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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 99 125 52424 Office: California Service Center

Date: SEP 12 2002

IN RE: Petitioner:
Beneficiary



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:



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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: This is a motion to reconsider the Associate Commissioner for Examination's decision dismissing the appeal of the denial of the nonimmigrant visa petition. The motion to reconsider will be dismissed.

The petitioner engages in the operation of concession stands. It desires to employ the beneficiary as a mechanic for eight months. The Department of Labor determined that a temporary certification by the Secretary of Labor could not be made. The director determined that the petitioner had not overcome the Department of Labor's advisory opinion and thereby establish that the need for the services or labor to be performed is temporary. The director also determined that the petitioner had not established that unemployed persons capable of performing such services or labor cannot be found in this country. The director's decision was affirmed by the Associate Commissioner on appeal.

On motion, counsel states that the Department of Labor failed to provide the petitioner or the applicant notice of the department's inability to grant certification.

According to 8 C.F.R. 103.5(a)(3), a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. In order to prevail on a motion to reconsider, the petitioner must establish that the decision was incorrect based on the evidence of record at the time of the initial decision. According to 8 C.F.R. 103.5(a)(4), a motion that does not meet applicable requirements shall be dismissed.

Counsel states on motion that since the petitioner nor the applicant received the Department of Labor's notice setting forth the reasons why the certification could not be granted, the case should be remanded and the certifying officer ordered to properly issue a Notice of Findings in the case. Counsel also states that the petitioner nor the employer was provided the opportunity to rebut any alleged reasons as to why the certification could not be granted. Counsel stated the same reasoning in his appeal to the Associate Commissioner for Examinations.

The petition was filed on March 22, 1999. The Department of Labor's notice dated May 27, 1998 denying certification was a part of the record at the time the visa petition was filed. There is no regulation or statute that allows the Service to remand the Department of Labor's findings. Inasmuch as the motion is not supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy, the motion will be dismissed in accordance with 8 C.F.R. 103.5(a)(4).

In visa petition proceedings, the burden of proof remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The motion is dismissed.