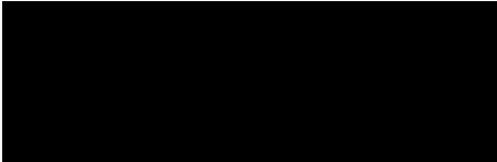




U.S. Citizenship
and Immigration
Services



FILE: EAC 05 041 50740 Office: VERMONT SERVICE CENTER

Date: MAY 24 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

PUBLIC COPY

INSTRUCTIONS:

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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 ten months. The director determined that the petitioner had not submitted a temporary labor certification from the Department of Labor (DOL) or notice stating that such certification could not be made at the time of filing the petition, and denied the petition.

On appeal, the petitioner states that the regulation only requires that a petitioner apply for a temporary labor certification prior to filing a petition. The petitioner further states that under the regulation a petitioner is not required to obtain a labor certification determination prior to filing Form I-129 with the director.

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 November 19, 2004 without a temporary labor certification, or notice detailing the reasons why such certification cannot be made. On January 11, 2005, the director requested the petitioner to submit a temporary labor certification issued by the DOL (ETA 750). In response to the director's request, the petitioner submitted its labor certification, however, the labor certification was approved subsequent to the initial filing date of the petition. Therefore, on February 23, 2005, the director issued a notice of intent to deny the petition, and afforded the petitioner 30 days to submit countervailing evidence or case precedent supporting its claim that Citizenship and Immigration Services (CIS) inappropriately applied the regulatory requirements.

On March 1, 2005, the petitioner replied that it has satisfied the requisite and mandated United States DOL employment policies and procedures and respectfully requested that CIS issue a notice of approval. The petitioner stated that it had included with this letter a copy of its labor certification and a copy of the requested names and birth dates for the beneficiaries.

The final determination notice from the DOL is dated January 21, 2005 and a copy of the original approved labor certification is valid from March 1, 2005 through December 31, 2005. Although the petitioner applied for a temporary labor certification on November 24, 2004, a determination was not rendered until January 21, 2005, subsequent to the petition's filing date.

The petitioner states that a petitioner is not required to obtain a labor certification determination prior to filing Form I-129 with the director. However, 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 petitioner argues further that it was not the intent of Congress nor the purpose or objective of the regulation at 8 C.F.R. § 214.2(h)(6)(iii)(C) to deny a petition merely because it was not accompanied by a labor certification determination when it was filed. However, the petitioner has not explained the Congressional legislative history of the applicable law or related floor statements to substantiate its statement. Simply 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)). Further, where the language of a statute is clear on its face, there is no need to inquire into Congressional intent. *INS v. Phinpathya*, 464 U.S. 183 (1984).

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.