



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: SRC 04 108 52372 Office: TEXAS SERVICE CENTER Date: [Redacted]

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

[Redacted]

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the matter will be remanded to the director for further action and consideration.

The petitioner desires to employ the beneficiary as a live-in caregiver or home attendant for one year. The director determined that the petitioner had not submitted a temporary labor certification (Form ETA 750) from the Department of Labor (DOL) or notice stating that such certification could not be made and denied the petition.

On appeal, counsel states that Citizenship and Immigration Services (CIS) is required to issue a request for evidence when initial evidence is missing.

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 March 5, 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.

The regulation at 8 C.F.R. § 103.2(b) states, in pertinent part that:

(8) Request for evidence. . . . Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and may request additional evidence, including blood tests. In such cases, the applicant or petitioner shall be given 12 weeks to respond to a request for evidence.

Counsel states that under the regulations CIS is required to issue a request for evidence when initial evidence is missing from the record.

Initial evidence is evidence specified in the regulations and on the application or petition and accompanying instructions. The regulations and the petition and accompanying instructions state that an H-2B petition for temporary employment in the United States, except for temporary employment in Guam, shall be accompanied by a labor certification determination, or a notice from DOL indicating why certification cannot be made. 8 C.F.R. § 214.2(h)(6)(iv)(A). Therefore, the director is required by regulation to issue a request for evidence in this circumstance. The record, as it is presently constituted, does not contain a notice requesting the petitioner to submit a temporary labor certification or notice detailing the reasons why such certification cannot be made.

Therefore, this case will be remanded to the director for review and issuance of a request for evidence, specifically, for the temporary labor certification from the DOL or notice detailing the reasons why such certification cannot be made. The director may also request additional evidence that is pertinent to the adjudication of this case. The petitioner should also be given an opportunity to submit any additional information or evidence that the director deems necessary to adjudicate the matter at hand. As always, 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.

ORDER: The director's decision is withdrawn. The matter is remanded to the director for further action and consideration consistent with the above discussion and entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.