. If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record with regard to the beneficiary's qualifications, it would constitute material 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 USCIS 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). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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 had approved nonimmigrant petitions on behalf of a beneficiary, 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).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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