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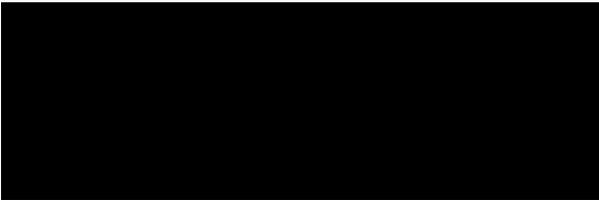
AUG 17 2005

FILE: EAC 04 265 53728 Office: VERMONT SERVICE CENTER Date:

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:



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 is a father who has filed this H-2B petition in order to employ the beneficiary as a live-in child monitor for the period October 2, 2004 to September 30, 2005.

As evident in this excerpt from his decision, the director denied the petition on the basis that the petitioner had filed the petition before the Department of Labor (DOL) had issued either a labor certification or a notice stating why such certification could not be made:

This petition was filed on September 27, 2004. The Labor Certification, which has been provided[,] has not been certified by [DOL].

The labor certification was not obtained prior to filing the petition; therefore, the petitioner was not eligible for the benefit sought as of the date of filing as required by 8 C.F.R. § 214.2(h)(6)(iii)(C).

In view of the above, the petition is denied.

The evidence of record establishes that the petitioner filed the Petition for a Nonimmigrant Worker (Form I-129) prior to a DOL determination on whether or not to approve a temporary labor certification. Therefore, the director's decision to deny the petition comports with the pertinent Citizenship and Immigration Services (CIS) regulations. The regulation at 8 C.F.R. § 214.2(h)(6)(iii)(C) states:

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). . . . [Italics added.]

The regulation at 8 C.F.R. § 214.2(h)(6)(iv)(A) stipulates that an H-2B petition "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. Further, the regulation at 8 C.F.R. § 214.2(h)(6)(iii)(E) states:

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. [Italics added.]

CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). 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). CIS regulations do not provide for amendment of a petition once it has been filed, other than by the filing of a new petition with fee. *See* 8 C.F.R. § 214.2(h)(2)(i)(E).

On appeal (brief, at page 3) counsel expressly acknowledges the following facts that establish that the director correctly found that the petition had been filed prior to DOL's determination on the labor certification issue. The petitioner filed an application for temporary labor certification (Form ETA 750) with DOL in August 2004, and the H-2B petition with CIS in September 2004. In October 2004, DOL made its determination regarding the Form ETA 750, by issuing a notice as to why a temporary labor certification cannot be made. Thus, the director correctly applied the aforementioned regulations that mandate that an H-2B petition be filed after DOL's determination on whether to grant a temporary labor certification or, in the alternative, notify a petitioner as to why certification cannot be granted.

Counsel's opinion that the time it took DOL to render its determination is "unfair and prejudicial" is not relevant to this proceeding. The matter for the AAO's determination is not the efficiency of DOL's application processing, but whether the director based his decision on legal or factual errors. The relevant CIS regulations provide no exceptions to or excusals from the requirement to file an H-2B petition only after DOL's labor certification determination. As the director correctly applied the relevant CIS regulations to the facts of this case, the appeal will be dismissed.

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.