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U.S. Department of Justice  
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



FILE: WAC 01 127 52245 OFFICE: CALIFORNIA SERVICE CENTER DATE:

IN RE: PETITIONER:  
BENEFICIARY



AUG 03 2002

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)

IN BEHALF OF PETITIONER: SELF-REPRESENTED

Public Copy

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is dive shop engaged in the field of marine ecology. It seeks to employ the beneficiaries as diving instructors and underwater photographers. The director determined that the petitioner had not submitted a temporary labor certification from the Department of Labor or notice stating that such certification cannot be made.

On appeal, the petitioner states that one of the prospective employees [REDACTED] is no longer available for employment. The petitioner further states that the Department of Labor indicated that they had sent the wrong forms back to the firm. The petitioner explains that the company has continued to advertise the position that was to be filled by Ms. [REDACTED]

8 C.F.R. 214.2(h)(6)(iv)(A) requires that a petition for temporary employment in the United States be accompanied by a temporary labor certification from the Department of Labor, or notice detailing the reasons why such certification cannot be made.

The petition was filed on March 23, 2001 without a temporary labor certification, or notice detailing the reasons why such certification cannot be made. On April 30, 2001, the Service requested that the petitioner provide a copy of a Form ETA 750 Alien Employment Certification which had been certified by an official of the Department of Labor (DOL).

In response to the request, the petitioner submitted a certified Form ETA 9035 Labor Condition Application. The petitioner states on appeal that it has been advised by the DOL to file a petition for H-1B status rather than H-2B. However, the fact remains that this petition was submitted without a temporary labor certification as required by 8 C.F.R. 214.2(h)(6)(iv)(A). Absent such documentation, the petition cannot be approved.

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.