



U.S. Citizenship
and Immigration
Services

DA



FILE: WAC 02 152 52949 Office: CALIFORNIA SERVICE CENTER Date: **AUG 04 2004**

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 of the Administrative Appeals Office 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.

to Robert P. Wiemann, Director
Administrative Appeals Office

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identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: This is a motion to reconsider the Administrative Appeals Office's decision dismissing the appeal of the denial of the nonimmigrant visa petition. The motion to reconsider will be granted and the previous decision affirmed.

The petitioner operates a tailor shop. It seeks to employ the beneficiary as a custom tailor for three years. The petition was not accompanied by the required labor certification, Form ETA 750. The director denied the petition stating that the petitioner had not submitted a temporary labor certification from the Department of Labor (DOL) or notice stating that such certification could not be made. On appeal, the Administrative Appeals Office (AAO) affirmed the director's decision. The AAO also determined that the petitioner had not established that its need for the beneficiary's services is temporary.

On motion, the petitioner states that it filed an application for foreign labor certification with the Employment Development Department (EDD) on April 30, 2001. The DOL informed the petitioner that the office was currently processing cases received on or before April 23, 2001 and that there were over 35,000 applications ahead of the petitioner's application. The petitioner is asking for reconsideration since it is unable to provide the required document at this time.

An H-2B petition for temporary employment in the United States shall be accompanied by a labor certification determination that is either: (1) a certification from the Secretary of Labor stating that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers; or (2) a notice detailing the reasons why such certification cannot be made. 8 C.F.R. § 214.2(h)(6)(iv)(A).

The petition was filed on April 22, 2002, without a temporary labor certification, or notice detailing the reasons why such certification cannot be made. Absent such certification from the Department of Labor or notice detailing the reasons why such certification cannot be made, the petition cannot be approved.

The petitioner states on motion that the DOL did not complete the processing of its foreign labor certification and therefore, it cannot provide the required document. Although this is unfortunate for the petitioner, neither the statute nor the regulations allows for an extension of time to complete a certification. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Further, the petitioner did not establish that its need for the beneficiary's services is temporary.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden. Accordingly, the previous decisions of the director and the AAO will be affirmed.

ORDER: The order of November 26, 2003 dismissing the appeal is affirmed. The petition is denied.