



U.S. Citizenship  
and Immigration  
Services

*Handwritten initials: DH*

[Redacted]

FILE: LIN 04 107 53527 Office: NEBRASKA SERVICE CENTER Date: **AUG 04 2004**

IN RE: Petitioner: [Redacted]  
Beneficiaries: [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:

[Redacted]

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.

*Handwritten signature: Mai Johnson*

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Robert P. Wiemann, Director  
Administrative Appeals Office

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**Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the matter will be remanded to the director for further action and consideration.

The petitioner operates a restaurant. It desires to employ the beneficiaries as waiters for seven and one-half months. The director determined 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 and denied the petition.

On appeal, counsel states that the labor certification was obtained prior to the filing date of the petition. Counsel also states that a copy of the certification is attached.

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 regulation at 8 C.F.R. § 103.2(b) states, in pertinent part that:

(4) *Submitting copies of documents.* Application and petition forms must be submitted in the original. Forms and documents issued to support an application or petition, such as labor certifications, Form IAP-66, medical examinations, affidavits, formal consultations, and other statements, must be submitted in the original unless previously filed with the Service.

The Petition for a Nonimmigrant Worker (Form I-129) was filed on March 4, 2004. On appeal, counsel submits a copy of the final determination notice from the DOL dated February 27, 2004. The notice states that the Application for Alien Employment Certification, Form ETA 750A, has been certified and is enclosed.

The actual date the approved labor certification was received by counsel from the DOL cannot be ascertained. However, the petitioner did apply for a temporary labor certification on December 30, 2003, prior to the filing of the petition, and such certification was approved on February 27, 2004. Accordingly, the petitioner has demonstrated that the temporary labor certification was obtained prior to the filing of the petition. However, the requisite labor certification in the record of proceeding, as it is presently constituted, is a copy, and not the required original.

In a letter, dated June 9, 2004, counsel requests that four of the petitioner's separate H-2B petitions<sup>1</sup> be reviewed simultaneously. Counsel explains that the original labor certification for this case may have inadvertently been placed in the wrong case file. However, the AAO does not have all four records before it in order to make that requested comparison.

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<sup>1</sup> The petitioner, Epoch Restaurant Group, has filed four separate petitions. The file numbers are listed in counsel's letter of June 9, 2004 as LIN-04-107-53527; LIN-04-139-50519; LIN-04-170-52356; LIN-04-170-52331; LIN-04-139-50434.

Further, the original ETA 750 contained in the record of proceeding has been obtained for 18 short order cooks. This labor certification does not relate to the petition requesting authorization for five waiters.

Therefore, this case will be remanded so that the director may review the aforementioned cases to see if the original labor certification relating to this case was inadvertently placed in the wrong record of proceeding. The petitioner should also be given an opportunity to submit any additional information or evidence that the director deems necessary to rectify the matter at hand. As always, 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.

**ORDER:** The director's decision is withdrawn. The matter is remanded to the director for further action and consideration consistent with the above discussion and entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.