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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, N.W.
Washington, DC 20536

[redacted]

FILE: LIN 03 036 52904 OFFICE: NEBRASKA SERVICE CENTER DATE: DEC 04 2003

IN RE: Petitioner: [redacted]
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)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 Citizenship and Immigration Services (CIS) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the Nebraska Service Center denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a truck stop/restaurant that desires to employ the beneficiaries as waitstaff for an undefined period of time. The director determined that the petitioner had not provided a certified Department of Labor (DOL) Form ETA 750 with its original petition.

On appeal, the petitioner describes her attempts to submit the requested documentation to the Secretary of Labor.

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii)(b), defines an H-2B temporary worker as:

> an alien having a residence in a foreign country which he has no intention of abandoning, who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country . . . .

With regard to the filing of a H-2B visa petition, 8 C.F.R. § 214.2(h)(6)(iii)(A) states:

> Prior to filing a petition with the director to classify an alien as an H-2B worker, the petitioner shall apply for a temporary labor certification with the Secretary of Labor . . . . The labor certification shall be advice to the director on whether or not United States workers capable of performing the temporary services or labor are available and whether or not the alien's employment will adversely affect the wages and working conditions of similarly employed United States workers.

In addition, 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, and has obtained a labor certification determination as required by 8 C.F.R. § 214.2(h)(6)(iv) or (v)."

The issue in this proceeding is whether the petitioner submitted a temporary labor certification or a notice that certification cannot be made, issued by the Department of Labor (DOL) when it filed the original I-129 petition or in response to the director's request for further evidence.

On November 29, 2002, the petitioner submitted the I-129 petition along with documentation on the beneficiaries' J-1 visa immigration status. On January 16, 2003, the director requested further evidence from the petitioner, namely, the certified DOL ETA Form 750 or evidence that the Department of Labor, through its local and regional offices, had chosen not to certify the DOL form. The petitioner submitted an uncertified ETA form.

On June 2, 2003, the director denied the petition. The director stated that the petitioner failed to comply with the regulatory requirements regarding the filing of petitions. On appeal, the petitioner explains the various interactions it had with the Department of Labor in attempting to find out where to file the DOL document. The petitioner submits no further documentation.

Upon review of the record, there is no evidence that the petitioner submitted the DOL ETA Form 750 when it filed the original petition or in response to the director's request for further evidence. To the extent that the petitioner has failed to submit a certified ETA Form 750 or a determination that the Department of Labor could not certify the position, the petitioner has not established that it provided the necessary documentation for the H-2B visa petition. As noted in the regulatory cites listed above, without such documentation, the petitioner cannot file the H-2B petition. Without more persuasive evidence, the petitioner has not complied with the regulatory requirements regarding the filing of H-2B petitions under the Act. The petition shall be denied.

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

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