

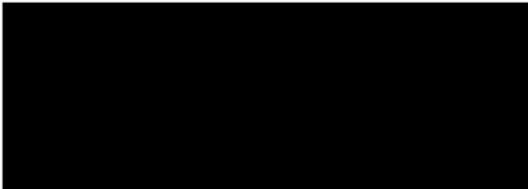
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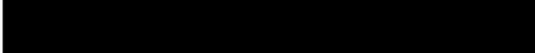
U.S. Citizenship
and Immigration
Services

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FILE: WAC 08 077 50134 Office: CALIFORNIA SERVICE CENTER Date: **JUL 10 2008**

IN RE: Petitioner: 
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(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 nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates a horse show barn. It desires to extend the stay and change the employer of the beneficiary to the current petitioner. The petitioner intends to hire the beneficiary as a horse show groom from October 17, 2007 to November 14, 2008. The director determined that the petitioner submitted the visa petition extension without a certified temporary labor certification (Form ETA 750) from the Department of Labor (DOL). The director also determined that the petitioner is not eligible to have the visa petition extended absent such certification from the DOL or notice detailing the reasons why such certification could not be made and denied the petition.

On appeal, counsel states that the United States Citizenship and Immigration Services (USCIS) agreed to accept the H-2B petition extension, knowing that the labor certification was not yet certified by the DOL but would send a request for evidence (RFE) and that counsel would submit the certified temporary labor certification when received from the DOL. Counsel states that it contacted USCIS after receiving the denial and was told that an amended petition would be accepted. Counsel states the amended petition was not accepted and therefore the reason for this appeal.

As discussed below, the AAO agrees with the findings of the director. Upon careful review of the entire record of proceeding, the AAO finds that the evidence of record supports the director's decision to deny the petition. The AAO will dismiss this appeal.

The regulation at 8 C.F.R. § 214.2(h)(6)(iii) states in pertinent part:

(C) The petitioner may not file an H-2B petition unless the United States petitioner has applied for a labor certification with the Secretary of Labor . . . within the time limits prescribed or accepted by each, and has obtained a labor certification determination as required by paragraph (h)(6)(iv). . . .

The regulations stipulate that an H-2B petition for temporary employment in the United States shall be accompanied by a labor certification determination that is either: (1) a certification from the Secretary of Labor stating that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers; or (2) a notice detailing the reasons why such certification cannot be made. 8 C.F.R. § 214.2(h)(6)(iv)(A).

The Petition for a Nonimmigrant Worker (Form I-129) was filed on January 18, 2008 without a temporary labor certification, or notice detailing the reasons why such certification cannot be made. Absent such certification from the DOL or notice detailing the reasons why such certification cannot be made, the petition cannot be approved.

On January 24, 2008, the director requested that counsel on behalf of the petitioner submit the original temporary labor certification, Form ETA 750, Application for Alien Employment Certification. Counsel was given until April 17, 2008 to submit the additional information.

In response to the director's request for evidence, counsel submitted with her letter dated April 14, 2008, the original final determination notice and the original Form ETA 750, certified by the DOL. The final determination notice from the DOL is dated April 11, 2008. The temporary labor certification was received for processing by the DOL's local office on February 29, 2008, and by DOL's foreign labor certification division on April 4, 2008 and a determination was not rendered until April 11, 2008, subsequent to the petition's filing date (January 18, 2008).

The regulation at 8 C.F.R. § 214.2(h)(6)(iii)(E) states that:

After obtaining a determination from the Secretary of Labor or the Governor of Guam, as appropriate, the petitioner shall file a petition on I-129, accompanied by the labor certification determination and supporting documents, with the director having jurisdiction in the area of intended employment.

Neither the statute nor regulations allow for the acceptance of a labor certification or final determination notice obtained subsequent to the filing of the petition. The 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).

Counsel states in her supporting brief dated June 13, 2008 that several cases for extension of stay were approved by USCIS except the current petition. However, each nonimmigrant proceeding is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). The director's decision does not indicate whether she reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same assertions that are contained in the current record, the approvals would constitute material and gross 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 had approved the nonimmigrant petitions on behalf of the 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).

Counsel states that the petitioner and the beneficiary relied on the representations made by USCIS that the extension of stay and later the amended petition would be accepted. Counsel states that the cases were filed as instructed, that USCIS accepted the filing fees and issued receipts on the cases. None of these arguments allow USCIS to deviate from the law and regulations which require the petitioner to obtain a determination from the Secretary of Labor prior to filing the nonimmigrant visa petition accompanied by the labor certification determination and supporting documents.

The director determined that the petitioner is not eligible to have the visa petition extended absent a valid temporary labor certification from the DOL or notice detailing the reasons why such certification cannot be made.

In the instant case, the petition was filed without a valid temporary labor certification or notice detailing the reasons why such certification cannot be made. Thus, the director's decision will not be disturbed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

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