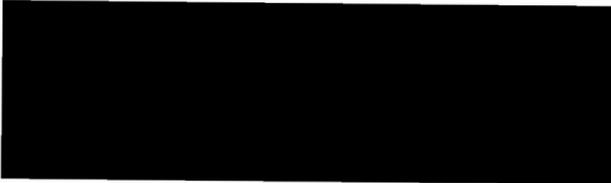




U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



D3

FILE: EAC 07 032 52284 Office: VERMONT SERVICE CENTER Date: **MAR 24 2008**

IN RE: Petitioner:
Beneficiaries:



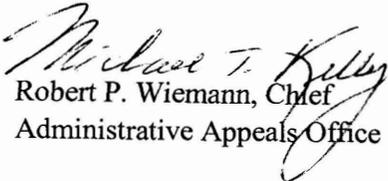
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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.

for 
Robert P. Wiemann, Chief
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 and the petition will be denied although the matter is moot due to the passage of time.

The petitioner operates a plumbing company. It desires to employ the beneficiaries as laborers pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) from November 15, 2006 to September 15, 2007. The Department of Labor (DOL) determined that a temporary labor certification by the Secretary of Labor could not be made because the petitioner had not submitted its recruitment results. Agreeing with the DOL's decision and determining that the petitioner had not provided the necessary documentation concerning its recruitment results, the director denied the petition.

On appeal, the petitioner states that it conducted the required advertising for the positions. The petitioner explains that there were no responses to the advertisements and that the recruitment efforts provided no applicants. The petitioner states that the Texas Workforce Commission (TWC) was promptly notified of that fact. In particular, the petitioner asserts that it complied with recruiting report requirements by responding as follows to question 21 on page 2 of the Form ETA 750:

We have placed an ad on "Star-Telegram Newspaper" from August 31, 2006 to September 2, 2006 with no results.

As discussed below, the AAO agrees with the findings of the director. Upon careful review of the entire record of proceeding, the AAO finds that the petitioner has not demonstrated that it provided the required recruitment results to the DOL. The AAO will dismiss the appeal.

The AAO first notes that this petition is moot, in that the period for which the alien workers were sought – November 15, 2007 to September 15, 2007 - has passed.

The DOL stated in its final determination notice dated October 10, 2006 that the petitioner had not submitted recruitment results, and therefore, no further consideration could be given to the application.

The regulation at 8 C.F.R. § 214.2(h)(6)(iv) states the following with regard to H-2B petitions filed after the DOL has denied temporary labor certification:

(D) *Attachment to petition.* If the petitioner receives a notice from the Secretary of Labor that certification cannot be made, a petition containing countervailing evidence may be filed with the director. The evidence must show that qualified workers in the United States are not available, and that the terms and conditions of employment are consistent with the nature of the occupation, activity, and industry in the United States. All such evidence submitted will be considered in adjudicating the petition.

(E) *Countervailing evidence.* The countervailing evidence presented by the petitioner shall be in writing and shall address availability of U.S. workers, the prevailing wage rate for the occupation of the United States, and each of the reasons why the Secretary of Labor could not grant a labor certification. The petitioner may also submit other appropriate information in

support of the petition. The director, at his or her discretion, may require additional supporting evidence.

The petition was filed along with countervailing evidence on November 13, 2006. On December 19, 2006, the director issued a request for evidence (RFE) which instructed the petitioner to provide along with other documentation its written recruitment results.

In response to the director's RFE, the petitioner submitted a letter that the TWC had faxed to it on August 25, 2006. The letter stated that the case regarding the labor certification application would be transmitted to the DOL "as is" on September 24, 2006. This letter notified the petitioner that the TWC had issued the necessary job posting and that the recruitment period extended for a period of 10 days from the date of the letter. The petitioner also provided a letter that had been faxed by the TWC on September 11, 2006. The letter explained that the minimum recruitment period required for the application for alien labor certification had ended; and it instructed the petitioner to submit, in duplicate, the newspaper ads and the results of recruitment efforts so the case could be forwarded to the DOL on September 25, 2006. This letter is addressed to [REDACTED], the petitioner's agent, located at [REDACTED].

Upon review, the petitioner did not provide documentation in regards to the recruitment results although both letters provided instructions on how to advertise and document the responses or lack thereof. The September 11, 2006 letter specifically states ". . . If the recruitment efforts produced no applicants, note that fact."

On appeal, the petitioner explains that no specific method of documenting the lack of applicants for submission was stated or otherwise provided. The petitioner states that the instructions lack any direction except to note the fact that the advertisements produced no results in some manner. The petitioner states that this instruction is read in conjunction with the application to which it applies, the Application for Alien Employment Certification (Form ETA 750), question 21 on page 2 of the ETA 750. That question reads: "Describe efforts to recruit U.S. workers and the results." As noted earlier in this decision, on appeal the petitioner asserts that it complied with its recruiting report requirements by responding as follows to question 21:

We have placed an ad on "Star-Telegram Newspaper" from August 31, 2006 to September 2, 2006 with no results.

The AAO notes that the combination of (1) the October 10, 2006 mailing date of the DOL Final Determination Letter (which includes the Form ETA 750 as its attachment), (2) the "AUG 25 2006" and "SEP 22 2006" Date Forms Received entries on page 1 of the Form ETA 750, and (3) the DOL Chicago National Processing Center date receipt stamp "SEP 29 2006" on page 1 of the Form ETA 750 indicates that the ETA 750 was in the custody of either TWC or DOL during the entire period of August 25, 2006 to September 29, 2006. This includes the period during which the petitioner placed its advertisement. It is also noted that the record of proceeding now includes an original and copy of a Form ETA-750 dated November 11, 2007, which is a month after the DOL's decision to not approve the application for labor certification. Further, it is noted that the petitioner does not specify when it communicated to DOL that it had advertised with no results.

Upon review, the AAO finds that the ETA 750 was received into TWC/DOL channels on August 25, 2006. The petitioner states that the proffered position was advertised in the newspaper from August 31, 2006 until September 2, 2006. The AAO cannot determine how the petitioner was able to include its recruitment results on the Form ETA 750 when the Form ETA 750 was no longer in its possession. On the basis of the totality of the evidence before it the AAO cannot reasonably conclude that the petitioner conveyed its recruiting results to the DOL prior to the DOL decision to deny the petition. 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, the petitioner has provided no evidence from the DOL that that the recruitment result information and the manner and time in which it was presented overcame DOL's finding that a recruiting report had not been furnished.

Absent evidence that establishes that the petitioner timely provided recruitment results as required by DOL, this petition cannot be approved.

Beyond the decision of the director, the AAO notes that the petitioner failed to advertise as required. In this regard, the AAO notes that the letter faxed to the petitioner on August 25, 2006 specifically instructed the petitioner that its advertisements must state the duration of the temporary job. The petitioner's advertisements failed to do so. For this reason also, the petition must be denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied although the matter is moot due to the passage of time.