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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: SRC 03 112 51862 OFFICE: TEXAS 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:



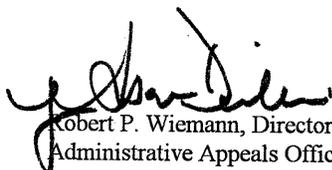
INSTRUCTIONS:

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, Texas Service Center, denied the nonimmigrant visa petition. The petitioner submitted a motion to reopen/reconsider to the director, and the director again denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a convenience store that desires to employ the beneficiary as a cooking instructor in Indian food from March 12, 2003 to March 11, 2004. The director determined that the petitioner had not provided a certified Department of Labor (DOL) Form ETA 750 with its original petition.

On motion, the petitioner submitted an uncertified ETA 750 to establish that the Department of Labor document had been filed prior to the submission of the I-129 petition, along with a rebuttal letter to the Department of Labor's decision. When deciding the motion, the director stated that the petitioner had not submitted the statement of non-certification by the DOL along with countervailing evidence at the time of filing the initial decision. On appeal, counsel cites to 8 C.F.R. § 214.2 (H)(6)(iii)(A) and reiterates that the petitioner did have a pending ETA 750 at the time of the submission of the original I-129. Counsel also asserts that due to DOL computer problems, the petitioner was unable to obtain a DOL decision on the labor certification prior to Citizenship and Immigration Services' (CIS) denial of the I-129 petition.

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. 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.

On March 12, 2003, the petitioner submitted the I-129 petition to Citizenship and Immigration Services (CIS), along with a cover letter describing the need for the beneficiary's services. The petitioner submitted no Form ETA 750 with the petition. On April 7, 2003, the director denied the petition and stated that there was no evidence that the petitioner had submitted an ETA Form 750 at the time it filed the I-129 petition.

On May 8, 2003, counsel submitted a motion to reopen the petition proceedings. Counsel asserted that the petitioner had filed the DOL ETA Form 750 on February 21, 2003 prior to filing the instant petition and submitted corroborating documentary evidence to support this filing as well as copies of its subsequent correspondence with DOL to correct the initial ETA 750. It also submitted the DOL's final determination on the labor certification document dated April 21, 2003. Counsel explained the problems it encountered in attempting to receive a more prompt DOL decision on its labor certification due to computer problems. Counsel also submitted its rebuttal to the DOL document that it had apparently sent to the DOL on May 6, 2003. The director affirmed her prior decision on the motion and concurred with the DOL's determination that the petitioner had not established that the petitioner's need for the beneficiary's services was temporary.

On appeal, counsel reiterates that at the time the petitioner filed the original I-129, it had a pending ETA Form 750, and that DOL computer problems had prevented the petitioner from obtaining a decision on the labor certification prior to the CIS denial of the I-129 petition. It submits no further documentation.

Upon review of the record, there is no evidence that the petitioner submitted the ETA Form 750 when it filed the original petition. Although on motion, the petitioner submitted documentation that it had filed the ETA Form 750 prior to filing the original I-129 petition with CIS, and also provided a copy of the DOL determination that it could not certify the position, the petitioner has not established that the ETA Form 750 was processed at any point prior to the denial of the instant petition. The DOL certification is dated April 21, 2003, two weeks after the denial of the I-129 petition. As noted in the regulatory cites listed above, without such documentation, the petitioner cannot establish eligibility for the H-2B classification. Without more persuasive evidence, the petitioner has not complied with the regulatory requirements regarding 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.