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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: WAC 01 204 56180 OFFICE: CALIFORNIA SERVICE CENTER DATE: DEC 05 2003

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

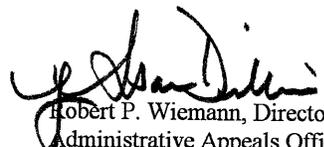
INSTRUCTIONS:

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 California 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 private citizen who desires to employ the beneficiary as a nanny from May 1, 2001 to April 30, 2004. The director determined that the petitioner had not provided a certified Department of Labor (DOL) Form ETA 750 or a statement as to why the certification could not be approved.

On appeal, the petitioner states that a petition for labor certification was made to the California Department of Labor and that this office had taken a long time. The petitioner submits no further documentation.

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 an H-2B visa petition, 8 C.F.R. § 214.2(h)(6)(iii)(A) states that 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. 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 May 1, 2001, the petitioner submitted the I-129 petition; however, it did not submit a certified ETA Form 750 or a statement from the Department of Labor as to why the application could not be certified. On June 20, 2002, the director requested further evidence from the petitioner, namely, the certified DOL ETA Form 750 or evidence that the Department of Labor (DOL), through its local and regional offices, had chosen not to certify the DOL form.

In response, the petitioner stated that it had submitted the ETA Form 750 to the Department of Labor for certification. As documentary evidence, the petitioner submitted a letter dated August 15, 2002, that it claims it sent to the California Department of Labor. The petitioner also submitted an ETA Form 750 application dated July 10, 2002. The petitioner's declaration also stated that the petitioner desired the beneficiary's services because the petitioner's entire family was involved in the family business and the family needed help for its children. In addition, the petitioner also submitted the immigration status forms requested by the director.

On March 31, 2003, the director denied the petition. The director stated that the petitioner failed to comply with the regulatory requirements regarding the filing of petitions because the required DOL certification or statement of non-certification was not in the record. On appeal, the petitioner states that it had submitted the requested ETA Form 750 to the California Department of Labor and infers that this office had taken a long time in processing the application. The petitioner submits no further documentation.

Upon review of the record, Citizenship and Immigration Services (CIS) notes that, although the petitioner indicated that a brief and/or additional evidence would be submitted to the AAO within 30 days of filing the appeal, as of this date, the record does not contain any additional evidence. Therefore, the record is considered complete, and the AAO shall render a decision based upon the evidence before it at the present time.

There is no evidence that the petitioner submitted the DOL ETA Form 750 to CIS when it filed the original petition or in response to the director's request for further evidence. The petitioner has only submitted an ETA Form 750 dated July of 2002. This date is more than a year after the initial I-129 petition was submitted. Furthermore the record is devoid of any information as to any certification of the submitted ETA Form 750 by the California Department of Labor. To the extent that the petitioner failed to submit a certified ETA Form 750 or a determination that the Department of Labor could not certify the position with the original petition or at any point during the extended period of the adjudication of the instant petition, 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 is not eligible to 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.