



U.S. Citizenship
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Services

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MAY 17 2005



FILE: LIN 04 046 54087 Office: NEBRASKA 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, Director
Administrative Appeals Office

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

The petitioner is a ski and snowboard resort. It desires to change the previously approved employment of the beneficiaries and extend their stay since they are now holding this status. The petitioner desires to employ the beneficiaries as cook helpers for six months. The director determined that the petitioner had filed the instant petition using a labor certification that had already been utilized for the maximum allowable number of alien workers and denied the petition.

On appeal, counsel states that the director did not provide the employer with a Request for Evidence (RFE) notice and therefore denied the employer of a meaningful opportunity to address the issues raised by Citizenship and Immigration Services (CIS) in the denial notice.

The regulation at 8 C.F.R. §103.2(b) states:

(8) *Request for evidence.* If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. . . .

Therefore, CIS was not required to send the petitioner an RFE notice. Further, counsel states on appeal that an employer may always utilize unused but approved labor certification allocations (including substitutions) in seeking H-2B classification for alien beneficiaries.

The Petition for a Nonimmigrant Worker (Form I-129) was filed on December 8, 2003 for 6 H-2B cook helpers. Counsel requests on appeal approval for only two of the six named beneficiaries, specifically, Eva Drahosova and Helena Detzova. The record indicates the two workers were previously in the United States in legal H-2B status working for the Holiday Inn under the approved petition, LIN-03-157-51588. This petition was valid from May 20, 2003 until November 1, 2003, and the copies of the beneficiaries' I-94 Departure Records show that the beneficiaries were authorized to remain in the United States until December 13, 2003.

The regulation at 8 C.F.R. § 214.2(h)(2) states in pertinent part:

(iv) *Substitution of beneficiaries.* Beneficiaries may be substituted in H-2B petitions that are approved for a group, or H-2B petitions that are approved for unnamed beneficiaries, or approved H-2B petitions where the job offered to the alien(s) does not require any education, training, and/or experience. . . .

In a letter submitted in support of the petition, the petitioner explained that it wanted to utilize the labor certification in its previously approved petition, LIN-04-004-52585. In his letter, dated December 5, 2003, counsel states that the petitioner only utilized six of the 50 approved visa allocations; therefore, 44 visa allocations remained available for usage by the petitioner. However, counsel states in this same letter that 44 of the 50 beneficiaries of the initial approved petition, LIN-04-004-52585, have utilized consular processing.

Moreover, the letter from the petitioner, Copper Mountain Resort, dated November 16, 2003 indicates that seven out of the 50 approved visa allocations were offered positions. The petitioner did not indicate in its letter whether the beneficiaries accepted or did not accept the offer. In another letter dated December 4, 2003, the petitioner states that it only used four of the total 50 visa allocations. Neither the petitioner nor counsel have clearly established how many visa allocations were available to be used in the current petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Counsel also states that the beneficiaries named in the current petition were originally included as beneficiaries on the approved petition, LIN-04-004-52585, but were not specifically named on the final approval notice issued by the Service Center. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petition, LIN-04-004-52585, was approved November 7, 2003 for 50 unnamed workers and notification was sent to listed consulates in Bratislava, Lima, Santiago and Buenos Aires. The labor certification relating to the petition LIN-04-004-52585 was granted September 23, 2003 for 50 cook helpers. In this case, the petitioner did not submit a list of the names, date and country of birth and number of workers who were admitted into the United States under the approved petition, LIN-04-004-52585, and indicate how many of the 50 positions remain available. The list that was provided by the petitioner only states that the list included names of the beneficiaries who had been offered a position by the petitioner. The petitioner does not indicate whether the beneficiaries accepted or rejected the offer. 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)). Absent such evidence, CIS cannot utilize the labor certification the petitioner filed with LIN-04-004-52585 for the current petition.

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.

ORDER: The appeal is dismissed.