



U.S. Citizenship
and Immigration
Services

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FILE: EAC 05 051 50090 Office: VERMONT SERVICE CENTER

Date: MAY 11 2005

IN RE: Petitioner: [Redacted]
Beneficiaries: [Redacted]

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:

SELF-REPRESENTED

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, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner engages in the business of landscape maintenance. It desires to employ the beneficiaries as landscape laborers for nine months. The director determined that the petitioner had not submitted a temporary labor certification (ETA 750) from the Department of Labor (DOL) or notice stating that such certification could not be made and denied the petition.

On appeal, the petitioner states that the mistake it made was in filing a Form I-129 (Petition for a Nonimmigrant Worker) without first obtaining the Final Determination approval from the United States DOL or an ETA 750 approval.

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 December 10, 2004 without a temporary labor certification, or notice detailing the reasons why such certification cannot be made. Absent such certification from the Department of Labor or notice detailing the reasons why such certification cannot be made, the petition cannot be approved.

On January 27, 2005, the director requested the petitioner to provide a labor certification that was certified prior to the petition's filing date. In response, the petitioner faxed a copy of its most current labor certification. Moreover, in the statement in support of the appeal, the petitioner states that the labor certification (ETA 750) was submitted with the Request for Premium Processing (Form I-907) on January 11, 2005. The final determination notice from the DOL is dated January 3, 2005 and a copy of the original approved labor certification is valid from March 1, 2005 through December 1, 2005. Although the petitioner applied for a temporary labor certification on November 4, 2004, prior to the filing of the petition, a determination was not rendered until January 3, 2005, subsequent to the petition's filing date.

The petitioner states that it thought it could file the petition upon receiving approval from the DOL, not realizing that it had to submit the Form I-129 with the ETA 750 approval from the United States DOL. 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 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).

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.

This decision is without prejudice to the filing of a new petition accompanied by the proper documentation and fee.

ORDER: The appeal is dismissed.