

U.S. Department of Homeland Security  
Citizenship and Immigration Services

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



FILE: LIN 03 092 51114

OFFICE: NEBRASKA SERVICE CENTER

DATE:

**DEC 05 2003**

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).

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

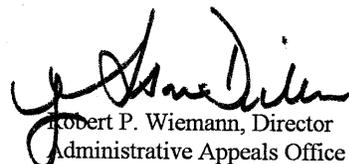
INSTRUCTIONS:

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 petition will be denied.

The petitioner is a bed and breakfast establishment on an island in Lake Erie that desires to employ the beneficiaries as housekeepers/assistant innkeeper on a six-month seasonal, annually recurrent basis. The director determined that the petitioner had not provided a certified Department of Labor (DOL) Form ETA 750 with its original petition, or a statement that certification could not be made.

On appeal, the petitioner submits a certified DOL Form ETA 750. The petitioner also submits a copy of the DOL certification application that she submitted to the DOL that was dated March 20, 2003.

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 received a temporary labor certification or a notice that certification cannot

be made, issued by the Department of Labor (DOL), prior to filing its original I-129 petition.

On January 27, 2003, the petitioner submitted the I-129 petition along with a letter of explanation with regard to the need for the beneficiaries' services. She also submitted a job description and employment agreement signed by both the beneficiaries. No ETA Form 750 was enclosed with the original petition. The petitioner explained that there is no labor pool available on the island to provide seasonal help. The petitioner stated that this is in part to the limited access to the island and the high cost of summer rentals. The petitioner also stated that the two beneficiaries would work certain hours for it, and then other hours for the other bed and breakfast operations on the island.

On March 21, 2003, the director denied the petition stating that the petitioner failed to submit the required Department of Labor certification or notice that certification could not be made. The director also stated that the denial was without prejudice to the filing of a new petition accompanied by the proper supporting documents. On appeal, the petitioner submitted the certified ETA Form 750 that is dated April 25, 2003.

Upon review of the record, there is no evidence that the petitioner had applied for the DOL ETA Form 750 when it filed the original petition on January 27, 2003. The documents submitted by the petitioner indicate that the DOL ETA Form was submitted in March of 2003, and was certified in April of 2003. As noted in the regulatory cites listed above, the petitioner may not file the H-2B petition prior to applying for the DOL ETA certification. 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.

It is noted that the director did not send the petitioner a request for further evidence prior to the denial of the instant petition, although he did indicate that the petitioner could submit a new petition with the required documentation without prejudice. It should also be noted that if the petitioner chooses to file a similar petition in the future, she would need to provide an itinerary with the dates and locations of the services to be performed by the beneficiaries in her bed and breakfast establishment as well as the other bed and breakfast operations on the island. This itinerary would then be filed with the CIS office that has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition would be where the petitioner is located for purposes of the petition. See 8 C.F.R. § 214.2(h)(2)(i)(B) and (C).

In addition, the petitioner would also need to specifically address the regulatory criteria for establishing a seasonal need.

8 C.F.R. § 214.2 (h)(6) (ii)(B) (2) states that a seasonal need occurs when the services or labor of the beneficiary is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner needs to specify the period(s) of time during each year in which it does not need the services or labor. The regulation also states that the employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. With regard to the issue raised in the director's decision, the petitioner has not met that burden.

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