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U.S. Citizenship  
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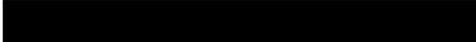
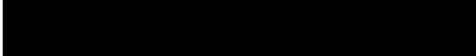
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*DL*

MAR 01 2007

FILE: EAC 06 171 51816 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:   
Beneficiaries: 

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*

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner is a father who filed the H-2B petition in order to employ the beneficiary as a childcare worker to care for his children during the period May 1, 2006 to May 1, 2007.

Quoting relevant regulations at 8 C.F.R. § 103.2(b) and at 8 C.F.R. §§ 214.2(h)(6)(iii)(C) and (iv), the director denied the petition on the basis that, at the time he filed the petition, the petitioner had not obtained from the Department of Labor (DOL) a temporary labor certification or notice stating that such certification could not be made.

On appeal, counsel states the following at section 3 of Form I-290B (Notice of Appeal):

The petitioner has reapplied for a labor certification within the time limits prescribed and is currently awaiting a decision.

Counsel also submits a letter, dated September 26, 2006, requesting an additional 120 days in which to submit as additional evidence the forthcoming DOL determination on the newly submitted labor certification application referenced in the Form I-290B. The requested extension period has expired, and the AAO has not received any additional evidence. Accordingly, the AAO deems the record complete and ready for adjudication. The AAO also notes that the promised evidence is not material to the basis on which the petition was denied and, therefore, would be irrelevant to the AAO's deliberations on the appeal.

As discussed below, the director's decision to deny the petition is correct. Accordingly, the appeal will be dismissed and the petition will be denied.

The petition was filed on May 4, 2005, but DOL did not issue its final determination on the related application for temporary labor certification (ETA Form 750) until May 31, 2006.

The relevant Citizenship and Immigration Services (CIS) regulations clearly preclude approval of an H-2B petition that was filed prior to the DOL determination on the related ETA Form 750.

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.

The AAO acknowledges that the petitioner filed its application for labor certification prior to filing the Form I-129. However, 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).

The director's decision correctly applied the governing regulations to the facts of the proceeding. The petitioner may not submit a determination from the Secretary of Labor, or notice indicating why such determination may not be made, that is dated after the filing date of the petition. Therefore the appeal will be dismissed, and the petition will be denied.

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. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed. The petition is denied.